

July 2, 2020

MEMBER AGENCIES

**VIA EMAIL AND U.S. MAIL**

Carlsbad  
Municipal Water District  
City of Del Mar  
City of Escondido  
City of National City  
City of Oceanside  
City of Poway  
City of San Diego

Mr. Keene Simonds  
Executive Officer  
San Diego County LAFCO  
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E-Mail: [Keene.Simonds@sdcounty.ca.gov](mailto:Keene.Simonds@sdcounty.ca.gov)

Fallbrook  
Public Utility District  
Helix Water District  
Lakeside Water District

Re: CEQA Process for Rainbow Municipal Water District ("Rainbow") and  
Fallbrook Public Utilities District ("Fallbrook") Applications for Detachment and  
Annexation

Olivenhain  
Municipal Water District  
Otay Water District

Dear Mr. Simonds:

Padre Dam  
Municipal Water District  
Camp Pendleton  
Marine Corps Base

As its General Counsel, I send this letter on behalf of the San Diego County Water Authority (the "Water Authority") in connection with the above-referenced applications by two of its member agencies to detach from the Water Authority, and LAFCO's June 16, 2020 "Preliminary Staff Reports" regarding these applications.

Rainbow  
Municipal Water District  
Ramona  
Municipal Water District

The LAFCO Staff Reports for the applications each assert that consideration of the applications "is expected to be exempt from the California Environmental Quality Act 'CEQA' per State CEQA Guidelines Section 15320." This "expectation" has no stated basis and is erroneous. The exemption cited does not apply to these applications, both facially and as a result of the circumstances arising from the facts underlying the detachments proposed by these applications. This letter therefore constitutes an objection by the Water Authority to LAFCO's potential attempt to use the Section 15320 exemption, and to avoid proper compliance with CEQA.

Rincon del Diablo  
Municipal Water District  
San Dieguito Water District  
Santa Fe Irrigation District  
South Bay Irrigation District  
Vallecitos Water District  
Valley Center  
Municipal Water District  
Vista Irrigation District  
Yuima  
Municipal Water District

There are potentially significant environmental impacts arising from the proposed detachments by Rainbow and Fallbrook from the Water Authority and the proposed annexations of Rainbow and Fallbrook to Eastern Municipal Water District (the "Project"). LAFCO must therefore, in connection with its review and determination of whether the Project will proceed, perform a full environmental review of these projects under CEQA. This will include LAFCO, as the lead agency for these projects, producing a detailed initial study and, thereafter, an environmental impact report ("EIR") that fully evaluates all potential environmental impacts of the Project.

OTHER  
REPRESENTATIVE

County of San Diego

Because LAFCO is required to investigate the basis for, review, and approve or reject the applications of Rainbow and Fallbrook based upon the record before it, it is uniquely positioned to perform a full environmental review of each Project and the cumulative effects of the Projects together. LAFCOs are particularly equipped to perform an analysis of the regional, and in this case potentially statewide, environmental impacts of annexations and detachments, as opposed to the entities seeking changes in their own

jurisdictions. The Supreme Court, in *Bozung v. LAFCO (Ventura County)* (1975) 13 Cal. 3d 263, a case involving LAFCO action on an annexation to a city, recognized this fact:

"A vital provision of the Guidelines (Cal. Admin. Code, tit. 14, Sec. 15142) stresses that an EIR must describe the environment from both a local 'and regional' perspective and that knowledge of the regional setting is critical to the assessment of environmental impacts. It directs special emphasis on environmental resources peculiar to the region and directs reference to projects, existent and planned, in the region so that the cumulative impact of all projects in the region can be assessed. While, of course, a city is not necessarily incompetent to prepare and evaluate an EIR complying with section 15142, obviously a LAFCO must be presumed to be better qualified on both scores.... CEQA does not, indeed cannot, guarantee that these decisions will always be those which favor environmental considerations. At the very least, however, the People have a right to expect that those who must decide will approach their task neutrally, with no parochial interest at stake." (*Bozung*, 13 Cal. 3d. at 283.)

Any previous "environmental review" performed by Rainbow or Fallbrook was related only to their submission to LAFCO of applications for detachment and annexation, not as to the potential impacts of the detachment or annexation themselves. Neither Rainbow<sup>1</sup> nor Fallbrook<sup>2</sup> performed an environmental review that can be relied upon in connection with consideration of the Project, and neither agency seriously considered any potential regional or statewide impacts of the Project. Indeed, Rainbow and Fallbrook provided very limited information to the public as to precisely how their detachments would work, focusing only on the narrow questions required to simply submit their applications to LAFCO. Even in that limited context, they ignored comments made during the process of submission of the applications, and the entities claimed that the approvals sought were exempt from CEQA review or did not constitute a project at all. These assertions do not have any factual basis and are incorrect.

Earlier this year, Otay Water District ("Otay") filed separate petitions for writs of mandate against Rainbow and Fallbrook in the San Diego Superior Court seeking a determination that the agencies failed to comply with CEQA in that they failed to perform a sufficient environmental analysis of potential environmental impacts associated with the approval to file the applications for detachment and annexation. Those suits in the

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<sup>1</sup> Rainbow's Notice of Exemption ("NOE") describes the project as "Resolution of Application Authorizing the GM to Prepare and Submit an Application to San Diego LAFCO to Detach from SDCWA and Annex to EMWD."

<sup>2</sup> Fallbrook's NOE identifies the project as "The Fallbrook Public Utility District (FPUD) adopted a resolution of application requesting the San Diego County Local Agency Formation [sic] (LAFCO) to commence proceedings for a reorganization to include detachment/exclusion of territory from San Diego County Water Authority (SDCWA) and annexation to Eastern Municipal Water District (EMWD)."

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alternative sought a declaration that the notices of exemption could not be used to avoid review of the environmental impacts of the changes that were being sought at LAFCO. The agencies had filed Notices of Exemption that asserted that their actions in filing those applications were exempt from CEQA.

Rainbow and Fallbrook, however, each stipulated that their approvals of Notices of Exemption did not bind LAFCO and are not applicable to LAFCO's obligations under CEQA. These stipulations were incorporated in the Court's order of dismissal in each of these cases, entered on May 28 and June 2, respectively. In each case, the parties stipulated, in relevant part, that:

"[t]he NOE may not be utilized or relied upon by San Diego LAFCO or any other agency for the purpose of that agency's CEQA compliance in connection with any potential detachment by Respondent [Rainbow or Fallbrook] from the San Diego County Water Authority, or for any potential annexation by Respondent into Eastern Municipal Water District. Nothing in this Stipulation and Order for Judgment is intended to limit the discretion of any agency to independently determine the appropriate level of CEQA review required for any potential detachment by Respondent from the San Diego County Water Authority, or for any potential annexation by Respondent into Eastern Municipal Water District."

Rainbow's and Fallbrook's stipulations, and the Court's orders, mean that Fallbrook and Rainbow have admitted that their Notices of Exemption are insufficient to substitute for a full and complete CEQA analysis by LAFCO, acting as lead agency with respect to the detachment and annexation applications.

To the extent that substantial evidence exists, in light of the whole record before LAFCO, that the Project may have a significant effect upon the environment, it must prepare an EIR. (CEQA § 21080(d).) "Substantial evidence" means that "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." This means, in this case, that there is substantial evidence to support a fair argument that the Project may have a significant effect on the environment. (14 Cal. Code of Regs., Division 6, Chapter 3 ["Guidelines"], § 15384(a).) As explained below, there are clearly potential impacts on the environment from the proposed detachments and annexations.

### **The Project is Not Exempt from CEQA Review**

LAFCO's stated "expectation," prior to any environmental review, that the Project is exempt from CEQA under Section 15320 is without merit.

The categorical exemption cited in the Preliminary Staff Reports is located in CEQA Guidelines Section 15320, "Changes in Organization of Local Agencies," also known as "Class 20." This exemption encompasses projects that consist of "changes in the organization or reorganization of local governmental agencies where the changes *do*

*not change the geographical area in which previously existing powers are exercised.*" (Emphasis added.) Among the examples cited are the establishment of a subsidiary district, consolidation of two or more districts having identical powers, and merger with a city of a district lying entirely within the boundaries of the city.

Categorical exemptions are to be interpreted narrowly in order to maximize the protection of the environment provided by CEQA. The examples provided by these exemptions are not just illustrative but also significant. Generally, courts have upheld the application of exemptions to activities that are similar to the listed examples and have rejected the use of exemptions where the activity is not similar to the listed examples. (*Practice Under the California Environmental Quality Act* (2d ed. Cal CEB) § 5.69.) "This principle of interpretation is embodied in the Guidelines, which state that CEQA should be interpreted to 'afford the fullest possible protection to the environment within the reasonable scope of the statutory language. [Citation.]'" (*Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster*, 52 Cal.App. 4th 1165, 1193).

None of the Class 20 examples in the CEQA Guidelines apply to this Project. The Project is not the creation of a subsidiary district, a consolidation of districts with identical powers, or a merger of a district into a city which encompasses it. Instead, the Project seeks detachment of two districts from a county water authority that encompasses both of them, and their annexation into an entity located in a different county than the detaching entities. By seeking detachment from the Authority and annexation by the Riverside County-based Eastern, Rainbow and Fallbrook will *change the geographical areas* in which the Authority, by subtraction, and Eastern, by addition, *exercise their powers*. If Rainbow and Fallbrook are detached, the Authority will no longer exercise its powers within the boundaries of these two districts, and Eastern will have the new right to exercise its powers within the boundaries of these two districts. This Project is not a mere consolidation, creation of a new subsidiary district, or a merger. The Class 20 exemption is facially inapplicable to the Project, and there is no factual evidence to support any determination that the Project is exempt from a full CEQA analysis.

Categorical exemptions are also inapplicable if an exception to the exemption applies to the projects. This exception applies where a reasonable possibility exists that the project may have significant impacts because of unusual circumstances. (CEQA Guidelines § 15300.2(c).) An "unusual circumstance" is some feature of the project which distinguishes it from others in the exempt class. (*Berkeley Hillside Pres. v. City of Berkeley* (2015) 60 Cal. 4th 1086, 1105-1106.)

The Project will impact the environment in ways not previously considered by Rainbow or Fallbrook. Rainbow has conceded, for example, in its "Supplemental Information Package for Reorganization Application," that the detachment and annexation will require it to accelerate the construction of "improvement projects" for which the cost estimates total \$10-\$15 million. (See pp. 5-6.) Although these projects are generally described in that package as necessary to serve some higher elevation areas in the southern part of Rainbow's service area, no substantial details or environmental analysis was identified with respect to these projects. Among these projects is construction that will provide service to an area of "new development," but there is no consideration of potential impacts regarding future development at that location or elsewhere. No analysis

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has been disclosed by Rainbow about the impacts of construction, operation or growth inducement, among other potential environmental impacts, regarding these projects. Neither Rainbow nor Fallbrook has apparently undertaken or presented any environmental analysis of the potential cumulative impacts of their simultaneous detachments and annexations. The existence of these potential impacts is an unusual circumstance for projects covered by the Class 20 exemption.

Importantly, the Project may also increase the reliance of Fallbrook and Rainbow upon water imported from the Bay-Delta, a unique ecosystem, in direct contradiction to the Delta Reform Act (Water Code § 85000, *et seq.*). That Act established a state policy calling for reduced reliance on the Bay-Delta through the development of regional supplies, conservation, and water use efficiency, and the Project's variance from these goals requires a full environmental analysis. By moving to complete reliance on imported water from a wholesaler which has high dependence on the Bay-Delta (MWD), and away from a wholesaler that has a much lower reliance on Bay-Delta water (the Water Authority), there is a likelihood of overall increased Bay-Delta reliance. Neither Fallbrook nor Rainbow provided a full analysis of this issue, and LAFCO must do so. These types of impacts are not part of the usual "reorganization" project covered by Class 20, and constitute "unusual circumstances" under CEQA Guidelines section 15300.2(c).

Since these circumstances of the Project are "unusual," this exception prevents use of the Class 20 Exemption so long as substantial evidence exists in the record to support a "fair argument" that the "exempt" project has a "reasonable probability" of creating a significant environmental impact as a result of the unusual circumstances. (*Berkeley Hillside Pres.*, 60 Cal. 4th at 1115; *Respect Life S. San Francisco v. City of S. San Francisco* (2017) 15 Cal.App.5th 449, 458). The unusual circumstances described above have a reasonable probability of creating significant environmental impacts, both direct and indirect. Substantial evidence has been shown and will be further developed to support a fair argument that such impacts are reasonably probable. Therefore, the Class 20 exemption cannot apply, and LAFCO must produce an EIR to perform a full environmental analysis of the Project.

Though we realize that the recent notices from LAFCO simply informed the recipients that LAFCO was anticipating use of Section 15320, and that LAFCO has not yet formally applied the exemption, we believed it important to provide this information and objection at an early stage so that LAFCO has an opportunity to fully review its position before mistakenly applying an improper exemption. LAFCO must perform a full environmental analysis of the Project that complies with CEQA. LAFCO has no basis to support its preliminary contention that the Project is exempt from CEQA, and it must begin a full environmental analysis beginning with an initial study of potential impacts. Thank you for consideration of these important issues.

Very truly yours,



Mark J. Hattam  
General Counsel

Mr. Keene Simonds

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cc via email:

Dianne Jacob, Chair, San Diego LAFCO  
Holly Whatley, Commission Counsel  
Aleks Giragosian, Deputy Commission Counsel  
Robert Barry, Chief Policy Analyst  
Gary Thompson, Executive Officer, Riverside LAFCO  
Sandra L. Kerl, General Manager, San Diego County Water Authority  
Kristina Lawson, Counsel, San Diego County Water Authority  
Jack Bebee, General Manager, Fallbrook PUD  
Paula C. P. de Sousa, Counsel, Fallbrook PUD  
Paul Jones, General Manager, Eastern MWD  
Nick Kanetis, Deputy General Manager, Eastern MWD  
Tom Kennedy, General Manager, Rainbow MWD  
Alfred Smith, Counsel, Rainbow MWD  
Water Authority Board of Directors