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July 23, 2020

**Via U.S. Mail and Email to: [Keene.Simonds@sdcounty.ca.gov](mailto:Keene.Simonds@sdcounty.ca.gov)**

Keene Simonds  
Executive Officer  
San Diego LAFCO  
9335 Hazard Way  
San Diego, CA 92123

Re: CEQA Process for Fallbrook Public Utility District's Reorganization Application

Dear Mr. Simonds:

Best Best & Krieger LLP represents Fallbrook Public Utility District ("FPUD") as general counsel. We submit this letter to the San Diego County Local Agency Formation Commission ("LAFCO") in response to the San Diego County Water Authority's ("SDCWA") July 2, 2020 letter to LAFCO ("SDCWA Letter"). Because the SDCWA Letter misstates both the law and the facts, we felt compelled to provide LAFCO with this response.

**1. The stipulated judgment between FPUD and Otay Water District explicitly affirms the validity of FPUD's exemption determination.**

In the SDCWA Letter, SDCWA appears to argue that a settlement negotiated between FPUD and Otay Water District somehow binds LAFCO and requires LAFCO to prepare an environmental impact report ("EIR") for FPUD's Reorganization Application ("Reorganization Application"). This argument grossly misstates the facts.

On December 9, 2019, FPUD adopted Resolution No. 4985, which determined that the Reorganization was exempt from CEQA review and authorized FPUD's General Manager to submit a Reorganization Application to LAFCO to detach from SDCWA and annex to Eastern Municipal Water District ("Eastern") (the "Reorganization"). The purpose of the Reorganization Application and the effect of the Reorganization, if approved, would be to change FPUD's wholesale water provider from SDCWA to Eastern. FPUD filed a Notice of Exemption on December 24, 2019. SDCWA, for whatever reason, did not bring a legal challenge to either FPUD's CEQA determination or FPUD's decision to pursue Reorganization.



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Otay Water District, however, did bring a lawsuit contending that FPUD’s exemption determination and Notice of Exemption violated CEQA. Soon after the lawsuit was filed—before the record was certified and merits briefing commenced, and in order to not needlessly spend FPUD ratepayer funds in defending a lawsuit that in FPUD’s opinion was baseless and vexatious—FPUD and Otay Water District settled the lawsuit through a stipulated judgment. The stipulated judgment effectively affirms the actions taken by FPUD at its December 9, 2019 meeting, and restates that which the law already requires.

The stipulated order for judgment states: FPUD’s “*CEQA Finding and the 2019 NOE are valid . . .*” Accordingly, contrary to SDCWA’s assertion, the stipulated order thus expressly affirms the validity of FPUD’s exemption determination. The stipulated order also states that FPUD’s exemption determination and Notice of Exemption do not apply to “any other agency’s action on any potential detachment or annexation” and that other agencies, including LAFCO, may not rely on FPUD’s exemption determination in connection with FPUD’s Reorganization Application. In the SDCWA Letter, SDCWA argues that this language means that FPUD “admitted that” its Notice of Exemption is “insufficient to substitute for a full and complete CEQA analysis by LAFCO, acting as lead agency with respect to the detachment and annexation application[. . .].” This argument is specious. SDCWA was not a party to Otay’s lawsuit nor a signatory to the stipulated order and thus is not qualified to speak to the stipulated order’s meaning. Further, this language in the stipulated order recognizes that LAFCO: (1) was not a party to Otay’s lawsuit; (2) had not yet taken any action on FPUD’s Reorganization Application; and (3) retains full discretion regarding FPUD’s Reorganization Application consistent with state law.

Indeed, the stipulated order expressly states that it does not limit LAFCO’s discretion to “*independently determine the applicability of CEQA, or what level of CEQA review may or may not be required*” in connection with FPUD’s Reorganization Application. (emphasis added.) The stipulated order thus simply contemplates, as LAFCO is fully aware, what the law requires—that in processing FPUD’s Reorganization Application, LAFCO would independently determine whether CEQA applied to the Reorganization; if it did apply, whether the Reorganization was exempt; and if it was not exempt, what level of CEQA review was required. As such, SDCWA’s suggestion that FPUD admitted an EIR would be required has no basis in fact.

**2. The proposed Reorganization is not subject to CEQA.**

CEQA only applies to discretionary actions that “may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.” (Pub. Resources Code § 21080, subd. (a), and § 21065.) As detailed in FPUD’s March 17, 2020 Reorganization Application, the Reorganization will not cause *any* physical



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change to the environment, either direct or indirect. The Reorganization will not require the construction of any new or additional infrastructure that would not otherwise be needed if LAFCO denied the Reorganization Application and FPUD remained a member of SDCWA. Further, the Reorganization would not result in any change in the manner in which FPUD receives its water supplies—or change the source of water for such supplies. FPUD currently receives Metropolitan Water District water by purchase through SDCWA, which water is delivered directly from Metropolitan Water District facilities—a fact that will not change if the Reorganization is approved. If the Reorganization is approved, FPUD would receive Metropolitan Water District water by purchase through Eastern. Thus, if the Reorganization Application is approved, FPUD will continue to receive the same water, through the same infrastructure, that it currently receives as a member of SDCWA. FPUD will simply pay less for that water. As LAFCO knows, CEQA does not apply to purely economic issues. (CEQA Guidelines, § 15131.)

**3. The proposed Reorganization is exempt from CEQA.**

The proposed Reorganization is also exempt from CEQA, meaning that no CEQA review is required. (*Walters v. City of Redondo Beach* (2016) 1 Cal.App.5th 809, 817.) Section 15320 of the CEQA Guidelines exempts “changes in the organization or reorganization of local government agencies where the changes do not change the geographical area in which previously existing powers are exercised.” (CEQA Guidelines, § 15320.) Here, the Reorganization proposes a change in FPUD’s organizational structure that will not result in any change to the geographic area in which FPUD exercises its previously existing powers. As such, the proposed Reorganization fits squarely within Section 15320 and is exempt from CEQA.

Apparently, SDCWA disagrees. First, in the SDCWA Letter, SDCWA argues, that Section 15320 is inapplicable because the proposed Reorganization would “change the geographical areas in which” SDCWA, “by subtraction, and Eastern, by addition, exercise their powers.” (emphasis omitted.) This argument fails. As discussed above, the proposed Reorganization proposes a change to FPUD’s wholesale water provider and that change will not result in any modification to the geographic area in which FPUD exercises its existing powers, and will not change the geographic area in which wholesale water services are provided. Moreover, the argument ignores the fact that the examples listed in Section 15320—creation of a subsidiary district, consolidation of two or more districts, and merger of a district with a city where the district is located entirely within the city—all contemplate some sort of “subtraction” and “addition.” For example, if two or more districts are consolidated, the geographic area of one district would necessarily be subtracted while the other’s is increased.



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Second, citing *Azusa Land Reclamation Co. v. Main San Gabriel Watermaster* (1997) 52 Cal.App.4th 1165, SDCWA contends that categorical exemptions like Section 15320 should be narrowly interpreted. But given that the Reorganization clearly fits within Section 15320's parameters, SDCWA's interpretation is not narrow. Instead its interpretation nullifies Section 15320 by ignoring its plain language. Further, *Azusa Land Reclamation* is factually different because it involved a proposal to dump 3.2 million tons of garbage into an 80-acre unlined solid waste landfill overlying a groundwater basin that provided water to over one million people. (*Ibid*, at p. 1175-1176.) In contrast to those facts, the Reorganization only proposes a change in what entity will deliver wholesale water supplies to FPUD. It does not propose any infrastructure construction or change in the amount of water supplied or source of the water.

Third, SDCWA asserts that the proposed Reorganization is not specifically listed as an example in Section 15320 and as such, the exemption does not apply. Section 15320, however specifically states that “[e]xamples include *but are not limited to*” the examples listed in subdivisions (a), (b) and (c) to Section 15320. (CEQA Guidelines § 15320)(emphasis added.) Section 15320 thus expressly states that other types of changes in organization structure will fit within the exemption.

Finally, citing CEQA Guidelines section 15300.2, subdivision (c), SDCWA argues that there are “unusual circumstances” that preclude use of the Section 15320 exemption here. The “unusual circumstances” exception to the applicability of an exemption only applies where the *proposed activity itself* is unusual as compared to the class of activities normally covered by the exemption. (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 241 Cal.App.4th 943, 955-956.) The “unusual circumstances” exception would apply here only if there was substantial evidence showing there was something unusual about the Reorganization as compared to governmental organizations or reorganizations in general, or annexations or detachments in particular. SDCWA has presented no evidence, much less substantial evidence, of anything unusual about the proposed Reorganization. “Argument, speculation, unsubstantiated opinion, or narrative” do not constitute substantial evidence. (CEQA Guidelines, § 15384, subd. (a).)

**4. SDCWA does not present any substantial evidence that the Reorganization might have a significant effect on the physical environment.**

On June 16, 2020, LAFCO's staff prepared a Preliminary Staff Report stating that the Reorganization Application is “expected to be” exempt from the CEQA under Section 15320.



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SDCWA opposes this preliminary determination but the SDCWA Letter does not present any substantial evidence sufficient to call the validity of the preliminary determination into question.<sup>1</sup>

In the SDCWA Letter, SDCWA argues that an initial Study and an EIR are required. As LAFCO is aware, an initial study is only required when the lead agency finds, after preliminary review, that the activity is subject to CEQA. (CEQA Guidelines, §§ 15061, 15063, subd. (a).) As FPUD explains above and in its Reorganization Application, the Reorganization is not subject to CEQA because the Reorganization will not result in any direct or indirect change to the physical environment.

An EIR is only required where there is a fair argument—based on substantial evidence—that the proposed activity may have a potentially significant impact on the environment. (*Joshua Tree Downtown Business Alliance v. County of San Bernardino* (2016) 1 Cal.App.5th 677, 685.) SDCWA’s vague allegations of environmental impacts do not meet this test.

For example, SDCWA speculates that the Reorganization would increase reliance on the Sacramento-San Joaquin Bay Delta. However, Eastern’s technical memorandum (included as part of FPUD’s Reorganization Application) states: “The de-annexation of FPUD and RMWD from the SDCWA would not result in Metropolitan, as a State Water Contractor, increasing its reliance on the Sacramento-San Joaquin Delta (Delta) since FPUD and RMWD would continue to be supplied from Metropolitan’s Robert A. Skinner Water Treatment Plant. . . . There would be no net increase in imported water to the region.” The change in wholesale water suppliers from SDCWA to Eastern will not change the source of water supplied to FPUD. As such, there is no evidence that the Reorganization would have any significant impact on the Delta.

SDCWA also posits that an EIR is necessary to analyze cumulative impacts resulting from FPUD’s proposed Reorganization in combination with Rainbow Municipal Water District’s proposed detachment and annexation, which LAFCO is also considering. A “cumulative impact of a project is an impact to which that project contributes and to which other projects contribute as well. [¶] *The project must make some contribution to the impact; otherwise, it cannot be characterized as a cumulative impact of that project.*” (*Sierra Club v. West Side Irrigation Dist.* (2005)128 Cal.App.4th 690, 700 [citing *Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2003) § 13.36, p. 533*])(emphasis added.) As explained above, the proposed Reorganization would not have any impact on the physical environment. By definition, therefore, the Reorganization cannot result in cumulative environmental impacts.

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<sup>1</sup> We note that many, if not all, of the assertions included in SDCWA’s July 2, 2020 letter were also included in SDCWA’s December 9, 2019 letter to FPUD, received the morning of FPUD’s December 9, 2019 Board Meeting at which the FPUD Board would consider initiating the Reorganization. Contrary to SDCWA’s recent assertions, FPUD did not ignore SDCWA’s comments—in fact as part of its staff presentation, FPUD responded to each of SDCWA’s comments.  
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Finally, SDCWA complains that FPUD refused to engage with stakeholders, provided only limited information to the public and ignored comments from other agencies. This is false and, in addition to being false, these complaints do not constitute substantial evidence that the Project might result in significant impacts to the physical environment. Specifically, during the months preceding the December 9, 2019 decision to authorize submittal of the Reorganization Application, FPUD gave the public and interested parties extensive information regarding the proposed Reorganization and provided many opportunities for the public to comment. Further, FPUD has been attempting since Spring of 2019 to engage with SDCWA, as a “subject agency” under the provisions of the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 (“CKH”), regarding the Reorganization, to no avail.<sup>2</sup> (Gov. Code §56077 [“‘Subject Agency’ means each district or city for which a change of organization or reorganization is proposed or provided in a plan of reorganization”].) FPUD has also reached out to numerous SDCWA member agencies to discuss its Reorganization Application—while not “subject agencies,” “interested agencies,” or “affected agencies,” as defined by CKH, FPUD desired to provide a forum to discuss any concerns these agencies may have.<sup>3</sup> Again, as stated above, these complaints do not constitute substantial evidence that the Project might result in significant impacts to the physical environment.

FPUD’s Reorganization Application provides substantial evidence demonstrating that the Reorganization would not have any direct or indirect physical impact on the environment. SDCWA does not offer any evidence to rebut this and instead proffers only speculation, argument and unsubstantiated opinion. This is insufficient as a matter of law to require an EIR.

## **5. Conclusion**

The law and the evidence fully support LAFCO Staff’s preliminary determination that FPUD’s proposed Reorganization is exempt from CEQA. SDCWA opposes Reorganization but it misstates the facts, misinterprets the law, and fails to present any substantial evidence that would support reconsidering LAFCO Staff’s preliminary determination.

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<sup>2</sup> See October 10, 2019 letter to SDCWA Chair, Jim Madaffer, delineating the various attempts to engage SDCWA and SDCWA member agencies in meaningful dialogue regarding the proposed Reorganization.

<sup>3</sup> SDCWA has regularly included agenda items related to the proposed Reorganization on its Board agendas, where representatives from all SDCWA member agencies receive updates on the Reorganization from SDCWA. In addition, SDCWA also provides regular updates to the general managers of each of its member agencies during the SDCWA monthly “GM Meetings.” In both of these forums, FPUD has continued to identify that it is willing to have more detailed discussion or provide any information at the request of any SDCWA member agency. The idea that other interested parties are not aware of this process or have not had the opportunity to provide input is baseless.  
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We appreciate the work that LAFCO and its Staff is undertaking to review the FPUD Reorganization Application, and ask that this letter be distributed to the members of the Ad Hoc Advisory Committee on the RMWD and FPUD Reorganization Proposals. We remain available to provide LAFCO Staff with further information not only regarding the content of this letter, but also regarding the FPUD Reorganization Application itself.

Sincerely,

A handwritten signature in black ink, appearing to read 'Paula C. P. de Sousa Mills'.

Paula C. P. de Sousa Mills  
of BEST BEST & KRIEGER LLP

cc: Jack Bebee, FPUD General Manager  
Holly Whatley, Commission Counsel  
Mark Hattam, General Counsel SDCWA  
Sandra L. Kerl, General Manager SDCWA  
Tom Kennedy, RMWD General Manager  
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