



San Diego County
Local Agency Formation Commission
 Regional Service Planning | Subdivision of the State of California

July 7, 2023

Delivered by Electronic Mail

Mr. Mark Hattam, Outside Counsel
 San Diego County Water Authority
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 San Diego, California 92123
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SUBJECT: Fallbrook-Rainbow Reorganization Proposals | Responses to July 3, 2023 Comment Letter

Mr. Hattam:

Thank you for your letter to the Commission dated July 3, 2023. The letter has been posted online and will be part of the supplemental materials provided to the Commission as it continues the joint-public hearing on the proposals at a special meeting on July 10th. The remainder of this correspondence draws on my own review of your letter and its stated purpose to advise of potential legal challenges from the County Water Authority should the Commission proceed with the staff recommendation. This includes my interest as Executive Officer to address several pertinent and otherwise disconcerting misstatements in your letter regarding the staff analysis and other baseline facts underlying the administrative review process. My responses are organized in order of your letter and are as follows.

1. With respect to CEQA, your letter incorrectly states LAFCO staff has failed to comply with statute. This misstatement is at odds with the record and suggests a misunderstanding of the CEQA statutes. The following comments collectively serve as corrections, and in doing so, fully attests to LAFCO’s compliance under CEQA.
 - a) CEQA is a disclosure process where public agencies make independent findings on the potential impacts of qualifying projects on the environment based on uniform criteria. The criteria and related thresholds are codified in the State CEQA Guidelines and – materially – legislatively premised on practitioners, courts, etc. not interpreting and/or requiring any additional procedures beyond those explicitly stated in the Guidelines (Section 21083.1).

<p>Administration Keene Simonds, Executive Officer 2550 Fifth Avenue, Suite 725 San Diego, California 92103-6624 T 619.321.3380 www.sdlafco.org lafco@sdcounty.ca.gov</p>	<p>Chair Jim Desmond County of San Diego</p> <p>Joel Anderson County of San Diego</p> <p>Nora Vargas, Alt. County of San Diego</p>	<p>Kristi Becker City of Solana Beach</p> <p>Dane White City of Escondido</p> <p>John McCann City of Chula Vista</p>	<p>Vice Chair Stephen Whitburn City of San Diego</p> <p>Marni von Wilpert, Alt. City of San Diego</p>	<p>Jo MacKenzie Vista Irrigation</p> <p>Barry Willis Alpine Fire Protection</p> <p>David A. Drake, Alt. Rincon del Diablo</p>	<p>Andy Vanderlaan General Public</p> <p>Harry Mathis, Alt. General Public</p>
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- b) Specific to the reorganizations, the applicants – Fallbrook and Rainbow – serve as the lead agencies for their respective proposals as the initiating parties. LAFCO serves as the responsible agency for both proposals. These role assignments appropriately align with the Guidelines (Section 15051).
- c) In adopting their resolutions of application, both applicants made findings as lead agencies that their proposed reorganizations qualify as projects, but categorically exempt from further analysis – i.e., initial studies (Section 15061). Both applicants cite “Class 20” exemptions as defined below (Section 15320):

“Class 20 consists 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.”

- d) In the role of responsible agency, LAFCO staff recommends the Commission independently concur and make parallel findings that the proposals are projects but categorically exempt from further analysis under Class 20 in the Guidelines. As detailed in the June 5th agenda report, staff believes this exemption appropriately applies given the underlying jurisdictional changes involve the transfer of existing municipal service functions involving wholesale water within the same geographic areas with no additional powers or expansions therein.
 - e) As responsible agency, making Class 20 exemption findings for both proposals moot any justification in statute for LAFCO to assume the lead agency role and proceed with additional analysis (Section 15052). This relatedly includes – and in contrast with your letter’s misstatement of “clear evidence in the record” – LAFCO staff determining no “exceptions to the exemption” reasonably apply to the proposals (Section 15300.2). Specifically, there is no material evidence suggesting similar reorganizations are in the queue and/or unusual circumstances exist that would reasonably produce cumulative impacts or significant effects on the environment – including your letter’s reference to the Bay-Delta. This latter comment is substantiated given the expected flow increase on the Bay-Delta should both proposals proceed is less than 2% and measurably below – and specifically 15 times less – the annual fluctuations already occurring.¹
2. Additionally, with respect to CEQA, your letter incorrectly infers the recommendation by LAFCO staff for the Commission to proceed as responsible agency with Class 20 exemptions for both proposals as “contrary” to a Superior Court order. This misstatement presumably ties to the CEQA lawsuits and related settlement agreements between Otay Water District and the applicants. LAFCO is not a party to the lawsuits or the settlement agreements and accordingly unbounded by any of the terms – whatever they may be given the signatories themselves are on record with different interpretations of the negotiated outcomes.

¹ Recorded flows through the Bay-Delta portion of the State Water Project have experienced significant fluctuations on a year-to-year basis of no less than 25% over the last five-years of available data published in the Department of Water Resources’ Bulletin 132 (2014 to 2018).

3. With respect to the County Water Authority Act, your letter incorrectly states the LAFCO staff recommendation violates the principal act because it does not include a condition to require the affected territory (Fallbrook and Rainbow) continue to be taxed for purposes of paying bonded and other debts. This misstatement implies the County Water Authority has voter-approved debts secured on the property tax roll – which is not the case. Instead, all of the County Water Authority’s existing bonded and other debts have been incurred by Board action by pledging future water rate revenues. The Board decision to not secure bonded and other debts on the tax roll through voter approved charges, assessments, taxes, etc. negates the applicability of the referenced provision in the principal act. All other revenues presently collected off the tax roll within the affected territory by the County Water Authority would be redirected or terminated should the detachments proceed under statutes outside of LAFCO’s purview with additional details footnoted.²
4. With respect to the administrative review process, your letter incorrectly and hyperbolically states there are numerous violations under LAFCO statute, rules, and policies by staff failing to review certain topics. No where in your letter – pointedly – are any actual citations given to substantiate these alleged violations.
5. With respect to the data collection utilized in administrative review, your letter incorrectly asserts LAFCO staff is relying on “stale” information. This misstatement contrasts with the extensive documentation in the record showing all core analysis performed by LAFCO staff relies on a recent five-year window of data (revenues, expenses, demands, etc.) collected between 2018 and 2022. Similarly, the five-year window used by LAFCO staff purposefully replicates the data range used by Dr. Michael Hanemann in performing his own analyses as tasked by the Ad Hoc Committee with representation and related direction therein from three County Water Authority officials.
6. With respect to voter rights, your letter incorrectly states the LAFCO staff recommendation does not follow the Constitution and related protections regarding taxation without voter approval. This misstatement is unsubstantiated. It also relatedly disregards the purpose of the recommended five-year exit fee is to provide the County Water Authority with an adjustment period should the detachments proceed. This could include reducing costs and/or establishing new revenues that would alleviate the need to pass the monetary impacts on to member agencies.

² As detailed in the June 5th agenda report, California Revenue and Taxation Code Section 99(b)(6) requires the County of San Diego and subject agencies to submit an adopted resolution to LAFCO agreeing to accept the exchange of property tax revenues associated with the proposed reorganization. The County has determined one of their adopted master property tax transfer resolutions apply to the proposed reorganization. The application of the County’s adopted master exchange resolution will result in 100% of all AB8 monies (the portion of the 1% in property taxes biannually collected) transferring to Eastern MWD. In the absence of consent of the applicants and affected agencies, LAFCO does not have the power to override application of the master exchange resolution. The total value of the property tax transfer is \$0.382 million and divided between \$0.173 within Fallbrook PUD and \$0.209 million in Rainbow MWD. (All remaining revenues collected by the County Water Authority off of the property tax roll within the affected territory involves unitary fees and available charges would immediately cease at the time of recordation. These other revenues currently total \$0.723 million.)

7. With respect to the conducting authority proceedings, your letter incorrectly states LAFCO is denying the right of the County Water Authority to be in charge of any post-approval procedures. Your letter ties this misstatement with the County Water Authority having exercised its allowance for “non-district” status and in doing so bypass standard LAFCO conducting authority proceedings in favor of following the exit procedures in the County Water Authority Act. Substantively, your letter proceeds to infer the alternative conducting authority proceedings also convey administrative duties from LAFCO to the County Water Authority. This inference strays from statute and conflicts with the Legislature tasking LAFCOs’ responsibility to oversee conducting authority proceedings beginning in 1985 as part of the Cortese-Knox Act as successor to the District Reorganization Act of 1965 and Municipal Organization Act of 1977.
8. With respect to other financial considerations, your letter states the LAFCO staff recommendation would result in uncompensated asset takings from the County Water Authority. This statement is void of any specific details. Nonetheless, and drawing from recall of past communications, it is assumed the statement is referencing meters and valves presently used by Fallbrook and Rainbow in receiving wholesale flows from the County Water Authority. As previously shared, and consistent with discussions with the Ad Hoc Committee, LAFCO staff believes these assets are fully depreciated and no longer assigned any book values.
9. With respect to the Metropolitan Water District of Southern California (“MET”), your letter asserts the LAFCO staff recommendation is legally vulnerable given it does not include a condition requiring separate approvals by MET. This assertion is perplexing and leaning towards gaslighting. The affected territory is entirely within MET, and as their own counsel advises there are no approvals needed by the MET Board involving the reorganizations under consideration by LAFCO.

Should you have any questions of me, please contact me at your convenience by telephone at 619-321-3380 or by email at keene.simonds@sdcounty.ca.gov

Sincerely,



Keene Simonds
Executive Officer

Attachment:

- 1) Letter from Mark Hattam, July 3, 2023

cc by email:

Commissioners (bcc)
Assistant Executive Officer Priscilla Mumpower
Commission Counsel Holly O. Whatley
Deputy Commission Counsel Aleks Giragosian
Chris Cate, Commission Consultant
Adam Wilson, Commission Consultant
Gary Thompson, Riverside LAFCO Executive Officer
Jack Bebee, Fallbrook PUD General Manager
Paula de Sousa, Fallbrook PUD Counsel
Tom Kennedy, Rainbow MWD General Manager
Alfred Smith, Rainbow MWD Counsel
Bill Pellman, Rainbow MWD Outside Counsel
Nick Kanetis, Eastern MWD Assistant General Manager
Dan Denham, County Water Authority Acting General Manager
David Edwards, County Water Authority Counsel
Adrian Granda, City of San Diego Intergovernmental Affairs Director

July 3, 2023

VIA EMAIL

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Re: Fallbrook/Rainbow Proposed Reorganizations

Dear Commissioners and Mr. Simonds:

You are preparing to hear again on July 10 the applications for the Fallbrook/Rainbow reorganizations. Though our previous submittals have made these points in detail, we write to remind you that if LAFCO approves the reorganizations as currently recommended by staff, that action will be vulnerable to legal challenges, including:

- Failure to comply with CEQA, all as detailed in prior submittals to LAFCO. These include: (a) the improper adoption of Fallbrook and Rainbow Board approvals to merely submit applications to LAFCO as a substitute for CEQA review; (b) that reorganizations of Rainbow and Fallbrook are exempt pursuant to a Class 20 Categorical Exemption (despite San Diego Superior Court Orders to the contrary); and (c) finding that LAFCO's action is exempt under Guideline 15061(b)(3), the "Common Sense Exemption," despite clear evidence in the record that the reorganizations will cause material adverse environmental impacts, and no CEQA review of such impacts. Substantial evidence in the record (as documented in the extensive CEQA comments in our prior letters) shows that the proposed re-organizations are not eligible for the above-referenced CEQA exemptions. Reasons why the exemptions cannot be used include (but are not limited to) the following: (1) The cumulative effect of the proposed reorganizations is significant; (2) Due to the unique nature and circumstances of the reorganizations and their expansive scope, there is a reasonable possibility that the proposed reorganizations will have a significant effect on the environment due to unusual circumstances; (3) The proposed reorganizations have the potential to substantially degrade the quality of the environment, substantially reduce the habitat of a fish or wildlife species, cause a fish or wildlife population to drop below self-sustaining levels, threaten to eliminate a plant or animal community, or substantially reduce the number or restrict the range of a rare or

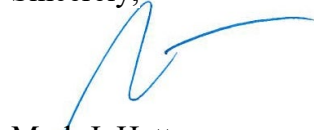
MEMBER AGENCIES

Carlsbad MWD • City of Del Mar • City of Escondido • Fallbrook Public Utility District • Helix Water District • Lakeside Water District • City of National City
City of Oceanside • Olivenhain MWD • Otay Water District • Padre Dam MWD • Camp Pendleton Marine Corps Base • City of Poway • Rainbow MWD
Ramona MWD • Rincon del Diablo MWD • City of San Diego • San Dieguito Water District • Santa Fe Irrigation District • Sweetwater Authority
Vallecitos Water District • Valley Center MWD • Vista Irrigation District • Yuima Municipal Water District

endangered plant or animal species; and (4) The environmental effects of the proposed reorganizations will have a substantial adverse effects on human beings.

- Violation of the Water Authority’s principal act, because staff have not proposed a condition that assures that “the taxable property within the excluded area shall continue to be taxable by the county water authority for the purpose of paying the bonded and other indebtedness of the county water authority outstanding or contracted for at the time of the exclusion....”
- Violation of LAFCO statutes/rules/policies and other legal requirements because of:
(a) failure to review the economic effect of anticipated water rate increases on agriculture in the Water Authority's service area following detachment of Fallbrook and Rainbow;
(b) failure to review economic justice issues in the Water Authority's service area following detachment; (c) reliance on staff reports that omit and skew material facts, downplay facts presented by expert interested parties, and dismiss material risks;
(d) failure to obtain and analyze crucial data; (e) reliance on stale data; (f) failure to reconcile provisions in the Water Authority's principal act with Proposition 13, and follow-on Constitutional amendments regarding taxation without voter approval; and
(g) failure to fully account for the financial impacts of the detachments on the Water Authority.
- Violation of the Water Authority's rights by proceeding as if LAFCO, not the Water Authority, is in charge of detachment “authority proceedings,” even though the Water Authority legally exempted itself from LAFCO control over such Part 4 proceedings.
- Uncompensated taking of Water Authority assets by LAFCO and Eastern under Public Utilities Code sections 1503 and 1505.5.
- Failure to condition the reorganizations on approval from the Metropolitan Water District of Southern California Board of Directors for Fallbrook and Rainbow to annex into Eastern.
- Uncertain and unaddressed conditions that would make any elections in Fallbrook or Rainbow premature and impossible to accurately and fully describe in the ballot pamphlets.

Sincerely,



Mark J. Hattam
Special Counsel for the San Diego County Water Authority

LAFCO
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cc via email:

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Water Authority Board of Directors
Eastern Municipal Water District Board of Directors