



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

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AGENDA REPORT
 Consent | Action

October 6, 2025

TO: Chair Whitburn and Commissioners

FROM: Keene Simonds, Executive Officer
 Aleks Giragosian, Assistant Commission Counsel

SUBJECT: Request to Join an Amicus Brief in Support of Monterey LAFCO

SUMMARY

The San Diego County Local Agency Formation Commission (LAFCO) will consider a request from Monterey LAFCO to join an amicus brief supporting Monterey's appeal of a trial court decision with potential precedent-setting implications for all LAFCOs. The request includes contributing up to \$1,200 toward proportional funding of the legal filing, which will be prepared under contract with Nossaman LLP. Staff recommends approval based on the direct benefit to San Diego LAFCO of establishing legal precedent that affirms LAFCO actions need only be supported by substantial evidence as provided under LAFCO law, rather than more restrictive legal standards that could limit LAFCO authority.

BACKGROUND

Monterey Peninsula Water Management District v. Monterey LAFCO

In 2022, Monterey LAFCO denied an application seeking activation of latent powers for the Monterey Peninsula Water Management District to provide retail water service. The District challenged the decision in court, asserting LAFCO exceeded its discretion in considering relevant factors. While the trial court acknowledged that some reasons cited by Monterey LAFCO were well-supported by substantial evidence, the court ruled in favor of the District,

Administration Keene Simonds, Executive Officer 2550 Fifth Avenue, Suite 725 San Diego, California 92103 T 619.321.3380 E lafco@sdcounty.ca.gov www.sdlafco.org	Paloma Aguirre County of San Diego Joel Anderson County of San Diego Monica M. Steppe, Alt. County of San Diego	Kristi Becker City of Solana Beach Dane White City of Escondido John McCann Alt. City of Chula Vista	Chair Stephen Whitburn City of San Diego Marni von Wilpert, Alt. City of San Diego	Vice Chair Barry Willis Alpine Fire Protection Jo MacKenzie Vista Irrigation David Drake, Alt. Rincon del Diablo	Brigitte Browning General Public Eileen Delaney, Alt. General Public
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determining that LAFCO's decision lacked a "rational connection." Monterey LAFCO is now appealing, arguing the trial court misapplied the legal standard by requiring more than what the Cortese-Knox-Hertzberg Act specifies. Under the Act, LAFCO decisions may only be overturned if they lack "substantial evidence" and cause substantial harm (Gov. Code, § 56107, subd. (c)).

DISCUSSION

This item is for San Diego LAFCO to consider a request to join an amicus brief supporting Monterey LAFCO's appeal of a trial court decision that applied a stricter legal standard than required under LAFCO law. The case involves whether LAFCO decisions should only need "substantial evidence" to be upheld in court, or if they must also demonstrate a "rational connection" as the trial court ruled. The request includes a monetary contribution of up to \$1,200 toward the cost of preparing the amicus filing.¹

ANALYSIS

The request before San Diego LAFCO offers a strategic opportunity to protect LAFCOs' decision-making authority under existing law. Allowing the trial court's heightened "rational connection" standard to stand could make all LAFCO decisions more vulnerable to legal challenges beyond statutory requirements. The modest funding contribution could preserve LAFCO's right to make decisions based on substantial evidence alone.

RECOMMENDATION

It is recommended that San Diego LAFCO approve the request by Monterey LAFCO to join the amicus brief for reasons detailed and consistent with Alternative Action One below.

ALTERNATIVES FOR ACTION

The following alternatives are available to San Diego LAFCO:

Alternative One (recommended):

- (a) Authorize San Diego LAFCO to file an amicus brief in support of Monterey LAFCO's appeal of the lower court decision in Monterey Peninsula Water Management District v. Monterey LAFCO.
- (b) Authorize the expenditure of up to twelve hundred dollars - \$1,200 - from Professional Services in the FY2026 operating budget to fund the amicus brief.
- (c) Authorize the Executive Officer to take all other steps necessary to participate in the appeal as an amicus.

¹ Other LAFCOs joining the amicus brief to date are Sacramento, San Mateo, Orange, Los Angeles, and Marin.

Alternative Two:

Continue to the next regular meeting and provide direction to staff as needed.

Alternative Three

Take no action.

PROCEDURES

This item has been placed on San Diego LAFCO's agenda as part of the consent calendar. A successful motion to approve the consent calendar will include taking affirmative action on the staff recommendation unless otherwise specified by the Commission.

Respectfully,



Keene Simonds
Executive Officer

Attachment:

- 1) Lower Court Decision: Monterey Peninsula Water Management District v. Monterey LAFCO

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ELECTRONICALLY FILED BY
Superior Court of California,
County of Monterey
On 10/25/2023
By Deputy: Conder, Perla

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF MONTEREY**

Monterey Peninsula Water Management District

Petitioner(s)/Plaintiff(s)

vs.

Local Agency Formation Commission of
Monterey County, et al.

Respondent(s)/Defendant(s)

Case No.: 22CV000925

INTENDED STATEMENT OF
DECISION

The instant matter came on for hearing and trial on the merits on September 21, 2023 at 8:30 a.m. in Department 15. Petitioner Monterey Peninsula Water Management District (“MPWMD”) was represented by Edward Schexnayder and Peter Damrosch. Respondent Local Agency Formation Commission (“LAFCO”) was represented by Richard Egger and Reed Gallogly. Intervenor California-American Water Company (“Cal-Am”) was represented by George Soneff.

Oral argument was heard, and the Court allowed the parties until October 12, 2023 to file additional citations to the administrative record, at which time the matter would be taken under submission.

Now, at a later time, the Court rules that a peremptory writ of mandate shall issue, as follows, for the reasons set forth below:

I. Factual and Procedural Background

This petition for writ of mandate filed by Petitioner Monterey Peninsula Water Management District (“Petitioner,” “MPWMD” or “District”) against Respondents Local

Agency Formation Commission¹ of Monterey County (“Monterey LAFCO” or the “Commission” or “LAFCO”) and the Commissioners of LAFCO (collectively “Respondents”), arises out of the ongoing saga involving water management in Monterey County.

By way of brief background, the Petition alleges that on November 6, 2018, Monterey voters approved Measure J which directed the District to acquire all the assets of California-American Water (“Cal-Am”), the private utility that has owned and operated the Monterey Water System (“MWS”) for more than 55 years.² Proponents of the measure contended that Cal-Am had mismanaged the MWS for decades, leading to recurring moratoria on water connections and some of the highest water rates in the country. Following Measure J’s adoption, the District has worked to comply with the voters’ directive to acquire Cal-Am’s system. The District prepared an economic feasibility study in 2019 and an environmental impact report (“EIR”) in 2020 to study acquisition of the Cal-Am system. In 2020, Cal-Am also filed a lawsuit in this Court to challenge the District’s EIR (Case No. 20CV003201), but this Court concluded on November 19, 2021 that Cal-Am’s suit was meritless.

As further alleged in the petition, the District applied to Monterey LAFCO to annex 58 parcels, update its Municipal Service Review and Sphere of Influence Study, and activate its “latent power”³ to sell water to retail customers, a power the District believes it has already used but felt Monterey LAFCO approval would reinforce. However, throughout the Monterey LAFCO proceedings, Cal-Am repeatedly demanded additional studies and raised various concerns regarding the District’s proposal. In response, Monterey LAFCO hired an independent financial consultant who concluded the District’s proposal would result in cost savings to Cal-Am’s customers under a range of reasonable assumptions. The Monterey LAFCO Executive Officer agreed and recommended that Respondents approve the District’s proposal, but on

¹ Local agency formation commissions are agencies that oversee the physical boundaries and structures of local governments.

² The text of Measure J appears at AR 9679-9681.

³ The Cortese-Knox-Hertzberg Local Government Reorganization Act (“CKH”), Government Code sections 56000 et seq., which governs LAFCO proceedings, includes a procedure for special districts to request activation of a “latent service or power” – a power granted by enabling legislation but that a district does not currently exercise.

December 6, 2021, following relentless lobbying by Cal-Am, the Monterey LAFCO Commissioners voted 5-2 to reject the staff's recommendation.

The District contends that multiple Monterey LAFCO Commissioners were biased against the District, including one Commissioner who openly stated his belief that public agencies were incapable of providing services effectively and another Commissioner who co-authored the official ballot argument against Measure J. For example, the District pleads that Commissioner Gourley, who introduced the motion to deny staff's recommendation, expressed animus against public entities providing public services, stating: "I'm definitely from a private sector [background], not the public sector. I don't think the government can run anything efficiently, and I think we've seen that." Additionally, Petitioner contends Commissioner Poitras demonstrated bias on behalf of the Monterey County Regional Fire District ("Fire District") and against the proposal, stating: "The district I represent, personally, is Monterey County Regional Fire District. They are slated to lose \$140,000 per year if this goes through. That is a considerable concern to me." Commissioner Poitras further indicated that he had been coordinating with the Fire District and represented that district's unique interests.

The District further asserts that the Commission voted to reject the District's proposal without a written basis for its decision, but then instructed staff to prepare a post-hoc resolution to justify the decision. Lastly, the District alleges the Commission's final resolution departed from the grounds of the December 6 deliberations in significant ways, omitting some of the Commissioners' indefensible statements and citing new evidence that went unmentioned at the December 6 hearing.

On January 31, 2022, the District sought reconsideration of the Monterey LAFCO decision and also requested that several of the Commissioners recuse themselves from further consideration of the District's proposal. On February 28, 2022, the Commission denied those requests and terminated the proceeding.

The District filed the present First Amended Petition for Writ of Mandate, alleging that Respondents' decision failed to satisfy the requirements of the Cortese-Knox-Hertzberg Act and violated key provisions of the California Environmental Quality Act ("CEQA") and state law.

Among other things, Petitioner pleads the Commission mishandled the essential inquiry for a latent powers proposal, which is whether the District would have sufficient revenue to carry out its proposal; disregarded its own internal policies when it engaged in an unstructured and ill-informed review of potential environmental impacts of the District's proposal; and denied the District a neutral and unbiased hearing. As such, Petitioners requested that the Court issue (a.) a writ of mandate directing Respondent to vacate and set aside its denial of the District's proposal and reconsider that proposal in compliance with all applicable law, and (b.) an injunction directing three of the LAFCO Commissioners to recuse themselves from participation in proceedings related to the District's proposal.

Subsequently, Cal-Am filed a motion for leave to intervene. On August 2, 2022, this Court signed an order permitting Cal-Am to intervene subject to various conditions, including the conditions that Cal-Am would not delay or prolong the proceedings or request an extension of time without first obtaining consent from the parties; would coordinate its briefing with Monterey LAFCO to avoid duplication; would not address whether the Monterey LAFCO Commissioners were biased or failed to exercise their independent judgment as Monterey LAFCO was the proper party to argue this issue; would apply to the Court to obtain a ruling on whether it could object to any settlement reached between the parties; and would not advance affirmative defenses not advanced by Respondents or otherwise enlarge the issues in this case.⁴

On September 15, 2022, the District filed the First Amended Petition ("FAP") which is the presently operative pleading. Subsequently, Respondents and Cal-Am demurred to and moved to strike the FAP. On December 13, 2022, this Court issued a ruling sustaining without leave to amend the demurrer to the first cause of action for decisionmaker bias and granted in part the motion to strike certain allegations relating to the issue of decisionmaker bias. However, the Court also denied the motion to strike relative to allegations of bias that could inform the analysis of the second cause of action for violations of the Cortese-Knox-Hertzberg Act's

⁴ Since 2019, the Court has heard the following matters, among others: a challenge to the construction of a desalination plant in *Marina Coast Water District v. County of Monterey, et al.* (19CV003305); a dispute over various agencies' competing claims to manage groundwater in the Marina area in *City of Marina, et al. v. Nemeth, Karla, et al.* (19CV005270); and Cal-Am's challenge to the EIR prepared for the potential acquisition and operation of the Monterey Water System in *Cal-Am v. Monterey Peninsula Water Management District* (20CV003201).

requirement that LAFCO Commissioners exercise independent judgment on behalf of the public as a whole. Lastly, the Court on that date issued an order to show cause why Cal-Am's complaint in intervention should not be dismissed given the fact Cal-Am's demurrer apparently violated two of the conditions of intervention. On April 28, 2023, the Court discharged the order to show cause and set this matter for a hearing on the petition for writ of mandate.

Currently before the Court is the petition for writ of mandate. Petitioners filed an opening brief which was opposed by LAFCO and responded to by intervenor Cal-Am. Petitioners also submitted requests for judicial notice in support of their opening brief and reply brief, while Cal-Am submitted a request for judicial notice in support of its response to the opening brief.

REQUESTS FOR JUDICIAL NOTICE

The parties' respective requests for judicial notice are GRANTED, and are as follows:

Petitioner requested, in conjunction with its Opening Brief, judicial notice of

- a. January 27, 2020 letter from Manatt, Phelps law firm to Petitioner;
- b. Monterey LAFCO Policies and Procedures Relating to Spheres of Influence and Changes of Organization and Reorganization (adopted February 24, 2020);
- c. excerpts from The Commission on Local Governance for the 21st Century Growth Within Bounds: Report of the Commission on Local Governance for the 21st Century (Jan. 2000); and
- d. Assembly Floor Analysis (July 23, 2001) of A. B. 948, as amended June 26, 2001 (2001-2002 Reg. Sess.)

Intervenor Cal-Am requests judicial notice of

- a. a District Special Board Meeting slide presentation dated April 3, 2023;
- b. the District's April 3, 2023 Purchase Offer for Monterey Water System and Transmittal of Appraisal Report in lieu of Summary Statement of Appraisal; and
- c. Cal-Am's April 28, 2023 Response to the MPWMD Purchase Offer.

Petitioner also subsequently requested, in support of its Reply Brief, judicial notice of

a. Senate Floor Analysis (June 5, 2008) of A.B. 2484, as amended May 21, 2008 (2007-2008 Reg. Sess.);

b. excerpts from the Legislative History of A. B. 2838 (1999-2000) Reg. Sess.;

c. Supplemental Excerpts from The Commission on Local Governance for the 21st Century, Growth Within Bounds: Report of the Commission on Local Governance for the 21st Century (Jan. 2000).

The parties' respective requests for judicial notice are granted, although the Court notes not all are actually necessary for the Court to reach its decision in this matter.

Threshold Issues

Cal-Am requests the Court rule whether a decision by LAFCO was necessary in the first place for Petitioner MPWMD to activate its latent power to sell water to retail customers.

As noted by Petitioner's Opening Brief at p.11, fn.3, "[w]hether LAFCO approval is necessary for the District to provide retail water service was not at issue before Monterey LAFCO, and is not before the Court in this action." What Cal-Am is requesting the Court to do, therefore, is issue an advisory opinion, which would be inappropriate. Cal-Am's request additionally runs counter to the conditions imposed by the Court in allowing intervention: the Court's August 2, 2022 Order Granting California-American Water Company's Motion For Leave To Intervene specifically states: "Cal-Am may not raise any affirmative defenses that LAFCO does not raise *or otherwise enlarge the issues in this case.*" [Emphasis added].

Accordingly, the Court will not address, and it was in violation of the terms of the Court's order permitting intervention for Cal-Am to request a ruling on, this issue.

Standard of Review

Government Code section 56107(c) provides that "[i]n any action or proceeding to attack, review, set aside, void, or annul a determination by a commission on grounds of noncompliance with this division, any inquiry shall extend only to whether there was fraud or a prejudicial abuse of discretion. Prejudicial abuse of discretion is established if the court finds that the determination or decision is not supported by substantial evidence in light of the whole record."

The appropriate standard of review, by the trial court in an ordinary mandamus proceeding, of LAFCO's action is not confined to whether the agency failed to apply or properly interpret the law, and whether the decision was arbitrary, capricious or failed to follow the procedure required by law or lacks evidentiary support. The court must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute. (*McBail & Co. v. Solano County Local Agency Formation Comm'n.* (1998) 62 Cal.App.4th 1223, 1227, 1228, citing *California Hotel & Motel Assn. v. Indus. Welfare Com.* (1979) 25 Cal.3d 200, 212.) While "LAFCO decisions do not require formal findings, [they] do require a statement of basis sufficient for judicial review of the decision." (*San Joaquin County Local Agency Formation Commission v. Superior Court* (2008) 162 Cal.App.4th 159, 171, fn.4.)

The Petitioner, of course, bears the burden of pleading and proving the facts upon which the claim for relief is based. (*California Pub. Recs. Rsch., Inc. v. City of Alameda* (2019) 37 Cal.App.5th 800, 805.)

The Court proceeds to rule on the Petitioner's substantive challenges as follows:

Argument #1: Did LAFCO Fail To Consider Properly Whether MPWMD Would Have Sufficient Revenue To Expand Its Water Service?

Analysis of this issue starts with the applicable statutory language from the CKH Act.

Government Code section 56824.14(a) states in pertinent part that a LAFCO "...shall not approve a proposal for the establishment of new or different functions or class of services within the jurisdictional boundaries of a special district unless the commission determines that the special district will have sufficient revenues to carry out the proposed new or different functions" The section expressly forbids approval of a proposed action unless a LAFCO determines the agency will have sufficient revenue to carry out the proposed function.

Government Code section 56668 lists a variety of factors for consideration in evaluating an application for a change of organization to provide new services. This statute is prefaced with the following language: "Factors to be considered in the review of a proposal shall include, but not be limited to, all of the following:" This language tells us two things: first, all of the

factors listed in the section *must* be considered. Second, other factors *can also* be considered – the list is not exhaustive. “The touchstone of statutory interpretation is the probable intent of the Legislature.” (*Quarterman v. Kefauver* (1997) 55 Cal.App.4th1366, 1371.) “Because the statutory language is generally the most reliable indicator of legislative intent, we first examine the words themselves, giving them their usual and ordinary meaning and construing them in context. When statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it.” (*Uber Techs. Pricing Cases* (2020) 46 Cal.App.5th 963, 973.)

All parties acknowledge the applicability of and discuss the factor listed in subsection (k) of Government Code section 56668, which lists as a mandatory factor for consideration “[t]he ability of the newly formed or receiving entity to provide the services that are the subject of the application to the area, *including the sufficiency of revenues for the services following the proposed boundary change.*” [Emphasis added.]

But the parties part company on whether LAFCO here properly – or actually - considered that topic. Petitioner District contends that Respondent LAFCO improperly addressed this factor based on the costs of mounting an eminent domain action to *acquire* the Cal-Am system, and particularly on the monetary consequences to Respondent if such an action were *unsuccessful* – without considering the ability of Petitioner to generate sufficient revenue *following* a successful acquisition.

Petitioner District proposed several means by which it could generate revenue following acquisition. Specifically, Petitioners state the District proposed to finance acquisition of Cal-Am’s system, a necessary prerequisite to expanding its water service, “primarily [through] water rates and charges,” including (1) volumetric rates and meter charges, (2) water supply availability charges, (3) connection and impact fees, (4) capacity and development charges, (5) system capacity charges, (6) fire service rates, (7) drought and surcharge rates, (8) permit fees, and (9) other “water rates, water connection fees, [and] surcharges” as needed (Opening Brief at p. 17, citing AR 03697, 03743-44.) The District indicated these funding mechanisms ensured a “full cost recovery of all operating, capital, and interest costs” for the proposed service. (*Id.* at p. 18, citing AR 03744.) Further, Petitioners state that LAFCO’s own Executive Officer extensively

analyzed the District's sources of revenue and recommended approving the District's application, concluding the "District's broad financial powers . . . support a finding that the District will have sufficient revenues to implement the proposed" service expansion. (*Ibid.*, citing AR 01852-53.)

In response, LAFCO contends that it considered the 'financial feasibility' of Petitioner's proposal, and that such was sufficient to meet its statutory obligation to consider factor (k).

The actual reference to factor (k) in LAFCO's Denial Resolution is contained in Section 2 of the Denial Resolution:

The Commission has considered feasibility-related information in the record for this proposal, including the Berkson Associates report dated October 11, 2021. Among other findings generally in agreement with the methodology used in the District's financial feasibility analysis (the Raftelis Report), key findings in the Berkson report⁵ also cautioned that:

- "The eminent domain process will resolve many of the uncertainties of the District proposal, however, the outcome may reduce the District proposal's financial feasibility."
- "In the event of District loss, abandonment, or failure to finance and acquire the system, significant additional District costs could be incurred."
- "Public acquisition and ownership of the Cal-Am system will reduce property tax revenue to public agencies."

"In considering factor (k), the Commission determines that the District's proposal and other evidence in the record does not adequately establish that District acquisition and ongoing ownership of the water system would be financially feasible."

(AR 00013.)

Yes, LAFCO did recite that it was considering factor (k). But there was clearly a misunderstanding in LAFCO's interpretation and application of this statutorily mandated factor. There are two flaws in LAFCO's approach: (1.) The standard which LAFCO

⁵ Berkson was a consultant for Respondent LAFCO; Raftelis was an economic consultant for Petitioner District.

employed was ‘financial feasibility’ -- not the statutorily prescribed sufficiency-of-revenues standard of Government Code section 56668(k)⁶; and (2.) it was based upon (a.) costs of acquisition via an eminent domain action by MPWMD and the chances of success of such an action without addressing the ability to absorb such costs through revenue following acquisition, as well as upon (b.) the property tax loss potential to other governmental agencies. Neither of these financial aspects bears any rational relationship to the statutory standard of whether the District could through water rates or other charges generate *sufficient revenues to provide the proposed services following the proposed action*. “Mandamus will not lie to control an exercise of discretion, i.e., to compel an official to exercise discretion in a particular manner. Mandamus may issue, however, to compel an official both to exercise his discretion (if he is required by law to do so) and *to exercise it under a proper interpretation of the applicable law.*” (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 442 [citations omitted; emphasis added].)

Given that the list of factors in Government Code section 56668 is by that section’s very terms not exclusive, the Court is not in this ruling stating that LAFCO could not have considered other economic consequences as it did. But those cannot be substituted for the statute’s mandate - that sufficiency of revenues following the proposed action be considered.

Similarly, Section 3 of the Denial Resolution, addressing the related requirement of Government Code section 56824.14(a), recited that “the District has failed to demonstrate that it will have sufficient revenue to carry out the proposed new or different functions or class of services, and failed to demonstrate it has the ability to finance an unsuccessful eminent domain action” (AR00015), pointing to “the Commission[‘s] voiced concerns over the potential costs to the District if it is unsuccessful in an eminent domain action against Cal-Am.” (AR00015). LAFCO then stated its reasoning as follows:

“The Commission considered Berkson Associate’s October 11, 2021 memo which, on page 5, detailed the financial consequences to the District if it loses, abandons, or fails to finance and acquire Cal-Am’s system. Berkson’s memo finds significant District costs could be incurred, specifically as much as \$34 million.”

⁶ The ‘feasibility’ standard employed by Respondent appears to result from conflation of language from Measure J, Section IV, adding Rule 19.8 to the Petitioner District’s Rules and Regulations language which states in part that “[i]t shall be the policy of the District, if and when feasible, to secure and maintain public ownership of all water production, storage and delivery system assets and infrastructure providing services within its territory.” (AR 09680-09681.)

Additionally, the Commission considered Cal-Am's October 19, 2021 letter on page 5 and Tab C, which stated, in part:

“The mere prosecution of the eminent domain lawsuit carries considerable financial risk for MPWMD, and hence to Monterey residents...If MPWMD fails in its eminent domain lawsuit, it will be required to pay all attorneys' fees and costs incurred by Cal-Am, as well as its own – with nothing to show for it...Data from the Claremont and Apple Valley cases suggest that a \$25 million to \$34 million loss estimate is conservative. There has been no proof that MPWMD could sustain such a financial loss without impairment of operations or assumption of costs new debt.”

(AR 00015.)

This determination by LAFCO focused on economic consequences in the event an eminent domain action by District failed – in which event, of course, it would not be “...carry[ing] out the proposed new or different functions or class of services.” Again, the language of Government Code section 56668 (k) is specifically directed to determining whether “... the special district will have sufficient revenues to carry out the proposed new or different services.” There is no rational connection between the sufficiency of revenues to carry out the proposed service upon successful acquisition of the water service by eminent domain and non-recoupable costs in the event the eminent domain action failed and the District does not proceed to carry out the proposed service.

Since the ‘rational connection analysis needs to occur at the inception of the court’s analysis’, *McBail, supra*, 62 Cal.App.4th at 1230, and the lacking rational connection is a procedural error, the Court need not address whether substantial evidence supported LAFCO’s decision.

Argument #2: Was Denial Improperly Based Upon Impacts To Property Tax Revenue?

The Denial Resolution asserted that the District’s “proposal’s effects on property tax revenues would be detrimental to the finances and operations of local public agencies.” (AR00009). LAFCO reasoned that because publicly-owned property is tax-exempt, the District’s acquisition of the Monterey System – a necessary step for the District to provide the proposed water service – would remove property from the tax rolls. That would in turn reduce tax

revenues to other agencies, a factor which LAFCO concluded weighed against approving the application. Petitioner's challenge to this is twofold.

A. Petitioner argues that LAFCO lacks the authority to consider tax consequences because the Legislature never authorized LAFCO to approve or disapprove the District's acquisition of private property. Petitioner's contention is that the Legislature *only* gave LAFCO authority in Government Code section 56824.14 to consider the District's ability to provide the new class of services and its impacts on existing providers.

The Court is not persuaded by this argument. Government Code section 56824.14 addresses certain information which *must* be submitted by a special district in its plan for services, and does not, when read in context with the rest of the statutory scheme, appear to limit the factors which LAFCO may evaluate in considering a special district's proposal for a Change of Organization to provide new services. On the other hand, Government Code section 56668 sets forth the factors which LAFCO must consider -- and which necessarily carry with them the authority for LAFCO to do so. Among those are subsection (b) [probable effect of the proposed action on the cost and adequacy of services in the area and adjacent areas] and subsection (c) [the effect of the proposed action on adjacent areas and on mutual social and economic interests, and on the local governmental structure of the county]. LAFCO's consideration of the probable tax revenue consequences upon other governmental service agencies here was properly within the scope of these factors and hence of LAFCO's authority.

B. Petitioner also argues that the administrative record does not support LAFCO's position that the District's proposal will significantly affect the services which other agencies provide.

The Court believes that the evidence from the Monterey Peninsula Unified School District ["MPUSD"] and Monterey County Regional Fire District ["MCRFD"] expressing concern about tax revenue impacts upon their respective operations is alone sufficient, substantial evidence to support LAFCO's conclusions in this regard. Neither Government Code section 56668 subsections (b) nor (c) set any minimum threshold which must be met before a factor can be deemed to weigh against approval of a proposal. MCRFD represented that it would

lose \$139,591.60 annually, which equates to the loss of one firefighter position, and stated: “As we have discussed on multiple occasions, staffing our fire engines continues to be a struggle and even the loss of a single firefighter is a critical loss for our District, impacting our mission to provide emergency medical, fire and rescue operations.” (AR 00012). As for the MPUSD, it has not been shown – i.e., there is no evidence showing – that ‘backfill funding’ from the State would be at the same level that MPUSD receives from property tax revenues presently.

Argument #3: Was LAFCO’S Determination That Granting the District’s Application Would Impose Undue Hardship on Ratepayers Outside of District’s Territory, and Impair Environmental Justice, Incorrect?

There are 5 smaller water systems and 8 wastewater systems outside Petitioner MPWMD’s boundaries which Cal-Am also presently operates (referred to as ‘satellite’ or ‘remaining’ systems) and would retain to serve in the event its Monterey water system operations are acquired by Petitioner. One community within such a satellite system is Chualar, which has been designated by the State Water Resources Control Board as a ‘disadvantaged community,’ i.e., one with a median household income less than 80% of the statewide median. (AR00011). LAFCO concluded Petitioner District’s acquisition of the Monterey system would (A.) probably result in undue hardship on ratepayers within those satellite systems and (B.) impair environmental justice, in derogation of the factor listed in Government Code section 56668(p).

LAFCO’s analysis of this factor was as follows:

The Commission further determines that potential future cost increases to areas served by Cal-Am’s remaining “satellite” water systems and wastewater systems would be an undue hardship for residents of these communities. The likely future rate increases have no certainty of being adequately limited or mitigated through the California Public Utilities Commission’s rate-setting processes.

The District’s proposed activation of latent powers was to provide and maintain potable water production and distribution services for retail customers to implement the District’s efforts to implement Measure J, which was approved by District voters in 2018. Pursuant to Measure J, the District seeks to acquire Cal-Am’s Monterey Main Water

System, which is almost completely within the District’s jurisdictional boundaries. The planned acquisition effort does not include five small “satellite” water systems in the area, but outside of the District’s jurisdictional boundaries (Ambler Park, Chualar, Garrapata, Ralph Lane, and Toro). Chualar, one of the satellite-system communities, is designated as a disadvantaged community, i.e. a community with a median household income less than 80% of the statewide median, by the California State Water Resources Control Board.

The District’s acquisition would also not include eight small wastewater operations owned by Cal-Am located both within and outside the District’s boundaries: the Carmel Valley Ranch, Indian Springs, Las Palmas, Oak Hills, Pasadera, Spreckels, Village Green, and White Oaks systems.

In considering factor (b) and making determinations, the Commission has reviewed – among other evidence - the Executive Officer’s December 6 report. The report discussed the possibility of future rate increases in Cal-Am’s remaining water and wastewater systems, as well as mechanisms, such as the California Public Utilities Commission rate-setting process, that may help limit future increases.

The Commission has also considered an October 11, 2021 report prepared by LAFCO’s independent financial consultant, Berkson Associates, which stated in part:

- “These smaller operations could experience some reduction in scale efficiencies and resulting impacts on costs depending on the number of additional staff required by these small systems. While these impacts may not directly impact Cal-Am, a portion of increased costs could be added to the rate base of these small operations and thereby increase rates to ratepayers served by those small operations.”

A November 22, 2021 supplemental memo by Berkson Associates further stated, in part:

- “It is correct that excluding a number of small water and sewer systems from MPWMD’s acquisition of the Monterey system will reduce current economies of scale and could result in increased costs to serve those systems. The specific

impacts on rates have not been determined; assertions of rates doubling have not been documented and impacts could be mitigated in a number of ways[.]”

- “During the eminent domain trials, Cal-Am may be awarded severance charges for lost value attributable to the remaining systems; the potential magnitude of charges and their rate effects are not known.”

The Commission has also considered written comments submitted by Cal-Am and several residents of the remaining Cal-Am water and wastewater systems and described under factor (n), below.

Based on the totality of evidence in the record, the Commission determines that that potential future cost increases to areas served by Cal-Am’s remaining “satellite” water systems and wastewater systems would be a probable undue hardship for residents of these communities.” (AR 00011-00012.)

Petitioner’s Arguments

A. **UNDUE HARDSHIP**

As to the finding of undue hardship on the satellite systems, Petitioner initially argues that the record is barren of substantial evidence to support LAFCO’s conclusion that its acquisition of the Monterey system would impose undue hardship on the ratepayers in the satellite systems because

(a.) the Berkson Associates report in the record states that ‘impacts on rates have not been determined’ (AR05952);

(b.) Respondent LAFCO asserted ‘likely future rate increases [in the satellite systems] have no certainty of being adequately limited or mitigated through the California Public Utility Commission’s [“CPUC”] rate-setting process’ – an incorrect standard; and

(c.) since 2006, CPUC has protected Chualar ratepayers by preventing water rates from rising faster than inflation, and such rates will remain in place unless changed by CPUC order (AR 05703-05704);

(d.) Cal-Am has instituted a number of mechanisms which spread the cost of small water systems across its entire statewide territory, including setting rates on a regional basis and providing discounts to low-income customers (AR 02510-02511, 05397); and

(e.) Respondent LAFCO failed to consult with the CPUC to determine any impact on water rates from Petitioner's proposal.

B. ENVIRONMENTAL JUSTICE

Petitioner points out that the CKH Act defines environmental justice as "fair treatment and meaningful involvement of people of all races [etc.] ... such that the effects of pollution are not disproportionately borne by any particular populations." Gov. Code section 56668(p). LAFCO's denial resolution cites this definition but

(1.) does not point to any effects of pollution from proposed acquisition by Petitioner; and

(2.) the EIR prepared in connection with this proposed project demonstrated no significant and unmitigated environmental impacts from Petitioner's acquisition.

Respondent's Arguments

A. UNDUE HARDSHIP

LAFCO counters that

(1.) There would be increased cost and hence economic hardship if the remaining systems were run independently of the Monterey area. All of these satellite or remaining systems are operated as part of an integrated system within the Cal-Am Central Division (AR01466), and 95.5% of Cal-Am's Monterey Operations would be taken by Petitioner, along with systems which monitor and control all operations in the Central Division. LAFCO also argues that as a consequence there would be 'near full elimination' of the 95 Cal-Am employees that operate both the main and remaining satellite systems – leaving Cal-Am to operate them as 'stand-alone' systems without the ability for Cal-Am to spread workload and cost throughout its Monterey County customers (AR01470-01476, AR 05716-05718);

(2.) The Raftelis report states that added costs to customers of the remaining satellite systems is difficult to evaluate but acknowledges that ‘increased marginal operating costs’ would likely be passed on to those customers (AR 04026);

(3.) There is no certainty CPUC would maintain the same rate caps [citing portions of the CPUC tariff and the CPUC’s resolution when Cal-Am acquired Chualar and several other of the remaining systems].

(4.) Hence Mr. Linam’s⁷ conclusion at AR 05718 that Petitioner was ‘wrong’ in asserting the CPUC will assure rate increases will be limited to inflation in event of a takeover is supported.

B. ENVIRONMENTAL JUSTICE

LAFCO has, instead of addressing this issue discretely, asserted that several of the CKH Act factors required consideration of acquisition’s financial impact on low-income residents, citing Government Code section 56668(b) [probable effect of proposed action on cost and adequacy of services and controls in the area and adjacent areas], (c) [effect on adjacent areas, on mutual social and economic interests ...], and (p) [environmental justice], as well as 56824.12 (a)(3) [a district’s ‘plan for services’ must contain potential fiscal impact to customers of existing providers].

THE COURT’S RULING ON ARGUMENT #3.

Environmental justice. It is clear to the Court that ‘environmental justice,’ as that phrase is defined in Government Code section 56668(p), is not implicated in Petitioner District’s proposal here. That subsection mandates that LAFCO consider “[t]he extent to which the proposal will promote environmental justice. As used in this subdivision, ‘*environmental justice*’ means the fair treatment and meaningful involvement of people of all races, cultures, incomes and national origin with respect to the location of public facilities and the provision of public services, to ensure a healthy environment for all people such *that the effects of pollution* are not disproportionately borne by any particular populations or communities.” [Emphasis added.]

⁷ This person is not identified by LAFCO in its opposition, but the administrative record citation indicates he is the Senior Director of Rates for Cal-Am.

The subsection plainly deals with pollution and no party has seriously contended pollution is a factor present or actually considered by LAFCO, notwithstanding LAFCO's recitation of 'environmental justice.' There is no support in the record for a finding that the proposal in question would have any impact whatsoever on pollution. Moreover, LAFCO's finding is not rationally related to the standard it recited it was evaluating: the resolution makes no reference to pollution and only makes reference to possible future rate impacts as 'represent[ing] an environmental justice concern.'

Hence, Government Code section 56668(p) cannot provide a basis for LAFCO's denial. In its briefing and oral argument, LAFCO has not demonstrated anything contrary. There is no rational relationship between the purpose of the statute's subsection and LAFCO's decision, nor any substantial evidence to support the decision that the subsection weighed against approval of the proposed action of Petitioner. Petitioner is correct that this standard was incorrectly applied by LAFCO.

Undue financial hardship. The remaining portion of Petitioner's challenge in this section of its argument is LAFCO's finding of probable undue financial hardship in its consideration of Government Code section 56668, subdivision (b)(1). "Substantial evidence ... must be of ponderable legal significance, which is reasonable in nature, credible and of solid value." *JKH Enterprises, Inc. v. Dep't. of Indus. Rels.* (2006) 142 Cal.App.4th 1046, 1057.

Government Code section 56668(b)(1) lists as a statutorily mandated factor for LAFCO's consideration "[t]he need for organized community services; the present cost and adequacy of governmental services and controls in the area; probable future needs for those services and controls; *and probable effect* of the proposed incorporation, formation, annexation, or exclusion and of alternative courses of action *on the cost* and adequacy of services and controls in the area and adjacent areas." [Emphasis added.]

LAFCO has shown that there is substantial evidence in the record that the economies of scale would be adversely impacted by the removal of the Monterey water system from Cal-Am's operations – i.e., that it will be more costly to operate the satellite systems. But whether LAFCO's finding that any such potential future cost increases to Cal-Am would (a.) be passed

on to the satellite system customers and (b.) result in “an undue hardship for the residents of these communities,” is supported by substantial evidence is another matter. Likewise, whether the finding that “likely future rate increases have no *certainty* of being adequately limited or mitigated through the [CPUC] rate-setting process” (emphasis added), AR 00011, is sufficient to address the statutory ‘probable effect’ standard presents a further issue.

There appears to be no serious dispute that any rate change would have to be approved by the CPUC, and that there is presently a set tariff applicable to Chualar which ‘caps’ any rate increases to the rate of inflation and which remains the same unless changed by the CPUC. The Court has not been directed to any evidence, not even an estimate, as to the amount of any potential rate increase. Cal-Am has not provided any evidence of the number of its customers among whom any increased costs of operation would be distributed, assuming the CPUC approved a rate increase. Nor has anyone pointed to any evidence of what the CPUC has done historically with requests for rate changes following a change in composition of a water system. While Respondent found there is no ‘certainty’ of future rate increases being ‘adequately limited or mitigated,’ that is not the correct standard, as Petitioner points out. The lack of certainty that present rates will remain capped is not the evidentiary equivalent of a probability that they won’t be. The express language of the subsection (b) of Government Code section 56668 mandates consideration of the ‘probable’ effects of a proposed action – not merely possible ones. LAFCO has cited an extended string of citations to a series of letters, reports and emails without any explanation or argument as to how those citations support its determination. As Petitioner correctly points out, points that are not supported by adequate factual or legal analyses are deemed waived. *Singh v. Lipworth* (2014) 227 Cal.App.4th 813, 817 [considering arguments forfeited when unsupported by “adequate factual or legal analysis”].

Based on the record here, it cannot be said that there is substantial evidence to support LAFCO’s decision that any increase in rates from decreased economies of scale is (a.) probable, and that if it did occur, that it would cause (b.) financial hardship on other ratepayers which (c.) is undue.

ARGUMENT #4. Did Respondent Incorrectly Consider Impacts to Water Supply?

Petitioner contends that LAFCO incorrectly concluded that public ownership of Cal-Am's system would 'potentially harm the Salinas Valley groundwater basin' [citing AR 00013]. Section 2 of the Denial Resolution states

“Government Code section 56668(l):

l) Timely availability of water supplies adequate for projected needs as specified in Government Code section 65352.5

The District develops and maintains 20-year water supply projections. Among other approved and proposed projects, the District, Monterey One Water, and Cal-Am are working to develop a replacement water supply known as the Pure Water Monterey Expansion project, which would include several water sources from the Salinas Valley. The project's goal is to meet the 2009 State Water Resources Control Board's cease and desist order, as extended in 2016, to terminate unauthorized diversions from the Carmel River.

In considering factor (l), the Commission finds that the District's proposal, as well as the evidence in the record, does not adequately establish that the District's current efforts to expand the Peninsula area's water supply will be sufficient to meet current and future needs, especially in times of drought, and to do so without utilizing water from the Salinas Valley and potentially harming the Salinas Valley groundwater basin.” (AR 00013)

LAFCO did not cite any evidentiary support for its conclusion in this portion of its determination, but later in the resolution (where LAFCO addressed factor (n), comments from landowners and residents of the affected community), it mentioned the Salinas Valley Water Alliance's October 22, 2021 letter, Monterey Peninsula Chamber of Commerce's October 25 and December 3, 2021 letters, Monterey County Farm Bureau's November 22, 2021 letter, and Sustainable Agriculture and Energy's (“SAGE”) December 6, 2021 letter, which each raised concerns regarding water supplies. (*Ibid.*) LAFCO then goes on to quote this portion of the Monterey County Farm Bureau's letter: “While Monterey County Farm Bureau has no position on the public ownership of the water supply system of the Monterey Peninsula, it makes little to

no sense to grant additional authority to an agency that will ultimately rely on a single facility resource⁸ for the water it supplies to its customers, especially if that source water supply is interruptible and not drought-proof.” (*Ibid.*)

Petitioner’s arguments are as follows:

A. Government Code section 56668(l) is inapplicable. Government Code section 56668(l) requires for a Change of Organization that LAFCO consider ‘timely availability of water supplies adequate for project needs as specified in [Gov C] section 65352.5. The latter section only applies where an agency with land use authority proposes to adopt or amend a general plan. Here, Petitioner District did not propose to do either. LAFCO’s finding of potential harm to SVGB is not rationally related to the standard set forth in the specific language of Government Code section 56668(l) [“... as specified in (Gov. Code) section 65352.5”].

B. Lack of substantial evidence and irreconcilably inconsistent findings. Even if Government Code section 56668(l) applied here, (i.) there is no substantial evidence in the record to support LAFCO’s conclusion, nor reasoning to support the conclusion, that the District’s application, which is simply for a change in ownership, may harm groundwater in the Salinas Valley. No change in operation or in exercise of ownership rights is involved; and (ii.) LAFCO findings are inconsistent with its findings made the same day, that “District’s analysis shows that ... [either of the two supply projects] will be more than sufficient to meet anticipated water demand.” Citing AR 01810.

C. Failure of LAFCO to follow its own local written policies and procedures. The CKH Act requires LAFCO to follow its own local policies, and here it did not because (i) those require LAFCO to consider analysis of the Lead Agency – here, Petitioner District – and LAFCO’s review is triggered only when the Lead Agency determines under CEQA that the project will lead to potentially significant groundwater impacts. Here, District determined it would not lead to potentially significant impacts; (ii) LAFCO is required to treat a Lead Agency’s EIR as adequate unless it follows statutory procedures to supplement the EIR or challenge it in court –

⁸ This is a reference to the Pure Water Monterey Expansion project.

neither of which occurred here; and (iii.) “LAFCO’s own procedures required it to consult with water resource agencies and incorporate their recommendations as appropriate into its decision for any proposal that “may significantly impact the groundwater basin, as documented by the Lead Agency pursuant to CEQA,” and LAFCO didn’t here: Petitioner contends there is no evidence of any consideration or incorporation of comments of any “expert water agency,” including Monterey County Water Resources Agency, Seaside Water Master, or Monterey Conservation District – all of which reviewed Petitioner’s application.

Regarding the applicability of Government Code section 56669(l), Respondent argues in opposition that Government Code section 56021, which defines Changes of Organization, does not include adoption or amendment of general plans, and therefore LAFCO’s inquiry into water is not limited to general plan adoption or amendment. Respondent contends that the language of section 56668(l) referencing Government Code section 65352.5 is only providing a guideline for LAFCO, not defining an exclusive area of LAFCO inquiry. Government Code section 56668(l) does otherwise and without limitation allows LAFCO to consider water supply and management as a factor when evaluating a Change of Organization.

In reply to this argument, Petitioner points out that some Changes of Organization do include general plan adoptions or amendments, but only in cases where adoption or amendment of a general plan is sought would Government Code section 56668(l) apply.

In response to Petitioner’s lack of substantial evidence and inconsistent findings contentions, LAFCO asserts that it properly relied on comments from the Salinas Basin Water Alliance and Salinas Valley Farm Bureau which expressed concerns regarding overreliance on source water for the Pure Water Monterey Project (which is part of the joint effort by Petitioner District, Cal-Am and Monterey One Water to develop a replacement water supply which would include several water sources from the Salinas Valley) to find that the proposal and evidence in the record does not adequately establish Petitioner’s current efforts to expand Peninsula’s water supply will be sufficient to meet current and future needs without utilizing water from Salinas Valley and potentially harming the SVGB; and Petitioner presented no evidence to address these concerns.

Petitioner points out in its Reply that Respondent does not address the issue of inconsistent findings.

In opposition to Petitioner's argument that LAFCO failed to follow its own written procedures and policies, LAFCO counters that its own procedures cannot override the authority given in Government Code section 56668(l) and (n) [consider comments from landowners, voters or residents – which would presumably mean such comments relevant to the factors set forth in the list of factors in Government Code section 56668].

In replying to this issue, Petitioner points out that all LAFCO decisions must be consistent with LAFCO's written policies and procedures, citing Government Code 56735(a)(1); *McBail*, 62 Cal.App.4th at 1228-1230.

RULING ON ARGUMENT #4.

A. Does Government Code section 56668(l) apply here? LAFCO'S reference to subsection(l) in its Resolution of Denial incorrectly applied that subsection as a factor for the proposal here. By its very terms, that subsection applies to “[t]imely availability of water supplies adequate for projected needs as specified in Section 65352.5.” The latter section only applies where an agency with land use authority proposes to adopt or amend a general plan. No general plan adoption or amendment was involved with Petitioner District's proposal, and hence the cited standard was not mandated for consideration by Government Code section 56668(l).

However, that does not mean that Respondent LAFCO could not consider availability of water supply and effects, if any, on the adjacent Salinas Valley water supply. Government Code section 56668 starts with the following language: “Factors to be considered in the review of a proposal shall include, but not be limited to, all of the following:“ Here, LAFCO has considered a factor which is not necessarily removed from its consideration, but its determination misapplied the SVGB concern as the factor in subsection (l) – to which it bears no rational relationship, as that factor does not even apply to the proposed action here. This alone is probably not a significant or prejudicial error, since LAFCO was not required to consider the factor in subsection (l) at all.

Nonetheless, once it elected in its discretion to consider the sufficiency of water supply, LAFCO's determination on that issue must still have been rationally based on substantial evidence and not have been arbitrary or capricious. In that regard, it is not possible to reconcile LAFCO's Denial Resolution under challenge here with its findings – on the very same day – in its adoption of the 2021 Municipal Service Review and Sphere of Influence for the District, which concluded that “completion of either Cal-Am's MPWSP desalination plant or M1W/MPWMD's Pure Water Monterey Expansion Project will be more than sufficient to meet anticipated water demand for at least the next 20 years.” (AR 01810). The diametrically opposed findings are arbitrary and accordingly cannot be upheld.

B. (1.) Is there substantial evidence to support LAFCO's determination regarding impact to the Salinas Valley groundwater basin if Petitioner's proposal goes forward?

As noted above and below, the irreconcilable, contrary findings of LAFCO regarding sufficiency of water supply are arbitrary and alone require a writ issue directing the LAFCO decision to be set aside.

As for Petitioner's additional contention that there is no substantial evidence to support LAFCO's determination that Petitioner did not adequately establish that its current efforts to expand the Peninsula area's water supply will be sufficient to meet current and future needs without potentially harming the Salinas Valley groundwater basin, it is important to note at the outset that, as Cal-Am pointed out, LAFCO did not make a finding of harm to the SVGB in the event that the proposed acquisition goes forward. It found that Petitioner did not adequately establish that its current efforts to expand the Peninsula's water supply would be sufficient and could be accomplished in a way that did not utilize water from the Salinas Valley or potentially harm the basin.

LAFCO relies upon, among other items in the record, a November 22, 2021 letter from the Director of the Monterey County Farm Bureau suggesting that Petitioner's opposition to Cal-Am's proposed desalination plant means that Petitioner District “will ultimately rely on a single facility resource for the water it supplies to its customers.” (AR 22485-22486). LAFCO cites AR 22485-22486 in support of the proposition the Salinas Basin Water Alliance's statements were

supported by the Monterey County Farm Bureau's comments to LAFCO, which outlined the Bureau's concerns of granting additional authority to the District that will ultimately rely on a single facility resource which has a finite supply of water. AR 22485-22486 appears to be the letter LAFCO quoted in its denial resolution (AR 00014). In it, the Executive Director of the Monterey County Farm Bureau suggests that the District's opposition to the desalination plant proposed by Cal-Am means the District "will ultimately rely on a single facility resource for the water it supplies to its customers[,]" (AR 22486), referring to an earlier statement in the same letter, implying that Petitioner relies on the Pure Water Monterey Expansion project "... as a single resource for the water supply of the Monterey Peninsula." The Bureau letter goes on to say that this is "unwise and unjustified, placing the entire community at risk" because the "source water supply is interruptible and not drought-proof." (*Ibid.*) The letter also quotes the letter from the Salinas Basin Water Alliance (found at AR 05628-05629) which states: "Salinas Valley does not have surplus water and should not be considered a reliable source for the Peninsula's needs." (*Ibid.*)

The October 22, 2021 letter from the Salinas Basin Water Alliance (AR 05628-05629) states "... the Pure Water Monterey project is a vital component of MPWMD's plans as they turn their back on desalination. However, Pure Water Monterey is heavily dependent on source water from the Salinas Valley (even more so if they are required to increase output to meet the peninsula's demands. Salinas Valley does not have surplus water and should not be considered a reliable source for the peninsula's needs."

The foregoing letters depend largely for support on a presumption that the Petitioner District relies solely upon Pure Water Monterey as its water supply source if the proposed acquisition were to succeed. The only basis brought to the Court's attention in the record for such a claim is the suggestion in Monterey County Farm Bureau's letter that because the District opposes desalination, it would end up relying on Pure Water Monterey as the "single source for the water supply of the Monterey Peninsula." (AR 22486.) Petitioners point out in their papers there is evidence there are multiple sources of water supply beyond the desalination plant or the Pure Water Monterey project, including 3,376 acre-feet per year ("afy") from the Carmel River,

774 afy from the Seaside Basin, 1,300 afy from the Aquifer Storage & Recovery Project, and 94 afy from the Sand City Desalination Plant. (AR 03690.)

When asked at oral argument whether this assertion that the District would be relying upon a single water source for its proposal in light of the evidence that there are multiple sources of water supply beyond the Cal-Am desalination plant or Pure Water Monterey project – such as 3,376 afy from the Carmel River, 774 afy from the Seaside Basin, 1,300 afy from the Aquifer Storage & Recovery Project and 94 afy from the Sand City desalination plant, LAFCO counsel indicated he was unable to answer that question.

Ultimately, however, the Court believes that whether or not Pure Water Monterey (“PWM”) was the sole source, or simply a source, of water supply proposed for Petitioner, there was sufficient evidence from which LAFCO could conclude that Petitioner had not shown its use of PWM water diverted from Salinas Valley wastewater, intended for use in the Salinas Valley, would not utilize Salinas Valley water supply.

In the Court’s estimation, characterizing the proposed acquisition as a mere change in ownership is an oversimplification and does not resolve the substantial evidence question. There was evidence before LAFCO that Petitioner opposes the Cal-Am desalination plant and, Respondent argues, also evidence that without the desalination plant the source of water supply available to Petitioner District would be greatly limited.

(2.) Whether or not there is substantial evidence which would support LAFCO’s determination in the Denial Resolution regarding water supply, is the determination nonetheless irreconcilable with LAFCO’s opposite findings the same day – and hence arbitrary and capricious? As noted above, LAFCO’s conclusions relative to adequacy of water supply mentioned in the context of Government Code section 56668(l) are irreconcilable with LAFCO’s nearly concurrent adoption of the 2021 Municipal Service Review and Sphere of Influence for the District (AR01810), which concluded that “completion of either Cal-Am’s MPWSP desalination plant or M1W/MPWMD’s Pure Water Monterey Expansion Project will be more than sufficient to meet anticipated water demand for at least the next 20 years.” Accordingly, a writ of mandate should issue on this basis alone.

C. Did LAFCO fail to follow its own procedures, in contravention of Government Code section 56375?

Government Code section 56375 and its subsection (a)(1) direct that once a LAFCO adopts written procedures and policies it must review proposals in a manner consistent with those policies:

“The commission shall have all of the following powers and duties, subject to any limitations upon its jurisdiction set forth in this part: (a)(1) To review and approve ... or disapprove proposals for changes of organization or reorganization, consistent with written policies, procedures and guidelines adopted by the commission.” Government Code section 56375(a)(1).

(1.) Petitioner asserts that the Respondent failed to follow pages 32-34 of its own written procedure, which requires that “[i]n considering a proposal which may significantly impact the groundwater basin, as documented by the Lead Agency pursuant to the California Environmental Quality Act (CEQA), LAFCO shall review the following information” (Petitioner’s Request For Judicial Notice, Ex B, p.32). However, it appears undisputed that Petitioner was the CEQA Lead Agency and did *not* document that its proposal may significantly impact the groundwater basin. The triggering language thus was not operative nor does the cited language purport to limit LAFCO’s consideration of groundwater impacts only in circumstances where a CEQA Lead Agency determines there might be such impacts. Consequently, there does not appear to be any basis for the argument that LAFCO failed to follow its own procedures.

(2.) Petitioner also maintains that LAFCO failed to follow its own procedural rules when it failed to treat the District’s EIR for the proposed acquisition as adequate, pursuant to Section VII 1 of LAFCO’s Local Rules, which states “All environmental factors introduced by the proposal shall be considered as outlined in [CEQA] and the State Guidelines [under CEQA].” Petitioner argues that CEQA, specifically Public Resources Code section 21167.2⁹ requires that

⁹ Public Resources Code section 21167.2 states: “If no action or proceeding alleging that an environmental impact report does not comply with the provisions of this division during the period prescribed in subdivision (c) of section 21167, the environmental impact report shall be conclusively presumed to comply with the provisions of this division for purposes of its use by responsible agencies, unless the provisions of Section 21166 are applicable.”

LAFCO treat Petitioner’s Lead Agency EIR as adequate unless LAFCO followed the statutory procedures to supplement the EIR or challenge it in court – neither of which was done here.¹⁰ The contention of Petitioner, which is not further elaborated, is that LAFCO is thus precluded from making a determination – i.e., that there might be a significant impact on the Salinas Valley groundwater basin or supply – because the EIR stands and is conclusive on the topic.

The Court does not believe, based upon the arguments presented, that this Local Rule binds LAFCO to an EIR’s determination outside the context of a direct CEQA challenge. Neither the language of Public Resources Code section 21167.2 [... the environmental impact report shall be conclusively presumed to comply with the provisions *of this division*”]; emphasis added] nor the corresponding CEQA Guideline 15231 [“ ... shall be conclusively presumed to comply with CEQA”] contains language which indicates an EIR has preclusive effect for all purposes.

(3.) Finally, Petitioner argues that LAFCO failed to follow its own Local Rule X, GROUNDWATER STANDARDS, Information Requirements, section 3, which provides: “Any proposal considered by LAFCO that uses water will be referred to the Monterey County Water Resources Agency, the Pajaro Valley Water Management Agency, the Monterey Peninsula Water Management District [i.e., Petitioner here], or any other affected water agency. Recommendations of the agencies will be considered by LAFCO and, where appropriate, should be incorporated into the project design prior to approval of the boundary change proposal.” This language of this particular provision does not require a CEQA Lead Agency finding in order to become operative. Petitioner’s argument is that there is “no evidence that LAFCO considered or incorporated the comments of any expert water agency.” Monterey County Water Resources Agency, one of the agencies specifically listed in the Local Rule, as well as Seaside Water Master, and Monterey County Resource Conservation District all reviewed the District’s application and did not identify any potential impacts to groundwater, AR 12323, 00399, 11956.

Section 21166 provides for certain circumstances in which a supplemental environmental impact report may be required.

¹⁰ Intervenor unsuccessfully challenged the EIR in Monterey County Superior Court case of *California-American Water Co. v. Monterey Peninsula Water Management District* (20CV003201); Respondent did not participate in that challenge or otherwise the challenge the EIR.

LAFCO also rejected the groundwater analysis and recommendations of Petitioner, which is also one of the specifically listed agencies in the Local LAFCO Rule.

LAFCO does not address these arguments, other than to argue that “LAFCO’s policies concerning CEQA compliance do not override the statutory authority stated in Section 56668(1) or (n) [[mandatory consideration of information or comments from the landowner, or landowners, voters, or residents of the affected territory].

The language of the Local Rule does not lead to the conclusion Petitioner urges, i.e., that the Rule was violated. First, the language of the rule regarding referral to agencies is in the disjunctive and does not by its terms require referral to all agencies. Secondly, LAFCO did receive the recommendation of Petitioner, one of the named agencies. And LAFCO did consider it, but ultimately elected not to incorporate it. The Local Rule provides that a recommendation is to be considered and, where appropriate” to be incorporated. LAFCO’s action clearly leads to the conclusion it did not deem it appropriate to incorporate Petitioner’s recommendation. It has not been shown that it abused its discretion in doing so.

Argument #5: Was There A Violation of Statutory Duty, By One Of The Three Commissioners Challenged, To Exercise Independent Judgment On Behalf Of The Public As A Whole?

Government Code section 56331.4 states that “[w]hile serving on the commission, all commission members shall exercise their independent judgment on behalf of the interests of residents, property owners, and the public as a whole Any member appointed on behalf of local governments shall represent the interests of the public as a whole and not solely the interests of the appointing authority. Three commissioners in this matter made statements on the record as follows: (1.) Chair Lopez stated he was “the guy who represents Chualar” and was uncomfortable moving forward because he “still ha[d] questions about the impact to [his] community, specifically, the community of Chualar” and was unwilling to support the application until Chualar “ha[d] its interest taken care of.” (AR 03178-79); (2.) Commissioner Poitras identified himself as representing the Monterey County Regional Fire District and emphasized his concerns that several special districts have the potential to lose a great deal of

money if Petitioner’s application were approved; and (3.) Commissioner Leffel stated she, “like Commissioner Poitras, represent[s] the special districts on this Commission. And ... you are going to save so much money on this district. But, meanwhile, all the other districts give it up to save that money.”

Petitioner’s Arguments:

A. Standing. Although there is a provision in Government Code section 56331.4 stating that there is no private right of action created by section 56331.4, this is to prevent actions seeking to hold Commissioners personally liable and does not preclude an action in ordinary mandamus. *California Hospital Association v. Maxwell-Jolly* (2010) 188 Cal.App.4th 559, 568-569 [Even without a private right of action under the Medicaid Act, an interested party can still “enforce the act by means of a writ of mandate under Code of Civil Procedure 1085”]; legislative history to Government Code section 56331.4.

B. Three Commissioners did not exercise independent judgment representing the public as a whole.

RULING ON ARGUMENT #5.

On the issue of standing, the Court believes that Government Code section 56331.4 does not eradicate any standing Petitioner would have had but for that section. The starting point of analysis is the statutory language. *Uber Techs. Pricing Cases, supra*. The language of the section states “*This section* does not ... *create* a private right of action in any person.” [Emphasis added.] It does not suggest that it is intended to abrogate the previously existing right to maintain an action for mandamus regarding (1.) the performance of an act which the law specifically enjoin, as a duty resulting from office, CCP 1085(a) and (2.) a beneficially interested party, with no plain, speedy or adequate remedy at all. CCP 1086. *California Hospital Association, supra*, 188 Cal.App.4th at 568-569.

The Court is satisfied that both requirements are met here. The right of action to compel the enforcement of a duty of office existed independently of Government Code section 56331.4.

On the substantive merits of the challenge, the Court notes at the outset that the issue is not one of ‘bias’ in its commonly used context of a consciously exercised prejudice for or against a certain group, interest or person in an unfair way. One might exercise independent judgment in the mistaken belief that one is required to vote according to the desires of the authority which appointed her or him as its representative, however, and that is the issue presented by Petitioner here. Although “[m]andamus will not lie to control the exercise of discretion, i.e., to compel the exercise of discretion in a particular manner [, it] may issue to compel an official both to exercise his discretion (if he is required by law to do so) and to exercise it under a proper interpretation of the applicable law.” *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 442.

There is a distinction, which the Court believes Government Code section 56331.4 expresses, between bringing the viewpoints and experience of a particular appointing authority to the table for discussion, on one hand, and voting or taking other action in a manner which serves only the appointing authority’s interest rather than the interests of the public as a whole, on the other. The statutory scheme of the CKH Act – which requires the appointment of persons by County and City governmental entities and by Special Districts (in addition to a member of the public appointed by the other commission members), Government Code section 56325, but requires that “all commission members shall exercise their independent judgment on behalf of the interests of residents, property owners, and the public as a whole,” Government Code section 56331.4, draws the distinction. To this extent, LAFCO’s argument here that section 56331.4 does not preclude a commissioner from *considering* the interests of his or her appointing authority is sound, as is LAFCO’s acknowledgment that “ ‘solely’ taking into account the interest of one’s district” would be inappropriate. But the apparent intention of this section goes further: if the language of section 56331.4 is to be given effect, it would be equally improper to take action based on the interests of anything less than the public as a whole -- viz., the *entire public’s* interests.

A LAFCO commissioner thus has a fine line to walk: she or he may be a representative of the appointing authority, and can present and consider that authority’s interests, but cannot take action based on anything less than the interests of the public as a whole.

It is Petitioner's burden in a mandamus proceeding to show violation of a public duty. *California Pub. Rsch., Inc. supra.* Here, the burden has not been met as to Commissioner/Supervisor Lopez. His statements do not show that he was considering the interests of less than those of the public as a whole. His statements expressed concerns about unanswered questions affecting various segments of the public community – not simply those of Chualar, and his statements expressing that he considered Chualar's interests does not compel an inference that he based his vote solely on Chualar's interests as its representative. Commissioner Leffel's statements do not demonstrate that she did, either. Her statement that "I do not believe that, in good faith, I can take from one part of my community just to make another part of the community happy" actually indicates an unwillingness to take action based on the interests of less than the public as a whole.

With respect to Commissioner Poitras, the Court does not believe it has been shown that he failed to exercise independent on behalf of the public as a whole. The focus of Petitioner's challenge is upon statements Commissioner Poitras made at the December 6, 2021 hearing; he made no statement at the January 5, 2022 hearing other than to cast his vote in support of the resolution. At the December 6, 2021 hearing it is true that he said he represented several special districts and that several of them have the potential to lose money as a result of the proposed action. However, he also went on to state "... we can't afford to lose a frontline firefighter as a result of this." (AR 03181, lines 8-9). The loss of a public safety officer position – a firefighter – seems to this Court to be a concern for the public welfare as a whole. Accordingly, the Court finds Petitioner has not shown Commissioner Poitras failed to exercise independent judgment on behalf of the public as a whole.

The Court does not believe the accusations of bias made by members of the public are of probative value on the issue of whether a commissioner failed to exercise independent judgment on behalf of the public as a whole. The only evidence of value on this issue is the content of the commissioner's respective statements.

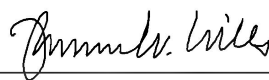
Conclusion:

In summary, the Court orders that a writ of mandate shall issue on the grounds that (1.) Respondent LAFCO failed properly to consider whether Petitioner will have sufficient revenue to carry out the proposed new or different services following the proposed change, pursuant to Government Code section 56668 (k); (2.) LAFCO improperly applied the ‘Environmental Justice’ factor of Government Code section 56668(p), since there is no evidence in the record of any pollution; (3.) there is no substantial evidence to support its finding that the proposed action would pose an undue economic hardship on other County residents in satellite water systems; and (4.) LAFCO’s findings regarding the sufficiency of water supply for the proposed action here are inconsistent and irreconcilable with its findings the same day in its adoption of the 2021 Municipal Service Review and Sphere of Influence for the District, which concluded that ‘completion of either Cal-Am’s MPWSP desalination plant or M1W/MPWMD’s Pure Water Monterey Expansion Project will be more than sufficient to meet anticipated water demand for at least the next 20 years.’”

Petitioner is to prepare and submit a proposed Writ of Mandate consistent with this ruling.

This Statement of Intended Decision shall serve as the Statement of Decision, subject to any objections of the parties.

Dated: October 25, 2023



Thomas W. Wills
Judge of the Superior Court

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CERTIFICATE OF MAILING
(Code of Civil Procedure Section 1013a)

I do hereby certify that I am employed in the County of Monterey. I am over the age of eighteen years and not a party to the within stated cause. I placed true and correct copies of the **Statement of Intended Decision** for collection and mailing this date following our ordinary business practices. I am readily familiar with the Court's practices for collection and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Services in Monterey, California, in a sealed envelope with postage fully prepaid. The names and addresses of each person to whom notice was mailed is as follows:

Edward Terry Schexnayder
396 Hayes Street
San Francisco, CA 94102

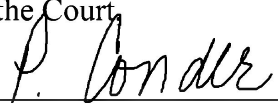
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Dated: 10/25/2023

Clerk of the Court

By: 
P Conder, Deputy Clerk

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