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RECEIVED

MAR 18 2013

MPWMD

March 18, 2013

File No. 6377.004

VIA EMAIL & U. S. MAIL

Mr. David J. Stoldt
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RE: Peoples Moss Landing Desalination Project

Dear Mr. Stoldt & Members of the Board:

I am legal counsel for the Peoples Moss Landing Desalination Project. In that capacity, I write to request, and insist, that the Board refrain from taking action on item #17 of tonight's agenda:

Consider Negotiating a Cost Sharing Relationship with DeepWater Desal to Advance a Desalination Alternative to the Cal-Am Proposal

Action: The Board will decide if staff should negotiate with DeepWater Desal to establish a cost sharing relationship for the environmental and permitting work necessary to advance a desalination alternative to Cal-Am's Monterey Peninsula Water Supply Project

Requested Action:

Rather, PML requests that the Board refer this matter back to the Water Supply Planning Committee with the following instructions:



- 1) Provide PML and DWD a reasonable opportunity (of at least 3 weeks) to provide factual response and comment on the Evaluation Matrices and proposed recommendation;
- 2) Provide the Public a reasonable opportunity to provide factual response and comment upon the Evaluation Matrices and proposed recommendation;
- 3) Recalculate the Evaluation Matrices based upon proper factual information as well as Objective and Lawful Criteria. Strive to eliminate subjective considerations and presumptions from consideration in the scoring process;
- 4) Exclude from participation in the scoring, information gathering and decision-making process any persons with actual or perceived bias and conflicts of interests as to any applicant; and
- 5) Properly agendaize consideration of the matter as an action item on the Water Supply Planning Committee before making any recommendation to the Board.

Reasons To Send Back to The Water Supply Planning Committee:

- 1) **The currently proposed process creates a perception of intent to quell participation, response and comment of PML and the Public**

Last Monday, March 11, 2013, the Water Supply Planning Committee met. The Committee's Agenda for March 11, 2013 listed as an item for discussion only, receipt of a "Progress Report on Investigation into Desalination Contingency Plan". On that date, the General Manager and the District Engineer presented the initial public disclosure of an "Evaluation Matrices" comparing and ranking the relative strengths and weaknesses of the PML project and the DWD project. These matrices were also presented to the Water Supply Planning Committee.

Unfortunately, rather than "discussing" the Matrices and providing the opportunity for response, clarification and input from the applicants and the public, the Committee purported to convert the item to an "action" item. The Committee immediately held a vote and recommended that this Board select DWD as the preferred Contingency Plan Alternative. The Committee further recommended that MPWMD exclusively negotiate with DWD for the purpose of providing DWD with up to \$500,000 of public funds to fund an EIR.



The matter is now scheduled as an "action" item on tonight's Board agenda.

In combination, 1) voting on a scoring matrix the same day it was presented; 2) providing no opportunity for applicants or the public to address inaccuracies or unsubstantiated subjective conclusions in the matrix; 3) conversion of a discussion item to an action item; and 4) scheduling the matter for a vote of the full Board one week later; could well be seen as an effort to frustrate the collection of accurate factual information and to frustrate input from the public and the applicants. Even if this is not the MPWMD's intent, this perception could present several problems for the District. It could also significantly erode any public confidence in the selection process.

2) Numerous facts relied upon in preparing the Matrix report by the GM & Engineer are inaccurate and Numerous subjective presumptions are unfairly incorporated into the scoring process.

Given a reasonable opportunity, PML intends to provide a full list of its specific objections to the facts and conclusions reached in the District's scoring Matrix. The factual errors and subjective inaccuracies are substantial. PML asserts that correction of the errors will result in PML receiving a substantially higher score than DWD on the Matrix.

As one example, within the first category of the Matrix, entitled "Organizational Information and Financial Strength", Mr. Stoldt gave DWD 8 points and PML 4 points. Mr. Larry Hampson gave DWD 8 points and PML 5 points.

In reaching this conclusion, Mr. Stoldt acknowledges that DWD provided no financial statements, that it has a short history, that it does not have a significant revenue capability. Mr. Stoldt does not identify any assets of DWD. Nor does Stoldt provide any factual support for his conclusion that DWD has greater access to capital. In other words, there is simply no basis for concluding that DWD has any assets or available borrowing capability. Stoldt then presumes that DWD is committing to provide \$4,000,000 in cost sharing with the District. This presumption is not based upon any binding promise by DWD, rather it is merely based upon the fact that DWD listed that amount as its cost estimate for environmental planning, legal, technical studies and preliminary design.

By contrast, PML did provide financial statements. PML shows a much longer history of existence. PML shows tens of millions of dollars in equity. PML shows a substantial and lengthy stream of annual income. PML holds title to substantial assets.



Frankly, any unbiased observer would conclude that PML is more well capitalized, has greater income, is longer established and is stronger financially than DWD. Any conclusion to the contrary is not based upon the facts presented.

Numerous other components of the Matrix are equally flawed. Equity and responsible decision-making with regard to public funds require that such inaccuracies be remedied prior to the Board reaching a final determination.

3) The factors contained in the Matrix report submitted to the subcommittee are improper and, in some instances, unlawful.

It is also worrisome that the Matrix considers and scores factors that are statutorily and Constitutionally impermissible, including the topic "Litigation History".

In evaluating this factor, Mr. Hamson gives DWD 5 points and PML 0 points. The rationale for this disparity is that an internet search of Mr. Nader Agha purportedly disclosed 15 civil lawsuits between 1998 and 2010.

Consideration of this matter is legally impermissible for an array of reasons.

The U.S. Const. amend. I. provides in part: Congress shall make no law abridging the right of the people peaceably to assemble, and to **petition** the government for a redress of grievances. Despite the explicit reference to Congress, the First Amendment, including specifically the right to **petition**, is "incorporated" against the states by virtue of the Fourteenth Amendment. Cases construing the California analog frequently rely on federal court interpretations of the First Amendment. The *right to petition encompasses the right to file a private lawsuit*, by which one litigant prays for the exercise of judicial power against another. These rights, to assemble peaceably and to **petition** for a redress of grievances, are among the most precious of the liberties safeguarded by the Bill of Rights.

Any attempt to disadvantage an applicant based upon its exercise of its past exercise of its constitutionally protected rights is highly likely to be deemed unlawful.

Moreover, even if it were not unlawful, the factor is not helpful. By analogy, if a government entity were selecting a software supplier and considering between Microsoft and Bob's Software Wholesale (fictitious name for recently formed unproven software company), it would probably not be appropriate to select Bob in based upon a finding that Microsoft had simply been involved in too many litigation cases.



Simply stated, this criteria should be eliminated from the Matrix.

4) There exists an actual, or perceived, bias and conflict of interest among the decision makers

PML has additional concerns regarding perceived bias and conflict of some of the MPWMD representatives.

Two members of the board have previously been involved in litigation with Nader Agha, where Mr. Agha prevailed. Mr. Agha fears that these legal conflicts may perpetuate a bias against PML. This perception is perpetuated by the scoring of the "Litigation History" item stated above.

PML is also concerned that Mr. Laredo is serving as legal counsel for MPWMD with regard to this matter, and presumably providing input on this decision. Simultaneously, Mr. Laredo is serving as legal counsel for the City of Pacific Grove in conjunction with negotiating and performing the terms of the agreement between PG and Mr. Agha to develop and build the PML project. Although Mr. Laredo originally recused himself from representation due to a conflict of interest, Mr. Laredo has resumed joint representation of both public entities over Mr. Agha's express objection. This dual capacity representation presents a clear and present conflict of interest. It also presents a situation where confidential and secret information of the PML project may be subject to improper disclosure. As such, PML must insist that Mr. Laredo no longer participate in any MPWMD discussions or action with regard to this issue.

Conclusion:

It is extremely important that this MPWMD decision be based upon accurate factual information, that the decision be an open process, that the applicants and the public have a full opportunity to provide information and comment. The applicants and the public need to feel as though the process has been thorough, accurate and free of bias.

This can only be accomplished by allowing input, reviewing and modifying the Evaluation Matrix.

For this reason, PML respectfully requests that this matter be sent back to the Water Supply Planning Committee, with all necessary instructions.



Sincerely,

JOHNSON, MONCRIEF & HART, PC

A handwritten signature in cursive script that reads "Paul Hart".

Paul Hart

PH/sld