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MONTEREY PENINSULA WATER MANAGEMENT DISTRICT

11
12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
13 **COUNTY OF MONTEREY**

14 MONTEREY PENINSULA WATER
MANAGEMENT DISTRICT,

15 Petitioner and Plaintiff,

16 v.

17 LOCAL AGENCY FORMATION
18 COMMISSION OF MONTEREY
19 COUNTY; COMMISSIONERS OF THE
20 LOCAL AGENCY FORMATION
COMMISSION OF MONTEREY
COUNTY; and DOES 1 through 20,

21 Respondents and Defendants.

Case No. 22CV000925

**PETITION FOR WRIT OF MANDATE
AND COMPLAINT FOR INJUNCTIVE
RELIEF**

CCP §§ 1085, 1094.5; Government Code §
56000 et seq. (Cortese-Knox-Hertzberg Act);
Public Resources Code § 21000 et seq. (CEQA)

INTRODUCTION

1
2 1. This Petition for Writ of Mandate and Complaint for Injunctive Relief (“Petition”)
3 challenges the February 28, 2022 decision of the Local Agency Formation Commission of
4 Monterey County (“Commission”) to deny the Monterey Peninsula Water Management
5 District’s (“District”) proposal to activate its “latent powers” to provide potable water to retail
6 customers. As explained below, the Commission’s actions in denying the District’s proposal
7 violated the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 (“Cortese-
8 Knox-Hertzberg Act”), Government Code section 56000 et seq.; the California Environmental
9 Quality Act (“CEQA”), Public Resources Code section 21000 et seq.; the CEQA Guidelines, 14
10 California Code of Regulations section 15000 et seq. (“CEQA Guidelines”), and state fair
11 hearing requirements.

12 2. In 2018, voters on the Monterey Peninsula adopted Measure J, which directs the
13 District to acquire the private utility system that provides their water. The current owner of that
14 water system—California-American Water (“Cal-Am”)—has mismanaged the Monterey water
15 system for decades, leading to recurring moratoria on water connections and some of the highest
16 water rates in the country.

17 3. Following Measure J’s adoption, the District has worked to comply with the
18 voter’s directive to acquire Cal-Am’s system. The District prepared an economic feasibility
19 study in 2019 and an environmental impact report (“EIR”) in 2020 to study acquisition of the
20 Cal-Am system. Cal-Am filed a lawsuit in Monterey Superior Court challenging the District’s
21 EIR, but this Court concluded that Cal-Am’s suit was meritless. *California-American Water Co.*
22 *v. Monterey Peninsula Water Management Dist.*, No. 20CV003201 (Sup. Ct. Monterey County,
23 Nov. 19, 2021).

24 4. The District also applied to the Commission to annex 58 parcels and to update its
25 Municipal Service Review and Sphere of Influence Study. At the same time, the District
26 requested that the Commission activate its “latent power” to sell water to retail customers, a
27 power the District believes it has already used, but felt Commission approval would reinforce.
28

1 5. Local Agency Formation Commissions (LAFCOs) are agencies that oversee the
2 physical boundaries and structures of local governments. The Cortese-Knox-Hertzberg Act,
3 which governs LAFCO proceedings, includes a procedure for special districts to request
4 activation of a “latent service or power”—a power granted by enabling legislation but that a
5 district does not currently exercise.

6 6. Having failed in its CEQA challenge, Cal-Am selected the Commission’s
7 proceeding as the next front in its campaign against Measure J. Throughout the Commission’s
8 review process, Cal-Am repeatedly demanded additional studies and raised a host of phantom
9 concerns about the District’s proposal. In response, the Commission hired an independent
10 financial consultant who concluded that the District’s proposal would result in cost savings to
11 Cal-Am’s customers under a range of reasonable assumptions. The Commission’s Executive
12 Officer agreed and recommended that the Commission approve the District’s proposal.

13 7. On December 6, 2021, following relentless lobbying by Cal-Am, the LAFCO
14 Commissioners voted 5-2 to reject staff’s recommendation. The Commissioners’ vote revealed
15 that parochial interests and Cal-Am’s alarmism had eclipsed reasoned decision-making. The
16 Commissioners cited a range of unsubstantiated and irrelevant concerns, several of which flatly
17 contradicted the project’s certified EIR, which this Court upheld. Multiple Commissioners
18 revealed bias against the District, including one Commissioner who stated openly that he
19 believed that public agencies were incapable of providing services effectively. Another
20 Commissioner, who had co-authored the official ballot argument against Measure J, renewed her
21 preconceived objections to Measure J and voted against staff’s recommendation.

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

27 9. On January 31, 2022, the District sought reconsideration and then requested that
28 several of the Commissioners recuse themselves from further consideration of the District’s

1 proposal. On February 28, 2022, the Commission denied those requests and terminated the
2 proceeding.

3 10. As explained below, the Commission’s decision fails to satisfy the requirements of
4 the Cortese-Knox-Hertzberg Act and violates key provisions of CEQA and state law. Among
5 other errors, the Commission mishandled the essential inquiry for a latent powers proposal:
6 whether the District would have sufficient revenue to carry out its proposal. The Commission
7 disregarded both CEQA and its own internal policies when it engaged in an unstructured and ill-
8 informed review of potential environmental impacts of the District’s proposal. And the
9 Commission denied the District a neutral and unbiased hearing. For these reasons and the
10 additional reasons stated below, this Court must overturn the Commission’s decision.

11 PARTIES

12 11. Petitioner and Plaintiff Monterey Peninsula Water Management District is a public
13 agency that manages the Monterey Peninsula’s water resources. The Legislature established the
14 District in 1977 and granted it “broad powers to manage and regulate water use and distribution”
15 on the Monterey Peninsula. *Monterey Peninsula Water Management Dist. v. Public Utilities*
16 *Comm’n* (2016) 62 Cal.4th 693, 695. The District uses these powers to promote water
17 conservation and environmental protection, and to develop water supply projects to address the
18 Peninsula’s chronic water shortages.

19 12. The District has a direct and beneficial interest in the Commission’s compliance
20 with the Cortese-Knox-Hertzberg Act and CEQA. These interests have been directly and
21 adversely affected by the Commission’s denial of the District’s proposal. The Commission’s
22 denial violates provisions of law as set forth in this Petition and interferes with the District’s
23 ability to implement Measure J. The maintenance and prosecution of this action will confer a
24 substantial benefit on the public by advancing the voter-adopted Measure J and by remedying
25 the Commission’s violations of the Cortese-Knox-Hertzberg Act and CEQA.

26 13. Respondent and Defendant Local Agency Formation Commission of Monterey
27 County is a public agency that oversees changes to the boundaries and structure of local
28 governments in Monterey County. Respondent’s responsibilities include, but are not limited to,

1 implementing and complying with the provisions of CEQA, the Cortese-Knox-Hertzberg Act,
2 and other law. Respondent issued the decision denying the District’s proposal that is challenged
3 in this action. In addition, Respondent is a “responsible agency” under CEQA. Pub. Resources
4 Code § 21069. As such, Respondent is responsible for complying with the requirements of
5 CEQA and the CEQA Guidelines with respect to the District’s acquisition of Cal-Am’s system.
6 Respondent committed acts and omissions in the CEQA process that are challenged in this
7 action.

8 14. Respondents and Defendants Commissioners of the Local Agency Formation
9 Commission of Monterey County (“Commissioners”) are the members of the governing board
10 of Respondent Local Agency Formation Commission of Monterey County. The Commissioners
11 are responsible for complying with the law, including CEQA and the Cortese-Knox-Hertzberg
12 Act. The Commissioners made the decisions that are challenged in this action.

13 15. The District does not know the true names and capacities, whether individual,
14 corporate, associate or otherwise, of Respondents and Defendants DOE 1 through DOE 20,
15 inclusive, and therefore sues said Respondents under fictitious names. The District will amend
16 this Petition to show their true names and capacities when they are known.

17 **JURISDICTION AND VENUE**

18 16. This Court has jurisdiction over the matters alleged in this Petition pursuant to
19 Code of Civil Procedure sections 1085 and 1094.5, Government Code section 56107, and Public
20 Resources Code sections 21168, 21168.5, and 21168.9.

21 17. Because this is an action or proceeding against a local agency, venue is proper in
22 this Court pursuant to Code of Civil Procedure section 394(a). Moreover, the proposal will be
23 implemented in Monterey County, Respondent denied the proposal in Monterey County, and the
24 impact on voters and ratepayers will be felt in Monterey County. As such, venue is proper in this
25 Court pursuant to Code of Civil Procedure section 393(b) because the causes of action alleged in
26 this Petition arose in Monterey County.

27 18. The District complied with the requirements of Public Resources Code section
28 21167.5 by serving written notice on March 30, 2022 of the District’s intention to commence

1 this action against Respondent. A copy of this written notice and proof of service is attached as
2 Exhibit A to this Petition.

3 19. The District is complying with the requirements of Public Resources Code section
4 21167.6 by concurrently filing a notice of its election to prepare the administrative record for
5 this action.

6 20. The District will promptly send a copy of the Petition to the California Attorney
7 General, thereby complying with the requirements of Public Resources Code section 21167.7.

8 21. The District has performed any and all conditions precedent to filing this action
9 and has exhausted any and all available administrative remedies to the extent required by law.

10 22. The District has no plain, speedy, or adequate remedy in the course of ordinary
11 law unless this Court grants the requested writ of mandate. In the absence of such remedies,
12 Respondent's denial will remain in effect in violation of State law.

13 **STATEMENT OF FACTS**

14 **I. Adoption and Implementation of Measure J**

15 **A. Ballot Initiative**

16 23. On November 6, 2018, the District's voters enacted Measure J, which directs the
17 District to acquire Cal-Am's water system.

18 24. Measure J was a response to the Monterey Peninsula's ongoing water crisis. For
19 decades, residents and businesses have struggled with increasing water prices, scarce water
20 supply, and recurring moratoria on new water connections. Measure J's findings catalogued the
21 inadequacies of Cal-Am's service, noting the following:

22 a. "Under Cal Am's ownership and management, the Monterey Peninsula's
23 water service has become the most expensive water service in the entire United States,
24 according to a Food and Water Watch report in June 2017."

25 b. "Since 2007, the total cost of water billed to ratepayers by Cal Am,
26 including surcharges, increased from \$2,501 to \$6,484 per acre-foot, a 159 percent increase.
27 During the same period, the consumer price index increased by merely 12.5 percent."
28

1 c. “In 1995, the State Water Resources Control Board (‘State Board’) ordered
2 Cal Am to cease illegal pumping from the Carmel River, and to plan for a new water supply. In
3 2009, the State Board issued a follow-up enforcement order, and threatened Cal Am with
4 mandatory water rationing for its failure to make adequate progress after its initial order 14
5 years earlier.”¹

6 d. “In 2007, a Monterey County Superior Court ordered Cal Am to cease its
7 over-pumping from the Seaside Groundwater Basin that threatened the long-term sustainability
8 of the Basin.”

9 e. “Cal Am has failed to complete three water supply projects it initiated after
10 1995 (Carmel River Dam, Moss Landing Desalination, and Regional Desalination Project). As a
11 result, stranded costs in excess of \$34 million were approved by the CPUC to be charged to Cal
12 Am’s ratepayers.”

13 f. “Cal Am’s record shows it lacks the capacity to manage the Peninsula’s
14 water system to ensure provision of reliable, efficient, cost-effective water service to
15 ratepayers.”

16 25. Measure J found that, in contrast to Cal-Am, the District has achieved a successful
17 track record of developing and managing water supply projects, including complex water
18 storage and reclamation projects that have expanded the region’s water supply. After noting that
19 85 percent of consumers in the United States receive water from public agencies, Measure J
20 concluded that:

21 “Public ownership of the Monterey Peninsula’s water system will
22 benefit residential and business customers and ratepayers by
23 lowering water service costs, guaranteeing transparency in meetings
24 and actions by governing bodies, assuring public access to records,
25 and [providing] full accountability of local elected officials in water
26 system management and water service delivery.”

27 ¹ The State Board’s order, extended in 2016, remains in effect. *See* State Water Resources
28 Control Bd., *Matter of the Unauthorized Diversion and Use of Water by the California
American Water Co.*, Order WR 2009-0060 (Oct. 20, 2009) (“2009 Cease and Desist Order”), as
amended by Order WR 2016-0016 (July 19, 2016).

1 26. Measure J directed the District to adopt a new policy to acquire and maintain
2 water systems in its territory as public assets. The measure specifically directed the District to
3 acquire Cal-Am's water system via a negotiated purchase or, if necessary, eminent domain.

4 27. Mary Ann Leffel, a current LAFCO Commissioner, was a vocal opponent to
5 Measure J. Commissioner Leffel co-authored the official ballot argument against the initiative,
6 arguing that public takeover would be costly and that Cal-Am would soon rectify its chronic
7 failure to secure a reliable water supply.

8 28. The District's voters disagreed with Commissioner Leffel's assessment. On
9 November 6, 2018, Monterey residents voted to enact Measure J by a margin of 56% to 44%.

10 **B. Feasibility Determination**

11 29. As directed by Measure J, the District took steps to determine whether the
12 acquisition of Cal-Am's system would be economically feasible.

13 30. On or about September 24, 2019, the District obtained a Letter of Confidence from
14 its investment banker, Barclays Capital, Inc ("Barclays"). The Barclays letter affirmed that the
15 District would have sufficient access to financing to fund both the acquisition of Cal-Am's
16 system and future capital needed to operate the system.

17 31. On or about October 29, 2019, the District's financial consultant, Raftelis
18 Financial Consultants, Inc., completed a study of the feasibility of acquiring Cal-Am's system
19 ("Raftelis Report"). The Raftelis Report concluded that public ownership would likely lead to
20 significant savings for the District's residents. The Raftelis Report highlighted many advantages
21 of acquisition, including the District's lower costs of public financing, reduced administrative
22 overhead, and tax-exempt status. The Raftelis Report further noted that public acquisition would
23 eliminate the need to generate shareholder profits above and beyond the cost of providing
24 service, resulting in substantial savings for ratepayers.

25 **C. Environmental Review**

26 32. The District, acting as the lead agency under CEQA, subsequently prepared an
27 Environmental Impact Report to evaluate potential impacts from acquiring and operating Cal-
28 Am's system.

1 33. On June 18, 2020, the District circulated a Draft EIR (“DEIR”) for public
2 comment. The DEIR studied numerous potential environmental impacts, including potential
3 impacts to regional water supply, and concluded that the District’s proposal, in combination
4 with required mitigation measures, would not result in any significant environmental impacts.

5 34. The EIR identified the Commission as a responsible agency under CEQA that
6 could oversee subsequent approvals related to the project. The Commission actively participated
7 in the CEQA process, including by providing comments in response to both the District’s Notice
8 of Preparation of an EIR and Draft EIR.

9 35. Notably, the Commission requested language explaining that the Commission
10 would use the EIR when considering any future latent power proposals. At no point, however,
11 did the Commission identify any perceived deficiencies in the EIR’s analysis of environmental
12 impacts or conclusions.

13 36. The District certified the Final EIR on October 29, 2020.

14 37. Shortly thereafter, Cal-Am filed a petition for writ of mandate in this Court
15 challenging the EIR and alleging a laundry list of perceived CEQA deficiencies. *California-*
16 *American Water Co. v. Monterey Peninsula Water Management Dist.*, No. 20CV003201 (Sup.
17 Ct. Monterey County, Nov. 19, 2021).

18 38. The Commission did not seek to intervene in that lawsuit or otherwise challenge
19 the District’s EIR.

20 39. On November 19, 2021, this Court denied Cal-Am’s writ petition. The Court
21 specifically rejected Cal-Am’s claim that the EIR’s analyses of hydrology and groundwater
22 impacts were deficient.

23 **II. LAFCO Proceedings**

24 **A. The Role of LAFCOs**

25 40. The Legislature established LAFCOs for each county in the state to “encourage
26 planned, well-ordered, efficient urban development patterns” and to promote the “orderly
27 formation and development of local agencies.” *Community Water Coalition v. Santa Cruz*
28 *County Local Agency Formation Comm’n* (2011) 200 Cal.App.4th 1317, 1324.

1 41. LAFCOs govern changes to the structure and number of local governments within
2 their jurisdictions. Among other functions, LAFCOs approve or disapprove proposals to form,
3 merge, and dissolve local agencies. LAFCOs also oversee the geographic boundaries of local
4 governments by considering proposals to annex territory and by determining each agency’s
5 “sphere of influence.” Gov. Code § 56425.²

6 42. The Cortese-Knox-Hertzberg Act, Government Code sections 56000 et seq.,
7 governs LAFCO proceedings. In 2001, the Legislature amended the Act to give LAFCOs
8 specific authority to review proposals by special districts to “exercise . . . new or different
9 functions or classes of services.” Gov. Code § 56021(m). Those proposals are often called
10 “latent power proposals.”³

11 43. When reviewing a special district’s application to provide a new or different
12 service, a LAFCO’s principal task is to determine whether the special district will have
13 “sufficient revenues to carry out the proposed new or different functions or class of services.”
14 Gov. Code § 56824.14(a). After holding a public hearing, a LAFCO may approve,
15 conditionally-approve, or deny a special district’s proposal. *Id.*

16 **B. The District Applies for LAFCO Approval**

17 44. On February 26, 2021, the District submitted a proposal to the Commission that
18 included several requests related to implementing Measure J.

19 45. First, the District sought to align its territory with Cal-Am’s primary service area.
20 To do so, the District asked to amend its sphere of influence and annex 58 parcels.

21 46. Second, the District proposed to activate its latent powers to provide water service
22 to retail customers. The Legislature granted the District broad powers in its enabling legislation
23 to sell and distribute water and to set water rates and charges. The District currently exercises
24

25 ² A sphere of influence is a “plan for the probable physical boundaries and service area of a local
26 agency.” Gov. Code § 56076. To prepare and update spheres of influence, a LAFCO conducts
27 municipal “service reviews,” which are evaluations of an agency’s ability to serve local
28 community needs. Gov. Code § 56430.

³ The Cortese-Knox-Hertzberg Act defines a “latent service or power” as “those services,
facilities, functions, or powers authorized by the principal act under which the district is formed,
but that are not being exercised.” Gov. Code § 56050.5.

1 those powers in multiple ways, including by selling water wholesale to Cal-Am, producing
2 water from the District's Aquifer Storage and Recovery project, and delivering water directly to
3 retail customers. Nonetheless, Cal-Am claimed in a January 27, 2020 letter that the District
4 required LAFCO approval to implement Measure J by providing water to Cal-Am's customers.
5 In response, out of an abundance of caution, the District applied to the Commission to activate
6 its latent powers to do so.⁴

7 47. In support of its latent power application, the District provided a range of
8 materials, including the Raftelis Report, the Barclay's Letter of Confidence, the District's EIR,
9 and a plan for providing services.

10 48. On March 28, 2021, the Commission informed the District that its application was
11 not complete. The District filed an amended proposal on May 3, 2021, which explained in
12 greater detail the District's plan for providing water services.

13 49. At the Commission's request, the District also contracted with a financial
14 consulting firm, HdL Coren & Cone, to analyze the proposal's effect on property tax revenues
15 for other local agencies ("HdL Report").

16 **C. Independent Consultant's Report**

17 50. On or about June 28, 2021, the Commission engaged Berkson Associates as its
18 independent consultant.

19 51. On or about October 11, 2021, Berkson Associates released its report ("Berkson
20 Associates Report"). The Berkson Associates Report concluded that the District's proposal
21 would result in lower water rates under a range of reasonable assumptions. The Berkson
22 Associates Report further explained that the total cost of the proposal was contingent on the
23 final acquisition price for Cal-Am's system. That price would not be known until the parties
24 completed negotiations or an eminent domain valuation trial. Nonetheless, the Berkson
25

26 ⁴ The District maintains that its powers to deliver water to retail customers is active and
27 therefore does not need the Commission's approval to provide water to Cal-Am's customers.
28 Moreover, even if the District did need the Commission's approval to serve Cal-Am's
customers, the District retains authority to condemn Cal-Am's property and engage a third party
to provide retail water service.

1 Associates Report concluded that the District’s proposal could produce savings for ratepayers
2 even if the cost of acquiring Cal-Am’s system substantially exceeded the District’s projections.
3 The report concluded the District would have sufficient revenues to acquire the system and to
4 provide the services, but further highlighted that if the Commission were concerned about a risk
5 of insufficient revenues, it could require as a condition of approval that the District raise revenue
6 from additional sources to cover the costs of acquiring Cal-Am’s system.

7 **D. Commission Staff Recommends Approval**

8 52. On October 13, 2021, the Commission’s Executive Officer filed a report and
9 proposed resolution recommending that the Commission conditionally approve the District’s
10 proposal (“Staff Report”).

11 53. The Staff Report concluded that the proposal met the requirements for activating
12 latent powers under the Cortese-Knox-Hertzberg Act. Staff’s conclusion was based upon an
13 array of evidence, including but not limited to the following:

14 a. The Berkson Associates Report, Raftelis Report, and other record evidence
15 demonstrated that the District’s acquisition of Cal-Am’s system could result in lower costs for
16 ratepayers.

17 b. The District has “broad financial powers,” including the ability to raise
18 revenue through water rates and charges. Those powers would give the District sufficient
19 revenues to carry out its proposal, even if the District’s costs were greater than anticipated.

20 c. The District and Cal-Am are currently developing a replacement water
21 supply to comply with the State Water Resources Control Board’s 2009 Cease and Desist Order
22 (as extended in 2016). The District’s acquisition of Cal-Am’s system would not affect the
23 development of a replacement water supply.

24 54. To address potential lost property tax revenues to local taxing agencies, staff
25 recommended that the Commission conditionally approve the proposal. Under staff’s proposed
26 condition, the District could not receive final approval to activate its latent powers until it made
27 best efforts to enter into revenue sharing agreements with the 14 largest affected local taxing
28

1 agencies. Staff concluded that this condition would effectively mitigate fiscal impacts to those
2 agencies.

3 55. Finally, staff recommended that the Commission, as a responsible agency under
4 CEQA, certify that the District's EIR adequately documents the environmental impacts of the
5 acquisition. Staff noted that the Final EIR incorporated detailed responses to comments,
6 including comments provided by the Commission. Consistent with that recommendation, the
7 Staff Report and proposed resolution relied heavily on the EIR's conclusions concerning the
8 potential environmental impacts of the project.

9 56. Staff further recommended that the Commission approve the District's other
10 request to amend its sphere of influence and annex 58 parcels. In support of that
11 recommendation, staff conducted a sphere of influence study and municipal review ("Municipal
12 Service Review"). In the Municipal Service Review, staff concluded that the District was
13 effectively and dependably carrying out its mission and found that the District has a consistent
14 track record of successfully providing water services for its residents, including retail water
15 service to some customers. Staff recommended that the Commission adopt the findings of the
16 Municipal Service Review and approve the District's annexation request.

17 **E. The Commission's December 6, 2021 Vote to Reject the District's Latent**
18 **Powers Proposal**

19 57. On December 6, 2021, the LAFCO Commissioners voted 5-2 to reject the
20 District's proposal to activate its latent powers.

21 58. The five Commissioners voting against the proposal cited a range of
22 unsubstantiated and statutorily invalid concerns, including but not limited to the following:

23 a. Contrary to the analysis in the District's EIR, Commissioner Craig raised
24 the specter that approving the proposal would lead to a loss of water in the Salinas Valley,
25 asserting: "[W]hat we are talking about is water. In the Salinas Valley, the water used in the
26 Salinas Valley is absolutely part of this discussion . . . [and] I know people have danced around
27 the water subject for decades, quite literally decades, and it is clear to me that the Peninsula
28

1 needs desal[ination]. It's clear to me that Peninsula doesn't want desal[ination]. And so there is
2 quite a bit of discussion over whether or not that water comes from the Salinas Valley.”

3 b. Chair Lopez claimed that the proposal would increase water rates in
4 Chualar, one of Cal-Am's remaining satellite systems, notwithstanding the fact that Chualar is
5 protected by a rate-case settlement that prevents water rates from rising faster than inflation.

6 c. Commissioners Poitras and Leffel both voiced concerns that other local
7 agencies would lose property tax revenue. Neither Commissioner explained why staff's
8 proposed condition of approval addressing this issue would fail to protect the local taxing
9 agencies.

10 59. Several of the denying Commissioners' statements openly revealed bias in the
11 proceeding, including but not limited to the following:

12 a. Commissioner Gourley, who introduced the motion to deny staff's
13 recommendation, expressed animus against public entities providing public services, stating:
14 “I'm definitely from a private sector [background], not the public sector. I don't think the
15 government can run anything efficiently, and I think we've seen that.” Commissioner Gourley's
16 views on public service provision were directly refuted by the Commission's simultaneous
17 determination in the Municipal Service Review, approved at the same meeting, that the District
18 capably and efficiently provides a range of water services.

19 b. Commissioner Poitras demonstrated bias on behalf of the Monterey County
20 Regional Fire District (“Fire District”) and against the proposal, stating: “The district I
21 represent, personally, is Monterey County Regional Fire District. They are slated to lose
22 \$140,000 per year if this goes through. That is a considerable concern to me.” Commissioner
23 Poitras further indicated that he had been coordinating with the Fire District and represented that
24 district's unique interests. Referencing a letter the Water District sent to the Fire District,
25 Commissioner Poitras stated that the “Water Management District *sent us a letter*, which arrived
26 around 11:00 a.m. on Friday . . . and we've just now . . . gotten it to *our attorneys*” (emphasis
27 added). Commissioner Poitras's open advocacy on behalf of Fire District directly violates the
28 Cortese-Knox-Hertzberg Act's mandate for LAFCO Commissioners to “represent the interests

1 of the public as a whole and not solely the interests” of the constituency that appointed them.
2 Gov. Code § 56331.4.

3 60. The Commission proceeded to reject staff’s recommendation without a coherent
4 description of the reasons for its decision, prompting confusion among the Commissioners.
5 Commissioner Oglesby inquired: “what are the findings we’re looking for? Because I didn’t
6 hear them, and some of them, as far as I’m concerned, [are] illegal to be putting down in a
7 document, right?” Similarly, Commissioner Root Askew asked: “[C]an you explain or could we
8 have county counsel . . . explain what the conditions of denial are that we’re voting on right
9 now. I’m unclear what the . . . rationale for denial would be.”

10 61. Nonetheless, the Commissioners voted to reject the District’s latent powers
11 proposal and directed staff to prepare a post-hoc resolution that would document the reasons for
12 its decision.

13 62. At the same hearing, and notwithstanding the Commission’s vote on the latent
14 powers proposal, the Commissioners adopted staff’s second proposed resolution and approved
15 the District’s requests to annex new territory and amend its sphere of influence.

16 63. The second resolution adopted the findings in the Municipal Service Review, and
17 contained findings that directly contradicted statements made by the Commissioners concerning
18 the District’s latent powers proposal. For instance, the second resolution expressly found that the
19 Commission’s Municipal Service Review and Sphere of Influence Study “support[] the
20 requested activation of these latent powers throughout the District.”

21 64. The Commission’s Municipal Service Review also found that the District’s
22 diverse sources of revenue, including its ability to levy water rates and charges, showed that the
23 District would have “the means to ensure it will have sufficient revenue to carry out retail
24 potable water services.” The Municipal Service Review further acknowledged that the District
25 had grown its operating reserves significantly in recent years and concluded that the District’s
26 “proactive financial policies and practices will allow the District to build reserve funds to meet
27 future needs.” And contrary to Commissioner Gourley’s views on public service provision, the
28 Municipal Service Review concluded that the District had a consistent and successful track

1 record of providing water supply and management services, and had received several awards for
2 its transparent and prudent fiscal practices.

3 **F. The January 5, 2022 Resolution**

4 65. On January 5, 2022, the Commission’s staff presented a new resolution that
5 purported to document the basis for the Commission’s December 6, 2021 vote.

6 66. The January 5 resolution failed to adequately reflect the basis for the December 6
7 vote. For instance, the resolution omitted any discussion of the need for new desalination
8 projects, a key consideration for Commissioner Craig. The resolution similarly omitted
9 Commissioner Gourley’s claims that the District, as a government agency, would not be able to
10 provide services in an efficient manner.

11 67. At the same time, the resolution discussed supposed evidence and determinations
12 that the Commissioners never raised at the December 6 hearing. Indeed, when introducing the
13 resolution, staff admitted that they had searched the record for evidence that went beyond the
14 evidence cited by the Commissioners at the December 6 hearing.

15 68. At the January 5, 2022 hearing, the District alerted the Commission to several
16 serious flaws in the December 6 decision. For example, the District noted that the issue of water
17 supply, cited in the resolution, was irrelevant to the District’s application because the District
18 proposed to acquire Cal-Am’s existing water portfolio. The District further explained that the
19 analysis in the HdL Report showed that property tax losses to local taxing agencies—much of
20 which would be “backfilled” by the State⁵—would be *de minimis*, and the ongoing negotiations
21 between the District and local taxing authorities would mitigate even those minimal losses.

22 69. A majority of the Commissioners ignored these concerns and the serious flaws in
23 staff’s proposed resolution, and voted to adopt the new resolution by a 5-2 vote.

24
25
26
27 ⁵ The HdL Report and Berkson Associates Report both explained that the State guarantees
28 school districts a certain level of funding, and “backfills” any difference between local revenues
and the guaranteed funding level.

G. Application for Reconsideration and Request for Recusal

70. On January 31, 2022, the District timely filed an application for reconsideration, and on February 25, 2022, the District filed a supplemental letter and request for recusal in support of its application for reconsideration.

71. The District’s reconsideration request reiterated the concerns that the District had previously expressed, highlighting numerous errors with the December 6 decision and January 5 resolution, including:

a. The Commission misapplied the key statutory criterion under the Cortese-Knox-Hertzberg Act: whether the District would have sufficient revenues to carry out its plan of services. The Commission focused exclusively on low-probability financial risks and failed to consider the District’s broad financial powers and ability to cover those risks. Those financial powers include the ability to borrow money to cover unexpected shortfalls, to raise revenue through water charges—a power the District already exercises to fund projects related to water supply and conservation—and to set water rates in exchange for providing retail service.

b. The Commission relied upon a variety of inappropriate factors under the Cortese-Knox-Hertzberg Act. For instance, the Commission exceeded its role under the Act when it attempted to use a latent powers proceeding to dictate the selection of future water supply projects in the region.

c. The Commission lacked substantial evidence to conclude that the District’s proposal would harm groundwater in the Salinas Valley.

d. The Commission lacked substantial evidence to conclude that property tax losses would be significant, or that staff’s proposed condition of approval would fail to mitigate those losses.

e. The Commission engaged in unsubstantiated speculation when it concluded that the California Public Utilities Commission (“CPUC”) would allow rates to increase in Cal-Am’s remaining small satellite systems, even though CPUC policy seeks to spread the cost of serving small water systems across larger areas.

1 f. The Commission violated CEQA by rejecting the District's proposal based
2 on environmental concerns that the EIR did not identify.

3 g. The Commission exceeded its authority when it considered the costs of an
4 unsuccessful eminent domain action as a basis for denying the District's proposal. Moreover, the
5 Commission substantially over-estimated the District's exposure to legal costs and ignored the
6 District's ability to raise revenues to cover those costs, if necessary.

7 72. The District also requested that Commissioners Gourley, Leffel, and Poitras recuse
8 themselves from further participation in the proceedings. As part of its request, the District
9 highlighted Commissioner Leffel's leadership in opposition to Measure J, noting that prior
10 public opposition to a project is a hallmark of decisionmaker bias. The District further described
11 how Commissioner Gourley's animus against public service provision prevented him from
12 serving as a neutral reviewer of the District's proposal, and how Commissioner Poitras had
13 openly coordinated with one interested party, the Fire District, to advance its unique interests
14 rather than represent the public as a whole as required by Government Code section 56331.4.

15 73. On February 28, 2022, the Commission denied the District's application for
16 reconsideration.

17 74. At the February 28, 2022 hearing, the Commission did not attempt to rebut the
18 evidence that Commissioners Leffel, Gourley, and Poitras were unable to serve as neutral and
19 unbiased decisionmakers. Instead, the Commission's General Counsel contended that the
20 Commissioners' patent bias was irrelevant to a latent powers proceeding.

21 **FIRST CAUSE OF ACTION**

22 **Decisionmaker Bias**

23 **(Violations of Code of Civ. Pro. §§ 1085, 1094.5)**

24 75. The District realleges and incorporates by reference the preceding paragraphs in
25 their entirety.

26 76. A special district seeking LAFCO approval for the activation of a latent power has
27 a right to an unbiased hearing. An unbiased decisionmaker is one who "has *no conflict of*
28 *interest, has not prejudged* the specific facts of the case, and is *free of prejudice* against or in

1 favor of any party.” *Petrovich Dev. Co., LLC v. City of Sacramento* (2020) 48 Cal.App.5th 963,
 2 973 (emphasis in original). The participation of even a single biased decisionmaker renders a
 3 decision invalid. *See Woody’s Group, Inc. v. City of Newport Beach* (2015) 233 Cal.App.4th
 4 1012, 1022; *Nasha v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 485.

5 77. The Commission failed to conduct a fair and lawful hearing, and prejudicially
 6 abused its discretion, by allowing biased decisionmakers to participate in the latent powers
 7 proceeding. The evidence of decisionmaker bias includes, but is not limited to, the following:

8 a. Commissioner Leffel’s longstanding public opposition to the District’s
 9 acquisition of Cal-Am system, including her authorship of the official ballot argument against
 10 Measure J.

11 b. Commissioner Gourley’s open animus against the provision of public
 12 services by public entities.

13 c. Commissioner Poitras’s coordination with the Fire District and attempt to
 14 coopt the proceeding to advance that party’s unique interests.

15 78. The Commission continued to allow biased decisionmakers to participate in the
 16 proceeding, even after the District and other members of the public alerted the Commission to
 17 compelling evidence of decisionmaker bias.

18 79. As a result of the foregoing defects, the Commission prejudicially abused its
 19 discretion and denied the District a fair and impartial hearing. Accordingly, the Commission’s
 20 denial of the District’s proposal must be set aside.

21 **SECOND CAUSE OF ACTION**

22 **Violations of the Cortese-Knox-Hertzberg Act**

23 **(Gov. Code § 56000 et seq.; Code of Civ. Pro. §§ 1085, 1094.5)**

24 80. The District realleges and incorporates by reference the preceding paragraphs in
 25 their entirety.

26 81. The Legislature created LAFCOs to “encourage the orderly formation and
 27 development of local agencies.” *Community Water Coalition v. Santa Cruz County Local*
 28 *Agency Formation Comm’n* (2011) 200 Cal.App.4th 1317, 1324 (quotation omitted). LAFCOs

1 pursue that mission primarily by reviewing applications from local governments to annex
2 territory and institute other changes to the structure of local government.

3 82. The Cortese-Knox-Hertzberg Act governs LAFCO proceedings. The Act prohibits
4 a LAFCO from committing prejudicial abuses of discretion and requires invalidation of any
5 decision that lacks substantial evidence. Gov. Code § 56107.

6 83. The Act further requires a LAFCO to adequately consider all relevant factors
7 when making a decision. For each decision, a LAFCO must provide a statement of basis that
8 demonstrates a rational connection between the factors the LAFCO considered, the choice it
9 made, and the purposes of the Cortese-Knox-Hertzberg Act. *McBail & Co. v. Solano County*
10 *Local Agency Formation Comm'n* (1998) 62 Cal.App.4th 1223, 1228.

11 84. Government Code sections 56824.10, 56824.12, and 56824.14 contain the
12 procedures and statutory criteria that govern proposals by a special district to exercise a new or
13 different function or class of service. When reviewing such proposals, a LAFCO's principal task
14 is to determine whether the special district will have sufficient revenues to carry out its proposed
15 plan for providing services. Gov. Code § 56824.14(a).

16 85. In addition, the Cortese-Knox-Hertzberg Act requires a LAFCO to establish
17 written policies and procedures and exercise its powers "in a manner consistent with those
18 policies and procedures." Gov. Code § 56300(a). The Commission has adopted local procedures.
19 *See Monterey County LAFCO, Policies and Procedures Relating to Spheres of Influence and*
20 *Changes of Organization and Reorganization* (Feb. 24, 2020), available at:

21 <https://www.co.monterey.ca.us/home/showpublisheddocument/72662/637202228138370000>
22 ("Policies and Procedures").

23 86. The Commission's Policies and Procedures include procedures for evaluating the
24 environmental impacts of a proposal. Those procedures mandate that the Commission review all
25 potential environmental impacts of a proposal in accordance with CEQA and the State's CEQA
26 Guidelines. *See* Policies and Procedures at 28. The Commission's Policies and Procedures
27 include specific procedures for identifying and evaluating groundwater impacts from a proposal.
28 *Id.* at 32-33. Those procedures assign the CEQA lead agency responsibility for identifying

1 groundwater impacts and include specific notice and informational requirements that must be
2 followed after an agency identifies potential groundwater impacts.

3 87. The Cortese-Knox-Hertzberg Act further mandates that LAFCO Commissioners
4 exercise independent judgment on behalf of the public as a whole and avoid narrowly
5 representing a single constituency. Gov. Code § 56331.4.

6 88. The Commission failed to proceed in a manner required by law, prejudicially
7 abused its discretion, and violated the Cortese-Knox-Hertzberg Act by misapplying the key
8 statutory criterion that governs latent power proposals: revenue sufficiency. The Commission's
9 errors include, but are not limited to, the following:

10 a. The Commission failed to consider the District's broad financial powers
11 and its ability to raise revenues sufficient to cover financial risks associated with the proposal.
12 Those powers include, but are not limited to: the power to levy charges to pay for water supply
13 projects; the power to set rates in exchange for providing retail water service; and the ability to
14 borrow money to cover unexpected shortfalls.

15 b. The Commission failed to address its concerns about revenue sufficiency
16 through appropriate conditions of approval.

17 c. The Commission over-estimated the financial risks the District faces,
18 including the risks from an unsuccessful condemnation action.

19 89. The Commission failed to proceed in a manner required by law, prejudicially
20 abused its discretion, and violated the Cortese-Knox-Hertzberg Act by considering factors that
21 are legally irrelevant to the District's application. Those factors include, but are not limited to,
22 the following:

23 a. Factors from Government Code section 56668 that do not apply to latent
24 power proposals.

25 b. Effects of the District's proposal on water supply.

26 c. The District's exposure to legal costs if it lost or abandoned an eminent
27 domain action.

28

1 90. The Commission failed to proceed in a manner required by law, prejudicially
2 abused its discretion, and violated the Cortese-Knox-Hertzberg Act by making determinations
3 that lack substantial evidence. The Commission’s unsupported determinations include, but are
4 not limited to, the following:

- 5 a. The District lacked sufficient revenues to carry out its proposal.
- 6 b. The proposal would negatively affect the region’s water supply.
- 7 c. Property tax losses would significantly and adversely affect local taxing
8 authorities and staff’s proposed condition of approval would be inadequate to mitigate those
9 losses.
- 10 d. The proposal would harm environmental justice.
- 11 e. Water rates for customers in Cal-Am’s remaining satellite systems would
12 increase.
- 13 f. The District would face up to \$34 million in legal fees if it lost or
14 abandoned the eminent domain action, and the District would be unable to cover those fees.

15 91. The Commission failed to proceed in a manner required by law, prejudicially
16 abused its discretion, and violated the Cortese-Knox-Hertzberg Act by failing to include an
17 adequate statement of basis for its decision. The Commission’s January 5 resolution constitutes
18 an improper post-hoc rationalization.

19 92. The Commission failed to proceed in a manner required by law, prejudicially
20 abused its discretion, and violated the Cortese-Knox-Hertzberg Act by considering the
21 environmental impacts of the District’s proposal in a manner that is inconsistent with its Policies
22 and Procedures. Those inconsistencies include, but are not limited to, the following:

- 23 a. The Commission conducted an unstructured, *de novo* review of the
24 proposal’s potential impacts on water supply outside of the CEQA process, even though its
25 Policies and Procedures require the Commission to rely exclusively on the CEQA process to
26 evaluate the environmental effects of a proposal.
- 27 b. The Commission failed to treat the District’s EIR as adequate, as required
28 by CEQA.

1 c. The Commission failed to follow the procedures in CEQA and the CEQA
2 Guidelines for informing the District of perceived shortcomings in the draft EIR and/or issuing a
3 supplemental EIR.

4 d. The Commission violated its own specific policies for evaluating
5 groundwater impacts. Those policies assign the responsibility for identifying adverse
6 groundwater impacts to the CEQA lead agency, not the Commission.

7 e. After the Commission improperly identified potential groundwater impacts,
8 it failed to follow its local procedures for notifying affected water agencies and soliciting expert
9 advice, resulting in an *ad hoc* and ill-informed determination on the potential groundwater
10 impacts of the proposal.

11 93. The LAFCO Commissioners failed to proceed in a manner required by law,
12 prejudicially abused their discretion, and violated the Cortese-Knox-Hertzberg Act by failing to
13 exercise independent judgment and represent the public as a whole.

14 94. The foregoing defects substantially and adversely affected the District. As such,
15 the Commission's denial of the District's proposal must be set aside.

16 **THIRD CAUSE OF ACTION**

17 **Violations of CEQA**

18 **(Public Resources Code § 21000 et seq.; Code of Civ. Pro. § 1094.5)**

19 95. The District realleges and incorporates by reference the preceding paragraphs in
20 their entirety.

21 96. CEQA is designed to ensure that the long-term protection of the environment be
22 the guiding criterion in public decisions. An EIR is the cornerstone of the CEQA process. Under
23 CEQA, the lead agency is responsible for preparing the EIR and determining the extent of
24 potential environmental impacts from its project. Pub. Resources Code § 21067. CEQA
25 carefully distinguishes the role of the lead agency from that of a responsible agency. A
26 responsible agency is an agency, other than the lead agency, that has responsibility for carrying
27 out or approving a project. Pub. Resources Code § 21069.

1 97. Under CEQA, a responsible agency's role is tightly circumscribed. CEQA and the
2 CEQA Guidelines impose an affirmative duty on responsible agencies to provide specific
3 comments on a draft EIR and to inform lead agencies of any perceived deficiencies in the draft
4 EIR. CEQA Guidelines § 15096. After the lead agency has certified an EIR, a responsible
5 agency must treat the EIR as adequate. Responsible agencies must "use the EIR prepared by the
6 lead agency, even if they believe it to be inadequate." *Central Delta Water Agency v. State*
7 *Water Resources Control Bd.* (2004) 124 Cal.App.4th 245, 274. When an EIR is challenged in
8 court, CEQA instructs that responsible agencies "shall assume that the environmental impact
9 report" is valid. Pub. Resources Code § 21167.3(a).

10 98. Under certain circumstances, a responsible agency can undertake additional
11 environmental review through the preparation of a subsequent or supplemental impact report.
12 Pub. Resources Code § 21166. To do so, the responsible agency must follow the relevant
13 procedures set forth in CEQA and the CEQA Guidelines. *See, e.g.*, CEQA Guidelines §§ 15162,
14 15163.

15 99. The Commission's own Policies and Procedures state that it must follow the
16 CEQA process for studying the environmental impacts of a proposal. Indeed, in the present
17 proceeding, staff recommended that the Commission adopt the District's EIR and relied heavily
18 upon it for conclusions with respect to the environmental impacts of the project.

19 100. The Commission failed to proceed in a manner required by law and violated
20 CEQA by failing to treat the District's certified EIR as adequate.

21 101. The Commission failed to proceed in a manner required by law and violated
22 CEQA by making new environmental determinations without following the CEQA process for
23 preparing a supplemental EIR.

24 102. As a result of these actions, the Commission improperly denied the District's
25 proposal in violation of CEQA, the CEQA Guidelines, and the Commission's Policies and
26 Procedures for implementing CEQA. As such, this Court must set aside the Commission's
27 denial.

28

PRAYER FOR RELIEF

WHEREFORE, the District prays for judgment as follows:

1. For alternative and peremptory writs of mandate directing Respondent to vacate and set aside its denial of the District’s proposal and to reconsider that proposal in compliance with all applicable law;

2. For a preliminary and permanent injunction directing Commissioners Leffel, Gourley, and Poitras to recuse themselves from further participation in proceedings related to the District’s proposal;

3. For alternative and peremptory writs of mandate directing Respondent to comply with CEQA and the CEQA Guidelines, and to take any other action as required by Public Resources Code section 21168.9 or otherwise required by law;

4. For costs of the suit;

5. For attorneys’ fees as authorized by Code of Civil Procedure Section 1021.5 and/or other provisions of law; and

6. For such other and further relief as the court deems just and proper.

DATED: April 1, 2022

SHUTE, MIHALY & WEINBERGER LLP

By: 

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EDWARD T. SCHEXNAYDER
Attorneys for Petitioner and Plaintiff
MONTEREY PENINSULA WATER
MANAGEMENT DISTRICT

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EXHIBIT A

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March 30, 2022

Via E-Mail and U.S. Mail

Ms. Kate McKenna, AICP
Executive Officer
Local Agency Formation Commission of Monterey County
132 W. Gabilan Street, Suite 102
Salinas, California 93901
mckennak@monterey.lafco.ca.gov

Re: Notice of Commencement of CEQA Litigation

Dear Ms. McKenna:

This letter is to notify you that the Monterey Peninsula Water Management District (“District”) will file suit against the Local Agency Formation Commission of Monterey County (“LAFCO”) and the Commissioners of LAFCO (“Commissioners”) for failure to observe the requirements of the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 (“Cortese-Knox-Hertzberg Act”), Government Code section 56000 et seq.; the California Environmental Quality Act (“CEQA”), Public Resources Code section 21000 et seq.; the CEQA Guidelines, 14 California Code of Regulations section 15000 et seq. (“CEQA Guidelines”), and state requirements for a fair hearing that culminated in the decision of LAFCO to deny the District’s proposal to activate its “latent powers” to provide potable water to retail customers (“Project”). This notice is given pursuant to Public Resources Code section 21167.5.

Pursuant to Public Resources Code section 21167.6, the record of proceedings for LAFCO’s actions includes, among other items, all “internal agency communications, including staff notes and memoranda related to the project or to compliance with [CEQA].” Because all e-mails and other internal communications—including communications by the Commissioners—related to the Project are part of the administrative record for the lawsuit to be filed by the District, LAFCO and the Commissioners may not destroy or delete such documents prior to preparation of the record in this case.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP



Edward T. Schexnayder

cc: Kelly L. Donlon, Deputy County Counsel, LAFCO General Counsel
donlonkl@co.monterey.ca.us

PROOF OF SERVICE

***Monterey Peninsula Water Management District v. Local Agency Formation Commission
of Monterey County et al.***

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the City and County of San Francisco, State of California. My business address is 396 Hayes Street, San Francisco, California 94102.

On March 30, 2022, I served true copies of the following document(s) described as:

NOTICE OF COMMENCEMENT OF CEQA LITIGATION

on the parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e-mail address Larkin@smwlaw.com to the person(s) at the e-mail address(es) listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the person(s) at the address(es) listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Shute, Mihaly & Weinberger LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 30, 2022, at San Francisco, California.



Patricia Larkin

SERVICE LIST

***Monterey Peninsula Water Management District v. Local Agency Formation Commission
of Monterey County et al.***

Ms. Kate McKenna, AICP
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