

Information presented to
the Commission at the



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File No. 14141.00000

May 12, 2016

VIA U.S. MAIL

RECEIVED
MAY 12 2016

LAFCO
San Bernardino County

Mr. Andrew Hitchings
Somach Simmons & Dunn
500 Capital Mall, Suite 1000
Sacramento, CA 95814

Re: Sterling Natural Resource Center and East Valley Water District's
Exercise of Latent Powers

Dear Mr. Hitchings:

I am writing in reference to a letter sent to you on May 2, 2016 from the San Bernardino LAFCO Executive Officer regarding the East Valley Water District's exercise of latent powers. The last sentence in the third paragraph states in part that "... there is no enforcement activity available to address this issue..." This statement refers solely to San Bernardino LAFCO. We express no opinion regarding the enforcement authority of others.

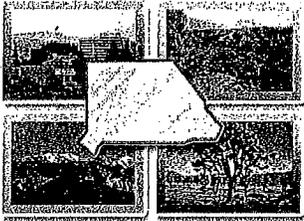
If you have any questions, please call me.

Sincerely,

Clark H. Alsop
Legal Counsel
Local Agency Formation Commission
For San Bernardino County

CHA:ja

cc: Kathleen Rollings-McDonald, Executive Officer



LAFCO

Local Agency Formation Commission for San Bernardino County

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to serve the Citizens, Cities, Special Districts,
and the County of San Bernardino.

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LEGAL COUNSEL

CLARK H. ALSOP

May 2, 2016

Andrew M. Hitchings
Somach Simmons & Dunn
500 Capital Mall, Suite 1000
Sacramento, CA 95814

RE: Sterling Natural Resource Center and East Valley
Water District's Exercise of Latent Powers

Dear Mr. Hitchings:

We are in receipt of your letter, dated April 21, 2016, which raises questions regarding the East Valley Water District improperly exercising its latent power to treat and dispose of wastewater. Your letter correctly identifies that the current functions and services authorized to the District are limited to the following as identified in the 2004 Service Review/Sphere of Influence Update for the District outlined in LAFCO Resolution No. 2836:

DISTRICT	FUNCTIONS	SERVICES
East Valley	Water	Retail, agricultural, domestic, replenishment
	Sewer	Sewage Collection
	Park and Recreation	Development, maintenance in conjunction with water facilities

The Local Agency Formation Commission for San Bernardino County (LAFCO) staff worked with the East Valley Water District from approximately October of 2014 to May of 2015 to provide for a process to activate their latent authority under their Sewer function to address treatment and disposal as required by Government Code Section 56824.10 through 56824.14. These efforts were outlined in the Status Report provided to LAFCO dated May 13, 2015 (copy of report without attachments is enclosed). As you are aware that effort was unsuccessful.

Somach Simmons & Dunn Letter
RE: East Valley Water District
May 2, 2016

As you have identified in your letter, the Framework Agreement and subsequent actions of the Board of Directors of the East Valley Water District and San Bernardino Valley Municipal Water District clearly identifies that the facility and future operation are intended to be provided by the East Valley Water District. This is in direct conflict with the sewer function and service authorized by LAFCO through its mandatory review process and documented in Resolution No. 2836. However, as has been outlined in various documents to the Commission and to the Districts, Government Code Section 56824.10 requires that the process be initiated by a resolution; and 56824.12 requires that said resolution be adopted by the legislative body of the special district. While LAFCO is afforded the ability to initiate a number of changes of organization through Government Code Section 56375(a)(2), it does not include the ability to initiate a change of organization which is an activation or divestiture of a function or service for a special district. Lacking this authority, in our opinion, there is no enforcement activity available to address this issue since even bringing a lawsuit cannot compel the action of the District to initiate the application.

We will provide a copy of your letter and this response to the Commission as a part of the Executive Officer's report at the May 18, 2016 hearing.

If you have any questions on this correspondence, please do not hesitate to contact me at (909) 388-0480 or by email at kmcdonald@lafco.sbcounty.gov.

Sincerely,



KATHLEEN ROLLINGS-McDONALD
Executive Officer

Enclosure

cc: Stacey Aldstadt
Steven Graham

**LOCAL AGENCY FORMATION COMMISSION
FOR SAN BERNARDINO COUNTY**

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DATE: MAY 13, 2015 
FROM: KATHLEEN ROLLINGS-McDONALD, Executive Officer
SAMUEL MARTINEZ, Assistant Executive Officer
TO: LOCAL AGENCY FORMATION COMMISSION

SUBJECT: Agenda Item #12 – Discussion of Status of Potential Proposal to
Activate Latent Authority for East Valley Water District to Provide the
Services of Wastewater Treatment, Disposal, and Recycling

BACKGROUND:

At the April 15 hearing, staff was requested to provide information related to the status of a potential proposal to activate the wastewater treatment, disposal and recycling authority for the East Valley Water District (hereafter "District"). Staff has been working with the District to address the submission of a proposal to activate expanded services under its sewer function to include the operation of a regional wastewater treatment plant. In order to address this issue, it is important to understand the relationship of the Commission to the functions authorized a special district under its parent act. The following provides an historical outline to clarify this relationship.

LAFCO AUTHORITY OVER LATENT POWER:

At the inception of Local Agency Formation Commissions in 1963 they were fashioned with a governing board made up of members of the Board of Supervisors, City Councils and a public member in all counties of California except for San Francisco. They presided over public hearings on city annexations, detachments, district formations, annexations, detachments, and reorganizations which included those types of changes. In 1970, at the behest of special districts throughout the State, representation on Commissions to have a seat at the table for determinations on their boundaries and governance was granted to independent special districts. AB 1155 (Knox) was approved and enacted, Chapter 1249 of Statutes of 1970, which authorized a process to allow for the seating of special districts but that came with a price, the loss of the direct authority to activate latent power authorized in each districts principal act (a copy of the relevant portion included as Attachment #1 to this report).

In 1976, at the request of independent special districts in San Bernardino County, Special Districts were seated on the Commission, the Rules and Regulations affecting special districts were adopted and the listing of authorized functions and services was developed through a survey process for all special districts under LAFCO purview. From 1976 through 2001 this process remained effectively static, but with the update of LAFCO law through approval AB 2838 (Hertzberg) there was a fundamental shift, all members represented on the Commission were to fund its operations, and in every sphere of influence update or amendment the active functions and services of special districts are to be reviewed. San Bernardino LAFCO commenced its mandatory service review/sphere of influence amendment process in 2002 and complied with this requirement.

EAST VALLEY WATER DISTRICT:

In 1976 when requested for response, the District (then known as the East San Bernardino County Water District) identified its range of services to be water, sewer and park and recreation. The Exhibit A detailing the functions and services performed by all special districts within San Bernardino County under the procedures required by District Reorganization Act limited the District's services to those services and functions listed at the time. In 2003-04 the Commission undertook the mandatory service review/sphere of influence update process for the east valley region of the County. In August of 2004, the service review report for the District was presented to the Commission and its determinations outlined in LAFCO Resolution No. 2836 (copy included as Attachment #2 to this report). In compliance with Government Code Section 56425(i) the following information was included:

WHEREAS, the Local Agency Formation Commission of the County of San Bernardino is required to review and update the Exhibit "A" of the Rules and Regulations of Special Districts to outline the services provided. The Exhibit "A" of the Rules and Regulations is amended to read as follows:

SERVICE	FUNCTIONS
Water	Retail, agricultural, domestic, replenishment
Sewer	Sewage collection
Park and Recreation	Development, maintenance in conjunction with water facilities

WHEREAS, pursuant to the provisions of Government Code Section 56425(h), the range of services provided by the East Valley Water District is limited to those identified above, and such range of services shall not be changed unless approved by this Commission; and,

From 2004 through October 2014, no questions were raised regarding this determination. However, in October 2014, through discussions related to the water conservation study, LAFCO staff was made aware of the wastewater treatment plant project for the District. Specifically, on October 20, 2014 the District's manager and consultant outlined the wastewater treatment plant project and LAFCO staff outlined to the District that it did not

have authorization to provide for anything other than wastewater collection and would need to apply to LAFCO for activation of the latent services under its sewer function. Attachment #3 to this report provides a copy of the letter sent to the City of Highland that provides a general outline of the project and the District's purpose in pursuing it.

As staff understands the sequence of events related to this project from review of its website, the District has taken the following primary steps:

September 2013		District Board of Directors authorizes General Manager to retain the services of a Program Manager for the evaluation of possible sewer treatment plant; this is a direct outgrowth of the 2012 Sewer Master Plan upgrade
January 2014		District awarded a contract for professional services to RMC to conduct a feasibility study for a water reclamation plant
October 2014		In closed session negotiation of purchase of property north of 3 rd street, east of Sterling Avenue for water reclamation plant conducted
October 2014		Accept final Feasibility Study and direct General Manager/CEO to pursue the construction of Water Reclamation Plant on District owned property; Authorize General Manager/CEO to issue RFQ and RFP for the design, build, and operation of the Sterling Recharge Facility (aka Water Reclamation Plant); Issue RFP for environmental consulting on Sterling Recharge Facility.
February 2015		Award Program Management Services Contract to Kennedy/Jenks Consultants for the District's Recycled Water Center; Award legal services contract to Musick, Peeler & Grant LLP for preparation of EIR and related CEQA compliance matters for District's Recycled Water Center; Award Professional Services Contract to ESA to prepare EIR and related CEQA compliance documents for District's Recycled Water Center
March-2015		Accept the findings of the updated Recycled Water Feasibility Study by RMC; receive and file the Economic Impact of the East Valley Recycled Water Project by John Husing; receive responses from community survey conducted by Probolsky Research Inc.

ITEM #12 – DISCUSSION ITEM
EAST VALLEY WATER DISTRICT
AUTHORIZED POWERS
MAY 13, 2015

At the March 18, 2015 Board of Directors meeting an item to initiate the activation process required by Government Code Section 56824.10 through 56824.14 was presented and the matter continued due to questions on noticing to the April 22, 2015 hearing. This item included a draft resolution of initiation and other background material. Ultimately the April 22 Board of Directors special meeting was canceled and staff is awaiting the rescheduling of this matter.

During this period LAFCO staff and Legal Counsel continued to meet with the staff of the District and its Special Counsel and Legal Counsel to review the options related to consideration of the activation proposal due to the complications of the progression of the project. LAFCO staff has provided to the District four options for consideration and are currently awaiting information as to the choice to move forward. Each of the options to address the question were reviewed and concerns outlined related how to move forward with the project. It appears that the choice will be to create some kind of Joint Powers Authority but the exact parameters of this effort are not clear at this time. LAFCO staff continues to work with all parties involved in this issue and seeks to be sure that the integrity of the process and the requirements of State law are complied with.

No action is required of the Commission other than to note receipt of the report and direct staff on any matters related to this discussion.

KRM

Attachments:

- 1 -- Excerpt from AB 1150 (Knox) Statutes of 1970
- 2 -- LAFCO Resolution No. 2836
- 3 -- East Valley Water District Letter to City of Highland Dated January 16, 2015 outlining the Project with attachments presented to City Council on January 27, 2015



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RECEIVED
APR 25 2016

LAFCO
San Bernardino County

April 21, 2016

Via Electronic Mail and First Class Mail

Kathleen Rollings-McDonald
Executive Officer
San Bernardino County Local Agency Formation Commission
215 North D Street, Suite 204
San Bernardino, CA 92415-0490

Re: Sterling Natural Resource Center and East Valley Water District's Exercise of
Latent Powers

Dear Ms. Rollings-McDonald:

This firm represents the City of San Bernardino and its Municipal Water Department (City). This letter is submitted on the City's behalf to share its serious concerns regarding East Valley Water District's (EVWD) involvement in the Sterling Natural Resource Project (SNRC). Given EVWD significant participation in and funding of the SNRC, the City believes that EVWD is improperly exercising its latent power to treat and dispose of wastewater without obtaining the San Bernardino County Local Agency Formation Commission's (SB LAFCO) approval. In light of SB LAFCO's role as the "watchdog" of local agencies, the City is requesting SB LAFCO's opinion on EVWD's conduct related to the SNRC, and requesting that SB LAFCO take appropriate enforcement action against EVWD for its failure to activate its latent power.

EVWD is a county water district that serves the City of Highland and a portion of the City of San Bernardino. EVWD is authorized under the Water Code "... to acquire, construct, and operate facilities for the collection, treatment, and disposal of sewage, waste, and stormwater." (Wat. Code, § 31100.) However, according to the SB LAFCO Policy and Procedure Manual and SB LAFCO's operative sphere of influence and municipal service review determinations, EVWD is not currently authorized to treat or dispose of wastewater.

In fact, on March 18, 2015, the EVWD Board considered adoption of Resolution 2015.05¹ to be submitted to SB LAFCO that would activate EVWD's latent power

¹ The resolution was titled: "A Resolution of the Board of Directors of the East Valley Water District Authorizing and Approving an Application to Be Submitted to the Local Agency Formation Commission County of San Bernardino for the Expansion of Authorized Services to Include Wastewater Collection, Treatment, Reclamation, Disposal, and Recharge of Recycled Water And Stormwater Under Its Authorized Sewer Function"

Kathleen Rollings-McDonald

Re: Sterling Natural Resource Center and EVWD's Exercise of Latent Powers

April 21, 2016

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to treat wastewater. However, the item was tabled to allow others to provide input. A public hearing was noticed for April 22, 2015, to reconsider the Resolution, but the hearing was cancelled on April 15, 2015, and the Resolution was never brought back to the EVWD Board for consideration. Instead, in the face of opposition from the City, EVWD reversed course and apparently colluded with San Bernardino Valley Municipal Water District (Valley District) to craft an agreement by which Valley District would be the putative "operator" of EVWD's wastewater treatment project.

On October 26, 2015, EVWD and Valley District entered into a Framework Agreement wherein Valley District would construct the SNRC and act as the lead agency for the project under the California Environmental Quality Act (CEQA), subject to EVWD's approval of every aspect of the project.² The Framework Agreement further provides that EVWD will fund the entire project (including actually reimbursing Valley District for its staff time incurred on the project), and EVWD can take over operations of the SNRC in the future.³ In addition, EVWD separately adopted its own CEQA Findings of Fact and Statement of Overriding Considerations for the SNRC, and adopted a resolution approving the project on March 23, 2016.

The City believes that the Framework Agreement and EVWD's involvement in and approvals of the SNRC are evidence of EVWD illegally exercising its latent powers to treat and dispose of wastewater. The following are the most salient provisions in the Framework Agreement establishing that EVWD would be the de facto wastewater treatment entity:

- The treatment facility will be located on EVWD property and owned by EVWD. (Framework Agreement, ¶ 5.)
- The facility will be operated by a contractor, not Valley District, and may be operated by EVWD at its discretion. (Framework Agreement, ¶ 3(b).)
- EVWD will finance the full cost of the Project. (Framework Agreement, ¶ 2(c).)
- EVWD is paying all costs associated with the facility, including reimbursing Valley District for Valley District's staff time associated with the Project. (Framework Agreement, ¶¶ 2(b)(5), (6).)
- The agreement specifies that EVWD will own all of the wastewater produced by the facility. (Framework Agreement, ¶ 4.)

² An execution copy of the Framework Agreement is attached hereto as Exhibit 1.

³ The Framework Agreement provides that Valley District will operate the plant or cause it to be operated by a subcontractor. Notwithstanding the flexibility allowed under the Framework Agreement, minutes for the Valley District Board meeting in October state the Board members' understanding and intent that the plant will be operated by a contractor. (See September 15, 2015 Memorandum from Doug Headrick to Valley District Board, p. 12 of 91 of September 15, 2015 Board meeting packet.)

Kathleen Rollings-McDonald

Re: Sterling Natural Resource Center and EVWD's Exercise of Latent Powers

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Local agencies are required to seek LAFCO approval before offering a service that is new or different from the services it currently provides. (Gov. Code, §§ 56375(a)(1), 56824.10; *South San Joaquin Irrigation Dist. v. Superior Court* (2008) 162 Cal.App.4th 146, 156-157.) EVWD has never formally proposed a change of organization with SB LAFCO that would allow it to activate its latent powers to treat and discharge wastewater.

The City would appreciate SB LAFCO's views on the foregoing matter. Additionally, if SB LAFCO comes to the same conclusion as the City, the City urges SB LAFCO to take appropriate enforcement action to prevent EVWD's continued violation of the law.

If you have any questions about this matter, please feel free to contact us. Thank you for your attention to this matter.

Very truly yours,



Andrew M. Hitchings

Enc.

cc: Stacey Aldstadt (*via electronic mail only*)

Steven Graham (*via electronic mail only*)

BCB/AMH:mb