

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE
CIVIL COMPLEX CENTER**

MINUTE ORDER

DATE: 08/20/2014

TIME: 03:30:00 PM

DEPT: CX101

JUDICIAL OFFICER PRESIDING: Gail A. Andler

CLERK: Mary White

REPORTER/ERM: None

BAILIFF/COURT ATTENDANT:

CASE NO: 30-2012-00576715-CU-WM-CXCCASE INIT.DATE: 06/13/2012

CASE TITLE: **Delaware Tetra Technologies, Inc. vs. Santa Margarita Water District**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Writ of Mandate

EVENT ID/DOCUMENT ID: 72012005

EVENT TYPE: Chambers Work

APPEARANCES

Related cases #2013-00635125 Delaware Tetra Technologies Inc vs County of San Bernardino, 2013-00633936 Center for Biological Diversity vs County of San Bernardino, 2012-00594355 Delaware Tetra Technologies Inc vs Santa Margarita Water District, 2012-00612947 Center for Biological Diversity vs County of San Bernardino, 2012-00576715 Delaware Technologies Inc vs Santa Margarita Water District

There are no appearances by any party.

See attached Statement of Decision.

Clerk to give notice to County of San Bernardino and County of San Bernardino to give notice to all other parties.

CLERK'S CERTIFICATE OF MAILING: I certify I am not a party to this cause, over age 18, and a copy of this document was mailed first class postage, prepaid in a sealed envelope addressed as shown, on 20-AUG- 2014, at Santa Ana, California. ALAN CARLSON /EXECUTIVE OFFICER & CLERK OF THE SUPERIOR COURT, BY: M.WHITE deputy.

DOWNEY BRAND LLP
STEVEN P SAXTON
CHRISTIAN L MARSH
ARIELLO O HARRIS
REBECCA A SMITH
333 BUSH STREET, STE 1400

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Calendar No.

CASE TITLE: Delaware Tetra Technologies, Inc. vs.
Santa Margarita Water District

CASE
30-2012-00576715-CU-WM-CXC

NO:

SAN FRANCISCO, CA 94104-2857

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE - CIVIL COMPLEX

DELAWARE TETRA TECHNOLOGIES,
INC., a Delaware Corporation,

Petitioner/Plaintiff,

v.

SANTA MARGARITA WATER
DISTRICT, a California Water District;
SANTA MARGARITA WATER
DISTRICT BOARD OF DIRECTORS, and
DOES 1 through 50, inclusive,

Respondents/Defendants

COUNTY OF SAN BERNARDINO, A
POLITICAL SUBDIVISION OF THE
STATE OF CALIFORNIA; CADIZ, INC.,
A DELAWARE CORPORATION;
FENNER VALLEY MUTUAL WATER
COMPANY, A CALIFORNIA NON-
PROFIT MUTUAL BENEFIT
CORPORATION, AND ROES 51
THROUGH 60, INCLUSIVE.

Real Parties in Interest.

Case No. 30-2012-00576715-CU-WM-CXC

Assigned for All Purposes to the
Honorable Gail Andler –

STATEMENT OF DECISION

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STATEMENT OF DECISION

I. PROCEDURAL HISTORY

The instant case is one of six separate cases filed challenging separate administrative decisions of the County and SMWD related to the Cadiz Valley Water Conservation, Recovery and Storage Project (Project).

In its First Amended Petition for Writ of Mandate, Tetra alleged five causes of action against Respondent SMWD and Real Parties in Interest County and Cadiz, Inc., including four causes of action asserting CEQA violations. Tetra alleged that approval of the 2012 MOU violated CEQA because SMWD: (1) improperly assumed the lead agency role; (2) improperly relied on a CEQA exemption after finding the MOU approval did constitute approval of a project within the meaning of CEQA; (3) failed to prepare an initial study and/or environmental assessment for approval of the MOU; and (4) improperly deferred environmental analysis of the Project. Tetra further alleged that approval of the 2012 MOU improperly amended and/or violated the Ordinance.

II. FINDINGS

Upon due consideration of the Administrative Record, the trial briefs of the parties, and the oral arguments of counsel, the Court issues the following decision:

A. Factual Background

Cadiz owns 34,000 acres of land in eastern San Bernardino County's Cadiz and Fenner Valleys, overlying extensive groundwater supplies. The Project is a public-private partnership designed to extract and sell groundwater from the basin underlying a portion of the Cadiz and Fenner Valleys. A portion of the groundwater would otherwise flow to the Bristol and Cadiz Dry Lakes, where it would evaporate. Petitioner's salt mining operation at that location would be impacted by the diversion of the groundwater.

In 2010, SMWD entered into an Option Agreement, and Environmental Cost Sharing Agreement (ECSA) with Cadiz for water supply and carry-over storage, and for sharing costs related to CEQA review of the Project.

1 SMWD and the County entered into a June 2011 Memorandum of Understanding (2011
2 MOU) pursuant to CEQA Guidelines section 15051(d). The 2011 MOU established that SMWD
3 would be lead agency, and that the Project's groundwater extractions would be subject to the
4 County's Ordinance. By entering into the 2011 MOU, SMWD agreed to a limited waiver of its
5 immunity by voluntarily submitting the groundwater extractions to the County for review under
6 the Ordinance.

7 One method of complying with the Ordinance is to qualify for an "exclusion" from the
8 permitting requirements for groundwater withdrawals. The Ordinance excludes well operators
9 from permitting requirements if: (1) the operator has developed a [GMMMP] approved by the
10 County consistent with County guidelines; and (2) the County and the operator have executed a
11 memorandum of understanding that requires sharing of groundwater monitoring data and ensures
12 implementation and enforcement of measures set forth in the GMMMP.

13 In May 2012, the County, SMWD, and Cadiz negotiated and entered into an MOU to
14 frame the County's future GMMMP review process under the Ordinance. In connection with
15 consideration of the 2012 MOU, SMWD staff advised SMWD's Board of Directors that "[b]y
16 adoption of the MOU, the District is not committing to project approval. The District will still
17 have the opportunity to review the GMMMP and the Final EIR, prior to consideration for project
18 participation." SMWD approved the MOU at the May 11, 2012 Engineering Committee Meeting
19 and three days later filed a Notice of Exemption (NOE) with the State Office of Planning and
20 Research, stating that the MOU was exempt from CEQA because it did not constitute an
21 "approval" of a "project" under CEQA or the Guidelines.

22 **B. Conclusions**

23 **1. First Cause of Action**

24 The Court finds that SMWD should not have been designated the lead agency for the
25 Project. CEQA's underpinnings of accountability and stewardship support the conclusion that the
26 County should have instead served as lead agency. The County was in the best position to
27 objectively balance the benefits and risks of the project rather than the purchaser of the water,
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1 SMWD . However, based on the applicable law, the Court is unable to conclude that the failure to
2 designate the County as Lead Agency, without more, constitutes a CEQA violation where the
3 SMWD may be considered to have a substantial claim to be the lead agency. *PCL*, 83
4 Cal.App.4th at 904–907; Guidelines §15051(a)&(d); Pub. Resources Code, §21067; Gov. Code,
5 §§53091(d)–(e), 53096; see *Central Delta Water Agency v. State Water Resources Control Bd.*
6 (2004) 124 Cal.App.4th 245.

7 Furthermore, as discussed below, the Court finds that the 2012 MOU did not constitute a
8 commitment by the County to approve a project and therefore CEQA does not apply to the
9 County’s decision to enter the MOU. Accordingly, the Court finds for Respondents and against
10 Tetra on the First Cause of Action.

11 **2. Second Cause of Action: SMWD’s Determination that the 2012 MOU**
12 **Was Exempt From CEQA Review Was Appropriate**

13 The Court finds that SMWD’s decision to enter into the 2012 MOU did not constitute an
14 “approval” of a “project” requiring CEQA review for the following reasons. Applicable law and
15 the record confirm that the MOU was a conditional agreement that did not commit either the
16 County or SMWD to a definite course of action and could not, by itself, result in any potential
17 physical environmental impacts because the MOU is not a physical component of the Project.
18 *Save Tara*, 45 Cal.4th 116, 139; *Cedar Fair*, 194 Cal.App.4th 1150, 1161–66; Pub. Resources
19 Code, §§21000(a), 21065, 21080; Guidelines §15378(a), (c). The 2012 MOU’s purpose was “to
20 establish a process for completing a GMMMP that comports with the County Ordinance and
21 CEQA.” 2:7 (MOU §4(b)). The 2012 MOU merely defined the parameters of the approval to be
22 sought from the County under the Ordinance and set forth the process for how the completion of
23 the details of the GMMMP would be accomplished. 2:6–7 (MOU §3). While the 2012 MOU
24 provided the framework for development of the GMMMP, which defined specific Project
25 activities that would have potential physical impacts, the MOU itself had none.

26 The Court further finds that the 2012 MOU does not commit SMWD to a definite course
27 of action because it contains many conditions that must be fulfilled before the MOU may become
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1 effective, including future compliance with CEQA and the ability to modify mitigation measures,
2 consider alternatives, deny the project, and modify the MOU if needed as a result of CEQA
3 compliance. 2:4, 6, 7 (MOU, Recital G, §§3(b)&(d), 4(a)&(b)); 3:20; see *Cedar Fair*, 194
4 Cal.App.4th at 1165, 1170–74 (court found that approval of a detailed term sheet for a football
5 stadium, which was approved after NOP issued for stadium Draft EIR, was not a CEQA project
6 because the term sheet did not commit a city to a definite course of action or rule out any
7 mitigation measure or alternative). In addition to the express terms of the 2012 MOU, the
8 circumstances surrounding the SMWD’s May 11, 2012 approval, set forth in the administrative
9 record, affirm that the MOU merely establishes a framework and was not an “approval” of a
10 “project.” 3:23–25 (May 11, 2012 staff memorandum); 6:66, 68; 765:47736–37.

11 Accordingly, the Court finds for Respondents and against Tetra on the Third Cause of
12 Action.

13 **3. Third Cause of Action: CEQA Did Not Require SMWD To Prepare an**
14 **Initial Study With Regard to the 2012 MOU**

15 This Cause of Action is substantially the same as the Second and Fourth Causes of Action
16 and therefore this Court incorporates its findings here. Because SMWD’s approval of the 2012
17 MOU was not a “project” requiring CEQA review, SMWD did not fail to conduct an initial study
18 and/or environmental assessment before approving the MOU. Therefore, the Court finds for
19 Respondents and against Tetra on the Third Cause of Action.

20 **4. Fourth Cause of Action: SMWD Did Not Defer Environmental**
21 **Analysis When It Approved the 2012 MOU**

22 This Cause of Action is substantially the same as the Second and Third Causes of Action
23 and therefore, this Court incorporates its findings from the Second and Third Causes of Action
24 here. Because SMWD’s approval of the 2012 MOU was not a “project” requiring CEQA review,
25 SMWD did not improperly defer environmental analysis. Therefore, the Court finds for
26 Respondents and against Tetra on the Fourth Cause of Action.

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5. Fifth Cause of Action: The MOU Did Not Improperly Amend the County's Groundwater Management Ordinance Nor Did It Violate the Ordinance

The Ordinance does not require that the 2012 MOU and GMMMP be approved in any particular order, as the plain language of the Ordinance includes no such requirement. 122:11314 (Ord. § 33.06552(b)). Therefore, approval of the 2012 MOU before consideration of the GMMMP, which was still under development, was appropriate and complied with the Ordinance. 2:6 (MOU §3(a)&(b)); 3:23–25, 39. Further, the 2012 MOU fulfilled the Ordinance's only two requirements pertaining to groundwater MOUs: first, that the parties share groundwater monitoring information and data and coordinate their efforts to monitor groundwater resources in the County; and second, that the measures identified in any County-approved groundwater management, monitoring and mitigation plan will be fully implemented and enforced. 2:7, 8 (MOU §§3(h), 4(a), 7). The Ordinance does not require the MOU to set *any* substantive parameters for groundwater extraction, provided that it meets the foregoing requirements. 122:11314 (Ord., §33.06552(b)).

The Court finds that the MOU was consistent with the Ordinance. Groundwater extractions are excluded from the Ordinance by well operators that (1) enter into an enforceable MOU with the County; and (2) institute a County-approved GMMMP that is consistent with County Guidelines. 122:11314 (Ord. § 33.06552(b)). The Ordinance unambiguously states that it "shall not apply to any well" that qualifies under the Ordinance's exclusion provisions. *Id.* Though the decision to approve a GMMMP or grant an exclusion was not yet before the County when the 2012 MOU was approved, the MOU was intended to satisfy the first element of the Ordinance's exclusion provisions. 2:4, 7 (MOU Recitals F, H, and § 4(a)). Where a well operator proceeds under an exclusion, the Ordinance's definitions are not controlling. See 2:7 (MOU § 4(a)); 122:11314 (Ord. § 33.06552(b)). The Court is not persuaded that the 2012 MOU is inconsistent with California groundwater law and its concepts of "temporary surplus," "overdraft," and "safe yield." Overdraft and the amount of temporary surplus available in a

1 particular basin are not rigid concepts, however, and are determinations that must be considered
2 "in light of the facts of [each] case." *City of Los Angeles v. City of San Fernando* (1975) 14
3 Cal.3d 199, 280.

4 Further, the 2012 MOU did not itself authorize any extraction of groundwater or any other
5 physical action. 122:11314 (Ord. § 33.06552(b)); 2:7 (MOU § 4(a)). The Court therefore finds
6 that, with regards to the application of certain terms under California water law, Tetra has not met
7 its burden to show that SMWD's approval of the 2012 MOU failed to follow the law or that it
8 was entirely lacking in evidentiary support. The terms and conditions of the 2012 MOU are
9 consistent with principles of California groundwater law, including Article X, section 2 of the
10 California Constitution and the state's policy of achieving "maximum beneficial use of water and
11 prevention of waste, unreasonable use and unreasonable method of use." *Erickson v. Queen*
12 *Valley Ranch Co.* (1971) 22 Cal.App.3d 578, 584-585; *San Fernando*, 14 Cal.3d at 105.

13 The Court accordingly finds for Respondents and against Tetra on the Fifth Cause of
14 Action.

15 **C. Relief**

16 Having found against Tetra on all of its causes of action, the Court denies the Petition in
17 its entirety and all forms of relief requested by Tetra.

18 Dated: AUG 20 2014



19 _____
20 Gail A. Andler
21 Judge of the Superior Court