

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

MINUTE ORDER

DATE: 08/20/2014

TIME: 03:42:00 PM

DEPT: CX101

JUDICIAL OFFICER PRESIDING: Gail A. Andler

CLERK: Mary White

REPORTER/ERM: None

BAILIFF/COURT ATTENDANT:

CASE NO: **30-2012-00612947-CU-TT-CXC** CASE INIT.DATE: 11/15/2012

CASE TITLE: **Center for Biological Diversity vs. County of San Bernardino**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Toxic Tort/Environmental

EVENT ID/DOCUMENT ID: 72012020

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.

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Page 1
Calendar No.

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

CENTER FOR BIOLOGICAL
DIVERSITY, NATIONAL PARKS
CONSERVATION ASSOCIATION, SAN
BERNARDINO VALLEY AUDUBON
SOCIETY AND SIERRA CLUB, SAN
GORGONIO CHAPTER,

Petitioners,

v.

COUNTY OF SAN BERNARDINO,
BOARD OF SUPERVISORS OF
COUNTY OF SAN BERNARDINO,
SANTA MARGARITA WATER
DISTRICT, AND SANTA MARGARITA
WATER DISTRICT BOARD OF
DIRECTORS,

Respondents.

CADIZ, INC., and FENNER VALLEY
MUTUAL WATER COMPANY, et al.

Real Parties in Interest.

Case No. 30-2012-00612947-CU-TT-CXC
Judge: Gail A. Andler, Dept. CX-101

STATEMENT OF DECISION (CBD EIR)

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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).

On August 31, 2012, Center for Biological Diversity, National Parks Conservation Association, San Bernardino Valley Audubon Society and Sierra Club-San Geronio Chapter (collectively CBD) filed a Verified Petition for Writ of Mandate (Petition) challenging SMWD's certification of the environmental impact report (EIR) for the Cadiz Valley Water Conservation, Recovery and Storage Project (Project) and approval of the Project.

II. FINDINGS OF FACT AND CONCLUSION OF LAW

Upon due consideration of the Administrative Record, the trial and letter 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 manage and use groundwater from the aquifer system underlying Cadiz's property in California's eastern Mojave Desert, 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.

The Project proposes to pump an average of 50,000 acre-feet per year (AFY) of groundwater that otherwise would be evaporated over a 50-year period and to provide this water to southern Californians through water providers like Cadiz's Project partner, SMWD, and other entities. The aquifer underlying Cadiz's 34,000 acre property contains between 17 and 34 million

1 acre-feet (MAF) of fresh water, most of which is currently unused.

2 In 2009, after southern California experienced water supply shortages as well as
3 decreasing reliability of supplies, Cadiz began to explore a conservation and groundwater storage
4 project in this area. Cadiz used updated modeling techniques based on site-specific studies to
5 quantify available water supplies in the basin. The models concluded long-term average recharge
6 in the Project area was 32,000 AFY; this result was confirmed by a study that measured actual
7 evaporation rates on the Dry Lakes. The Project is designed to situate wells on Cadiz's property
8 so that they intercept the groundwater and capture it before it reaches the highly saline brine, thus
9 minimizing the natural loss of groundwater to evaporation at the Dry Lakes. Once implemented,
10 the public-private partnership Project would actively manage the groundwater and conserve
11 groundwater that would otherwise evaporate, and recover this water for beneficial use throughout
12 southern California.

13 The regional, multi-jurisdictional water supply project was formulated in two phases:
14 Phase 1 (Conservation and Recovery) and Phase 2 (Imported Storage). Phase 1 would capture an
15 average of 50,000 AFY of groundwater from a wellfield located on Cadiz's property and deliver
16 it via a 43-mile underground pipeline to be built within an active railroad right-of-way (ROW), to
17 a tie-in to MWD's Colorado River Aqueduct allowing for delivery to water users throughout
18 southern California.

19 SMWD entered into an Option Agreement, and Environmental Cost Sharing Agreement
20 with Cadiz for Project water supply and carry-over storage, and for sharing costs related to CEQA
21 review of the Project.

22 SMWD prepared an EIR to evaluate the Project, including a draft Groundwater
23 Management, Monitoring and Mitigation Plan (GMMMP) designed to manage the groundwater
24 extractions, and intended by Cadiz and SMWD to satisfy the requirements of the County Desert
25 Groundwater Management Ordinance (Ordinance). The Draft EIR analyzed Phase 1 at a project
26 level and analyzed Phase 2 at a programmatic level. On July 31, 2012, SMWD's Board of
27 Directors voted to certify the FEIR as complying with CEQA and approved the Project. On the
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1 same day, SMWD approved the Purchase and Sale Agreement and the Updated GMMMP, and
2 adopted CEQA Findings, Statement of Overriding Considerations and a Mitigation Monitoring
3 and Reporting Program Report (MMRP). .

4 **B. Conclusions**

5 As to the various sub-issues within CBD's single cause of action alleging various CEQA
6 violations, the Court makes the following findings:

7 **1. SMWD as Lead Agency**

8 The Court finds that SMWD should not have been designated the lead agency for the
9 Project. CEQA's underpinnings of accountability and stewardship support the conclusion that the
10 County should have instead served as lead agency. The County was in the best position to
11 objectively balance the benefits and risks of the project rather than the purchaser of the water,
12 SMWD . However, based on the applicable law, the Court is unable to conclude that the failure to
13 designate the County as Lead Agency, without more, constitutes a CEQA violation where the
14 SMWD may be considered to have a substantial claim to be the lead agency. *PCL*, 83
15 Cal.App.4th at 904–907; Guidelines §15051(a)&(d); Pub. Resources Code, §21067; Gov. Code,
16 §§53091(d)–(e), 53096; see *Central Delta Water Agency v. State Water Resources Control Bd.*
17 (2004) 124 Cal.App.4th 245.

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19 **2. Project Properly Included All Responsible Agencies**

20 CBD did not brief or argue this issue. Failure to brief an issue constitutes waiver of those
21 issues. *Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 685; *Tisher v. Cal. Horse*
22 *Racing Bd.* (1991) 231 Cal.App.3d 349, 361. Therefore, the Court finds for Respondents and
23 against CBD on the second issue.

24 **3. EIR Included An Adequate Description of the Project and the Affected**
25 **Environment**

26 CBD objected to the terms “conservation” and “waste” in the EIR's Project Objectives,
27 claiming they are misleading, and are used in a way that is inconsistent with their “accepted use”
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1 under the Water Code, in State Water Resource Control Board (SWRCB) decisions, case law and
2 other statutes. OB at 18–21. Despite its language preference, CBD points to no portion of the
3 record showing that anyone was ever confused by the nature of the Project or that the EIR failed
4 to consider the entire Project or its potential impacts due to the EIR’s use of the term
5 “conservation.” Therefore, the Court finds no error or inconsistency under CEQA.

6 The Court finds that the EIR’s use of these terms complies with CEQA. CBD’s objection
7 based on the terms’ use in contexts outside of CEQA is irrelevant in this CEQA challenge.
8 CEQA requires that a project be fully, adequately and clearly described to “provide decision-
9 makers with information which enables them to make a decision which intelligently takes account
10 of environmental consequences.” *Dry Creek Citizens Coalition v. County of Tulare* (1999) 70
11 Cal.App.4th 20, 26.

12 Further, the Project’s fundamental purpose of saving and putting to beneficial use
13 substantial quantities of groundwater that are wasted and lost to evaporation is consistent with
14 existing law and policy. 9:465–66; Cal. Const., art. X, §2; *Joslin v. Marin Municipal Water*
15 *District* (1967) 67 Cal.2d 132, 140; see, e.g., *In the Matter of Application 31212*, SWRCB Order
16 WR 2008-0013-DWR (2008); *In the Matter of License 7354, License 12624, and Permit 21809*,
17 SWRCB Order WR 2008-0037-DWR (2008); *In the Matter of Permit 16762*, SWRCB Order WR
18 2006-0017 (2006). The Project Description, including Project Objectives and Title, fully disclose
19 the scope and nature of the Project, and consistently use and explains the terms “conservation”
20 and “waste” as employed in the Project Objectives. 9:395–96, 439, 462, 465–66, 470; see, e.g.,
21 9a:787, 830–40, 841–56; 14:4195–97. The record demonstrates through the modeling that
22 without the Project 1.36 MAF of water would have evaporated over 50 years and 2.2 MAF over
23 100 years (savings continue even after pumping stops). 12c:3297–99; 15:4733. By strategically
24 managing groundwater levels, the record also shows that the Project puts this water to beneficial
25 use before it is lost or “wasted” through evaporation 9:466; 12c:3300; 14:4195–97.

26 CBD also incorrectly argued that the Project does not ensure Project extractions will be
27 limited to 50,000 AFY over a 50-year term. OB at 21–24. The Court finds that the EIR’s project
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1 term and withdrawal rate are accurately described and that the Project will not extract more than
2 an average of 50,000 AFY of groundwater over a 50-year term, which includes the County’s 20%
3 of Project annual yield that is reserved “for the benefit of future San Bernardino County users.”
4 9a:853; 14:4099; 15a:5068. Accordingly, the Court finds for Respondents and against CBD on
5 the third issue.

6 **4. EIR’s Analysis Did Not Segment Project**

7 CBD did not brief or argue this issue. Failure to brief an issue constitutes waiver of those
8 issues. *Paulus*, 139 Cal.App.4th at 685; *Tisher*, 231 Cal.App.3d at 361. Therefore, the Court
9 finds for Respondents and against CBD on the fourth issue.

10 **5. EIR Adequately Described the Project’s Impacts**

11 CBD argued the EIR and MMRP approved by SMWD does not (1) adequately analyze
12 significant project impacts of long term aquifer drawdown, (2) include feasible mitigation or
13 effective enforcement mechanisms, (3) properly apply groundwater law principles and definitions
14 from the Ordinance; and (4) adequately analyze and mitigate impacts to the desert kit fox. OB at
15 24–42.

16 First, the Court finds that the EIR properly concluded that the Project will not
17 substantially deplete the aquifer or interfere with groundwater recharge and no mitigation was
18 required. Under CEQA, project impacts are measured against a threshold of significance, and
19 Appendix G of the Guidelines, which the Project used, is a commonly accepted method to define
20 the standard of significance in an EIR. See *Oakland Heritage Alliance v. City of Oakland* (2011)
21 195 Cal.App.4th 884, 896–97. The CEQA threshold of significance does not establish a
22 maximum permissible water level drawdown, or a temporal limitation on water level recovery
23 rates. Instead, it presents an “effects-based” test. Guidelines §15064(b). CBD’s claim that the
24 basin will be substantially depleted because the Project will extract more water than the natural
25 recharge rate would require that EIRs set arbitrary minimum water drawdown levels and reach
26 significance conclusions regardless of the actual impacts (or lack thereof) to other legal users of
27 water, the environment, or surface land uses. OB at 35:1–17. This is contrary to CEQA. The
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1 Court finds that the EIR correctly applied Appendix G's Part IX(b)'s threshold.

2 **The Court also finds that the fact that groundwater extractions may exceed recharge for an**
3 **extended period and result in managed drawdown does not, by itself, constitute a significant**
4 **impact under CEQA.** 9a:844–45, 848. The record details that impacts from drawdown would not
5 be significant with respect to subsidence (9:729–31; 12:2219–20, 2261–62), saline migration
6 (9a:800, 831–835; 12:2218, 2259–60, 2265), air quality with the exception of construction
7 emissions of NOX (9:567–74, 576–577; 11:1567, 1712; 13:3554; 14:4297–98; 14a:4500–01),
8 biological resources (9:582, 605, 625–26, 633–34; 14a:4394–96;), and springs (9a:801, 841–43,
9 855; 12c:3327, 3334–36, 3344–45; 15a:4938–40, 4948–49). The Court also finds that the record
10 demonstrates that any potentially significant impacts to the basin itself—such as saline intrusion
11 or subsidence—would be less than significant or less than significant with mitigation. 9a:797,
12 831-35, 839-40, 843-44, 862; 12:2211, 2215, 2218-20, 2223, 2259-62, 2265-67; 12c:3316, 3320.

13 **Second, the Court finds that the mitigation measures, including those approved in an**
14 **abundance of caution even where the record reflected no significant impacts, satisfy CEQA and**
15 **are effective.** As lead agency, SMWD adopted an MMRP that is fully enforceable, separate and
16 apart from any County approvals or agreements. 8:170–205; 15a:4776–77, 4800; 849:52394.
17 **The measures in the MMRP comply with CEQA's definition of mitigation (Guidelines §15370)**
18 **and contain extensive monitoring requirements, triggering thresholds to provide early warning**
19 **signs of potential impacts, and corrective measures to insure the Project's impacts to the basin**
20 **will remain less than significant should there be any deviation from the modeling results.** 8:195–
21 200; see also 15a:4776–95. **The Court also finds that the EIR properly evaluates the potential**
22 **significant impacts of mitigation measures, such as impacts from monitoring features and from**
23 **providing substitute water and drilling replacement wells.** See e.g., 9:462; 9a:810, 835, 840, 966;
24 14a:4485–86; see also 9:476, 479. Further, the Court finds that the EIR did not defer formulation
25 or evaluation of mitigation measures. 9:515-16; 8:17; *see, e.g.*, 8:172, 176-84, 192-93, 195, 197,
26 200.

27 Third, the Court finds that CBD's claims regarding misused groundwater law terms are
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1 not relevant to this case, which does not involve an adjudication of groundwater rights.
2 Nonetheless, the Project complies with groundwater law principles, including those set forth in
3 Article X, section 2 of the California Constitution, which “declares the state’s policy to achieve
4 maximum beneficial use of water and prevention of waste, unreasonable use and unreasonable
5 method of use” (*Erickson v. Queen Valley Ranch Co.* (1971) 22 Cal.App.3d 578, 584–85) and in
6 the California Supreme Court’s decision in *City of Los Angeles v. City of San Fernando* (1975) 14
7 Cal.3d 199. The Court also finds that there is no conflict between the definitions of safe yield
8 and overdraft in the EIR, MOU and Updated GMMMP and the Ordinance because the
9 Ordinance’s definitions do not apply to extractions, like the Project’s, made under an exclusion
10 from the Ordinance. 168:17616 (Ord. §33.06552(b)). Exclusions are governed by a County-
11 approved GMMMP. *Id.*

12 Fourth, CBD argued that the EIR failed to adequately address and include mitigation
13 measures for the desert kit fox, which it alleged is a protected species. OB at 39–40. The Court
14 finds the EIR discloses potential temporary impacts to the common desert kit fox, which is not a
15 protected species and therefore no specific mitigation is required. 9:589–91; 11:1760-1890,
16 11:1821, 1824. CEQA requires a mandatory finding of significance for impacts on species only
17 where a project “...has the potential to...threaten to eliminate a plant or animal community, [or]
18 substantially reduce the number or restrict the range of an endangered, rare or threatened species
19” Guidelines §15065(a)(1); Guidelines, App. G, subd. IV. The Court finds the Project’s
20 impacts to kit fox do not meet these criteria because kit fox are not endangered, rare or threatened
21 (14a:4401–02) and because the record shows that the Project will only temporarily disturb their
22 habitat during construction, not eliminate the kit fox community. 9:589; 11:1760-1890. The EIR
23 properly concludes that no specific mitigation measures are required for temporary impacts to kit
24 fox. *San Franciscans for Reasonable Growth v. City and County of San Francisco* (1989) 209
25 Cal.3d 1502, 1517; Pub. Resources Code, §21100(b)(3). Accordingly, the Court finds for
26 Respondents and against CBD on the fifth issue.
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6. EIR Adequately Analyzed Alternatives

The record shows that the range and discussion of alternatives in the EIR complies with CEQA, and therefore the Court finds that the EIR considered a reasonable range of alternatives. CEQA does not require an EIR to consider every conceivable project alternative and selection of alternatives is subject only to a rule of reason. Guidelines §15126.6(a), (f); *Citizens of Goleta Valley v. Bd. of Supervisors of Santa Barbara County* (1990) 52 Cal.3d 553, 566.

The record shows that the EIR reviewed eleven potential alternatives and properly eliminated five, including the “Average Natural Recharge Rate Alternative,” during the scoping process because they did not meet the Project’s basic objectives or fundamental purpose, did not significantly reduce impacts resulting from the Project, or were infeasible. 9a:1084–93; see *In re Bay-Delta Programmatic Environmental Impact Report Coordination Proceedings* (2008) 43 Cal.4th 1143, 1165; *Cal. Oak Foundation*, 188 Cal.App.4th at 277. The Court finds that SMWD properly exercised its discretion to select the remaining alternatives which were examined in detail, and the record disclosed the reasons for including them. Guidelines §15126.6(a). In addition to the mandatory No Project Alternatives (9a:1099–1105), the EIR analyzed six other alternatives that would implement most Project objectives and lessen impacts. The EIR devotes more than 50 pages to analyzing whether those alternatives met CEQA’s criteria to “avoid or substantially lessen the significant effects of the Project, while still achieving the primary Project objectives,” as well as comparing the alternatives’ impacts to the Project, by an impact-to-impact comparison. Guidelines §15126.6(e)(3)(A); 9a:1081–131. Nothing else was required. Accordingly, the Court finds for Respondents and against CBD on the sixth issue.

7. EIR’s Response to Comments Was Adequate

CBD did not brief or argue this issue. Failure to brief an issue constitutes waiver of those issues. *Paulus*, 139 Cal.App.4th at 685; *Tisher*, 231 Cal.App.3d at 361. Therefore, the Court finds for Respondents and against CBD on the seventh issue.

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8. SMWD Was Not Required to Include Terms of MOU in and Recirculate EIR

CBD did not brief or argue this issue. Failure to brief an issue constitutes waiver of those issues. *Paulus*, 139 Cal.App.4th at 685; *Tisher*, 231 Cal.App.3d at 361. Therefore, the Court finds for Respondents and against CBD on the eighth issue.

9. Project’s CEQA Findings Were Supported By Substantial Evidence

CBD did not brief or argue this issue. Failure to brief an issue constitutes waiver of those issues. *Paulus*, 139 Cal.App.4th at 685; *Tisher*, 231 Cal.App.3d at 361. Therefore, the Court finds for Respondents and against CBD on the ninth issue.

To the extent that CBD’s claim that the EIR’s analysis and mitigation for hydrological impacts can be interpreted as being in support of its ninth issue, this Court rejects CBD’s arguments as to that issue and incorporates its findings as to the fifth issue here. The Court also finds that the record shows that localized and temporary drawdown of groundwater levels under Cadiz’s property will not result in a significant adverse impact to the basin. 9a:797, 828-29, 842, 845-53; 12:2216-20, 2327-2337. Ultimately, the fact that groundwater extractions may exceed recharge for an extended period does not, by itself, constitute a significant impact. 9a:844-45, 848. Modeling results show that groundwater levels will return to prior levels after the Project concludes. 9a:848. Accordingly, the Court finds the EIR’s findings were supported by substantial evidence.

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10. Project’s Statement of Overriding Considerations Was Supported By Substantial Evidence

CBD did not brief or argue this issue. Failure to brief an issue constitutes waiver of those issues. *Paulus*, 139 Cal.App.4th at 685; *Tisher*, 231 Cal.App.3d at 361. Therefore, the Court finds for Respondents and against CBD on the tenth issue.

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C. Relief

Having found against CBD on its First Cause of Action containing ten separate CEQA issues, the Court denies CBD's requests for declaratory and injunctive relief.

III. CONCLUSION

Having found for Respondents and against CBD on all ten CEQA issues, the Court finds for Respondents and against CBD on the First Cause of Action.

Dated: AUG 20 2014



Gail A. Andler
Judge of the Superior Court