

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

**MINUTE ORDER**

DATE: 08/20/2014

TIME: 03:02:00 PM

DEPT: CX101

JUDICIAL OFFICER PRESIDING: Gail A. Andler

CLERK: Mary White

REPORTER/ERM: None

BAILIFF/COURT ATTENDANT:

CASE NO: **30-2013-00633936-CU-TT-CXC** CASE INIT.DATE: 02/22/2013

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

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

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EVENT ID/DOCUMENT ID: 72011963

**EVENT TYPE:** Chambers Work

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**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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SUPERIOR COURT 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; and  
BOARD OF SUPERVISORS OF COUNTY  
OF SAN BERNARDINO,

Respondents.

CADIZ, INC.; FENNER VALLEY  
MUTUAL WATER COMPANY; and  
SANTA MARGARITA WATER  
DISTRICT,

Real Parties in Interest.

CASE NO. 30-2013-00633936 (CEQA)

Assigned for All Purposes to the  
Honorable Gail A. Andler

**STATEMENT OF DECISION**

**STATEMENT OF DECISION**

**I. PROCEDURAL HISTORY**

CBD filed a Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief (Petition) on November 1, 2012, challenging the County’s October 2012 approvals related to the Cadiz Valley Water Conservation, Recovery and Storage Project (Project), including the

1 County's approvals as a responsible agency under the California Environmental Quality Act  
2 (CEQA) and as the entity responsible for implementing its own Desert Groundwater Management  
3 Ordinance (Ordinance).

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

## 7 **II. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

8 Upon due consideration of the Administrative Record, the trial briefs of the parties, and  
9 the oral arguments of counsel, the Court finds as follows:

### 10 **A. Factual Background**

11 The County's Ordinance was designed to "encourage reasonable and beneficial water use"  
12 (61:5923) and allows groundwater extractions with a County-issued permit or "as otherwise excluded"  
13 from the application of the Ordinance. 62:5932 (Ord. §33.06554(a)). The Ordinance "shall not apply"  
14 to any well operator where the operator has executed an enforceable Memorandum of Understanding  
15 (MOU) with the County and "developed and instituted a County-approved groundwater  
16 management, monitoring and mitigation plan [GMMMP] associated with its extraction of water  
17 that is consistent with guidelines developed by the County." 62:5929 (Ord. §33.06552(b)).  
18 Except for the requirement that the GMMMP be consistent with County-issued guidelines, the  
19 Ordinance does not state what procedures or criteria the County must apply in approving a  
20 GMMMP for an exclusion. *Id.*

21 The Project is a public-private partnership designed to manage and use water from the aquifer  
22 system underlying Cadiz's property in California's eastern Mojave Desert. Under current natural  
23 hydro-geologic conditions, surface and groundwater flow from all four of the watersheds near the  
24 proposed Project and drain into the Bristol and Cadiz Dry Lakes, mix with the brine water, and  
25 evaporate. The Project proposes using wells to intercept the groundwater and capture it before it  
26 reaches the highly saline brine. *Id.* Once captured, the groundwater would then be distributed to  
27 southern California water users through water providers like SMWD, among others. SMWD served as  
28 the lead agency for CEQA review of the Project, pursuant to a 2011 Memorandum of Understanding

1 (2011 MOU) between the County and SMWD. See Cal. Code Regs., title 14, State CEQA Guidelines  
2 (Guidelines) §15051(d). The 2011 MOU also provided that the Project would be subject to the  
3 County's discretionary review, under the Ordinance and as a responsible agency, of the Project's  
4 groundwater pumping. 291:7913, 7915 (2011 MOU §§2, 7).

5 In December 2011, SMWD released a Draft EIR for the Project. The Draft EIR included  
6 a draft of the GMMMP and noted that, consistent with CEQA, that the GMMMP would  
7 ultimately be submitted to the County, a responsible agency for the Project, for its review and  
8 approval under the Ordinance. Also fulfilling its obligations under CEQA, SMWD consulted  
9 with the County regarding the content of the GMMMP.

10 On May 1, 2012, the County Board of Supervisors approved an MOU (2012 MOU) by and  
11 among SMWD, Cadiz, and the County. The 2012 MOU contained parameters for development of the  
12 GMMMP and for the County's enforcement of the GMMMP if that document were to be adopted. The  
13 2012 MOU provided that if and when the GMMMP was approved, the County would ensure that the  
14 measures in the GMMMP were fully implemented and enforced and that the MOU would remain  
15 enforceable.

16 The SMWD Board of Directors certified a Final EIR for the Project in July 2012, which  
17 included an updated GMMMP. In August 2012, SMWD submitted the GMMMP to the County for its  
18 consideration under the Ordinance. On October 1, 2012, the County Board of Supervisors held a  
19 special meeting and voted to (1) approve the EIR as a responsible agency; (2) approve the GMMMP  
20 under the Ordinance; and (3) grant an exclusion from the Ordinance.

## 21 **B. Discussion**

### 22 **1. First Cause of Action: Approval of GMMMP Complied with County** 23 **Desert Groundwater Management Ordinance**

24 CBD argued that the County's approval of the GMMMP and decision to grant an  
25 exclusion from the Ordinance to the Project violated the Ordinance in three ways. First, it alleged  
26 that the County approved the MOU and GMMMP in the wrong order, and that, therefore, the  
27 MOU could not ensure that the GMMMP's terms would be implemented and enforced. Second,  
28 it asserted that the definition of terms such as "overdraft," "safe yield," and "aquifer health" in the

1 GMMMP conflict with the applicable definitions of those terms in the Groundwater Ordinance.  
2 Third, it contended that the County “unlawfully expanded” the concept of “temporary surplus” as  
3 that term is understood in California water law.

4 The Court finds that the Ordinance does not require the County to approve the 2012 MOU  
5 and GMMMP in any particular order, as the plain language of the Ordinance includes no such  
6 requirement. 62:5929 (Ord., §33.06552(b)). The Ordinance requires only that for a well to be  
7 excluded from the Ordinance, the well operator must enter into an enforceable MOU “and”  
8 develop and institute a County-approved GMMMP. 62:5929 (Ord. §33.06552(b)(2)); *MacIsaac*  
9 *v. Waste Management Collection & Recycling, Inc.* (2005) 134 Cal.App.4th 1076, 1083. The  
10 plain language of the Ordinance does not contain a sequencing requirement, and the Court cannot  
11 impose this requirement based on policy justifications not appearing in the language itself. *In re*  
12 *Cabrera* (2013) 55 Cal.4th at 692-93; see also *Yamaha Corp. of America v. State Bd. of*  
13 *Equalization* (1998) 19 Cal.4th 1, 22. Further, the timing of the 2012 MOU and GMMMP  
14 approvals does not impair the enforceability of those documents, as the County conditioned the  
15 2012 MOU’s effectiveness on the possibility that it would later approve a GMMMP, and  
16 specifically provided for the enforceability of both documents if approved. 7:12; 772:9529-31,  
17 9535 (2012 MOU §§3, 4, 7 & 25). The 2012 MOU therefore satisfied the Ordinance’s only  
18 requirement. 62:5929 (Ord. §33.06552(b) (2)); see Civ. Code, §1438; *L.A. Athletic Club v. Bd. of*  
19 *Harbor Comrs. of L.A.* (1933) 130 Cal.App. 376, 387; *Frankel v. Bd. of Dental Examiners* (1996)  
20 46 Cal.App.4th 534, 550.

21 The Court further finds that the County’s use of the terms “temporary surplus,” “overdraft,”  
22 “safe yield” and “undesirable result” was consistent with the Ordinance and with California  
23 groundwater law. The Ordinance protects “the groundwater resources of San Bernardino County in  
24 order to ensure the health of that resource,” and is intended to be consistent with California Constitution  
25 Article X, section 2’s directive to maximize the beneficial use of water resources while preventing  
26 waste. (Ord. §33.06551(c)). The Ordinance unambiguously states that it “shall not apply to any well”  
27 where the well operator (1) enters into an enforceable MOU with the County; and (2) institutes a  
28 County-approved GMMMP that is consistent with County Guidelines. (Ord. §33.06552(b)). Because

1 the challenged Project proceeded under an exclusion from the Ordinance, the definitions of the  
2 Ordinance are not controlling. The County's authority to grant an exclusion is within its discretion to  
3 tailor groundwater regulation to the unique needs of its jurisdiction and to particular aquifers. See  
4 *Baldwin v. County of Tehama* (1994) 31 Cal.App.4th 166, 182. Further, CBD did not present evidence  
5 that the GMMMP was inconsistent with the County's Guidelines, and compliance with those  
6 Guidelines was the only requirement necessary for the GMMMP to be approved under the Ordinance.  
7 (Ord. §33.06552(b) (1))

8       The Court further finds that the County's approval of the GMMMP did not unlawfully expand  
9 the concept of temporary surplus, and the record shows the GMMMP's use of the terms "overdraft,"  
10 "safe yield" and "undesirable result" comport with California water law and the Ordinance. CBD's  
11 argument is based on the notion that the California Supreme Court's decision in *City of Los Angeles v.*  
12 *City of San Fernando* (1975) 14 Cal.3d 199 (*San Fernando*) established a rigid template for application  
13 of these terms. State law mandates that managing groundwater, unlike surface waters, is a matter for  
14 local control based on local conditions. *Baldwin v. County of Tehama, supra*, 31 Cal.App.4th at 182.  
15 The law does not require the maintenance of a particular groundwater level, nor does it require a specific  
16 method of basin management. See, e.g., *City of Lodi v. East Bay Mun. Utility Dist.* (1936) 7 Cal.2d 316,  
17 340-41 (*City of Lodi*); *City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 288-89. Overdraft and  
18 the amount of surplus groundwater available for appropriation in a particular basin are determinations  
19 that must be considered "in light of the facts of [each] case." *San Fernando*, 14 Cal.3d at 280. Case-  
20 and fact-specific water management is further evident in the numerous cases acknowledging that a trial  
21 court shoulders the equitable obligation to pursue a management plan (or "physical solution") to  
22 facilitate the maximum beneficial use and prevention of waste or unreasonable use of the state's water  
23 resources as required by Article X, section 2 of the California Constitution. *City of Lodi*, 7 Cal.2d at  
24 341; *Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.* (1935) 3 Cal.2d 489, 573-74; *Erickson v. Queen*  
25 *Valley Ranch Co.* (1971) 22 Cal.App.3d 578, 584-85; see also *Joslin v. Marin Municipal Water Dist.*  
26 (1967) 67 Cal.2d 132, 140-41 (reasonable use determined on a case-by-case basis).

27       The Court finds that CBD has failed to meet its burden under the arbitrary and capricious  
28 standard to show either that the County failed to follow the law or that the GMMMP is entirely lacking

1 in evidentiary support. The record demonstrates that the County's use and application of the terms  
2 "temporary surplus," "overdraft," "safe yield" and "undesirable result" are consistent with California  
3 groundwater law and the Ordinance and satisfy the constitutional mandate to put the waters of the State  
4 to maximum beneficial use to the extent capable. The record also supports the County's conclusion that  
5 the Project, with the protections included in the GMMMP, will prevent waste and unreasonable use of  
6 water without causing undesirable results for other legal users of water, the environment, or other public  
7 interests, consistent with the requirements of Article X, section 2, and the County's Ordinance. (Ord. §  
8 33.06551(c)). Specifically, the GMMMP includes terms and conditions that will enable the County to  
9 take additional action in the future if necessary to prevent overdraft or other undesirable results. Under  
10 the terms of the GMMMP, such actions may include reduction or cessation of Project-related  
11 groundwater pumping.

12 For the foregoing reasons, the Court finds for Respondents and against CBD on the First  
13 Cause of Action.

14 **2. Second Cause of Action: GMMMP Approval Did Not Constitute**  
15 **Improper Amendment of County Ordinance**

16 CBD further argued that the County's GMMMP approval was an illegal amendment to the  
17 Ordinance because it used different definitions of terms also found in the permitting section of the  
18 Ordinance, specifically, that the term "overdraft" in the GMMMP includes the concept of  
19 temporary surplus. The 2011 and 2012 MOUs require the parties to comply with the Ordinance.  
20 (2011 MOU §7); (2012 MOU Recitals F & H, and §§3, 4, & 7). But, as discussed above, the  
21 record confirms that the Project proceeded under the exclusion provisions of the Ordinance.  
22 Administrative Record, 7:10, 12; 15:4633-46; 772:9522-23. To the extent that this argument can  
23 be viewed as supporting CBD's First Cause of Action, the Court finds that the County did not  
24 amend its own Ordinance; rather, the Ordinance unambiguously states that it "shall not apply" to  
25 extractions when the well operator (1) enters into an enforceable MOU with the County; and (2)  
26 institutes a County-approved GMMMP that is consistent with County Guidelines. (Ord.  
27 §33.06552(b)). Because the challenged Project proceeded under an exclusion from the  
28 Ordinance, the definitional section of the Ordinance is not controlling. For the foregoing reasons,

1 the Court finds for Respondents and against CBD on the Second Cause of Action.

2 **3. Third Cause of Action: No CEQA Violation For Designation of**  
3 **SMWD as Lead Agency**

4 In its Third Cause of Action, CBD alleged that the County should have acted as the “lead  
5 agency” in approving the EIR. This claim should have been and was raised by CBD in the earlier  
6 related action challenging the EIR, *Center for Biological Diversity v. Santa Margarita Water*  
7 *District*, Orange County Superior Court Case No. 30-2012-00612947. CEQA claims that should  
8 have been brought in an earlier action are barred by the statute of limitations in future actions.  
9 Pub. Resources Code, §§21167(c), (e); *Committee for Green Foothills v. Santa Clara County*  
10 *Board of Supervisors* (2010) 48 Cal.4th 32, 51-52, 54-57; *Citizens for a Megaplex-Free Alameda*,  
11 149 Cal.App.4th at 109-110.

12 Notwithstanding the law precluding re-litigation of this issue, CBD contended that the  
13 County had the “principal responsibility” for approving the Cadiz Project, including the  
14 groundwater extractions, and thus CEQA required the County, not SMWD, to act as the lead  
15 agency. CBD argued that SMWD’s “decision to act as lead agency eliminated the accountability  
16 that CEQA requires” and that SMWD “could not objectively balance the Project’s benefits and  
17 risks as CEQA requires.” Respondents argued that SMWD was the proper lead agency because  
18 (1) SMWD is the agency that will carry out and has the greatest responsibility for the Project as a  
19 whole; (2) SMWD had approval authority and acted first on the Project; and (3) SMWD had a  
20 “substantial claim” to serve as lead agency and the County therefore properly entered into an  
21 agreement designating SMWD as the lead agency. Respondents’ Joint Opposition Brief at pp.  
22 17-20; see also Pub. Resources Code, §21067; Guidelines, §15051(c) & (d); *Cal. Oak Found. v.*  
23 *Regents of the Univ. of Cal.* (2010) 188 Cal.App.4th 227, 241-42 (Regents acted as lead agency  
24 for University’s own stadium project).

25 The record demonstrates that while the County has regulatory authority over the Project  
26 wellfield, the County will not engineer, design, finance, or construct any Project facilities. 8:26-  
27 29; 15:4638-40; 627:8950-51. Further, it is not uncommon for public agencies to act as the  
28 CEQA lead agency for projects that will have impacts in other jurisdictions. See *County of Inyo*

1 v. *City of Los Angeles* (1977) 71 Cal.App.3d 185; *Planning and Conservation League v. Castaic*  
2 *Lake Water Agency* (2009) 180 Cal.App.4th 210, 240; *City of Marina v. Board of Trustees of*  
3 *CSU* (2006) 39 Cal.4th 341, 359-60; *County Sanitation Dist. No. 2 v. County of Kern* (2005) 127  
4 Cal. App. 4th 1544.

5 Even if the Third Cause of Action were properly before the Court, the Court finds that,  
6 while it has concerns regarding the lead agency designation, it is not persuaded that those  
7 concerns constitute a CEQA violation under existing law because SMWD has a substantial claim  
8 to be the lead agency. See Guidelines, §15051(a) & (d); Pub. Resources Code, §§21005, 21067,  
9 21168.5; Gov. Code, §§53091(d)-(e), 53096; *Central Delta Water Agency v. State Water*  
10 *Resources Control Bd.* (2004) 124 Cal.App.4th 245. Further, CBD has not shown that the  
11 County's actions as a responsible agency amounted to prejudicial error under CEQA. *Neighbors*  
12 *for Smart Rail v. Exposition Line Construction Authority* (2013) 57 Cal.4th 439, 463; *Planning*  
13 *and Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 907.  
14 Accordingly, the Court finds for Respondents and against CBD on the Third Cause of Action.

15 **C. Relief**

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

18  
19 Dated: AUG 20 2014

20  
21 By:   
22 GAIL A. ANDLER  
23 Judge of the Superior Court  
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