Court of Appeal Case No. G051058

IN THE COURT OF APPEAL, STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION THREE

CENTER FOR BIOLOGICAL DIVERSITY, *et al.*
Petitioners and Appellants,

v.

COUNTY OF SAN BERNARDINO, *et al.*
Respondents

CADIZ, INC., *et al.*
Real Parties in Interest

On Appeal from the Superior Court of Orange
The Hon. Gail Andler, Presiding
Orange County Superior Court Case No. 30-2013-00612947

APPLICATION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF ASSOCIATION OF CALIFORNIA WATER AGENCIES (ACWA)

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WATER AGENCIES

TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, APPELLATE DISTRICT, DIVISION	Court of Appeal Case Number: G051058
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APPELLANT/PETITIONER: Center for Biological Diversity, et al. RESPONDENT/REAL PARTY IN INTEREST: County of San Bernardino, et al.	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

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1. This form is being submitted on behalf of the following party (*name*): Association of California Water Agencies

2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

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Full name of interested entity or person	Nature of interest (Explain):
(1)	
(2)	
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(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: August 25, 2015

Andrew Brady
(TYPE OR PRINT NAME)

▶ _____
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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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APPLICATION TO FILE

Pursuant to Rule 8.200(c) of the California Rules of Court, the Association of California Water Agencies ("ACWA"), respectfully requests leave to file the accompanying amicus brief in this proceeding, in support of Defendants and Respondents County of San Bernardino and Board of Supervisors of County of San Bernardino, and Real-Party-in-Interest and Respondent Santa Margarita Water District.

This brief is being submitted by Edward J. Casey and Andrew Brady of Alston & Bird, LLP, on behalf of ACWA. No party or counsel for a party in the pending case authored the proposed amicus brief in whole or part, or made any monetary contribution intended to fund its preparation. Counsel for ACWA are retained on a pro bono basis in this matter.

STATEMENT OF INTEREST AS AMICUS CURIAE

Since 1910, ACWA has served as a non-profit public benefit corporation organized and existing under the laws of the State of California. ACWA is comprised of over 450 public water agencies, including cities, municipal water districts, county water districts, irrigation districts, municipal utility districts, public utility districts, California water districts, and special act districts. ACWA's member agencies manage California's public water systems and provide for the maintenance and beneficial use of

California's water supply, including the production, conservation, treatment, storage, transportation, and distribution of water throughout the state.

ACWA's Legal Affairs Committee, comprised of attorneys representing ACWA member agencies from each of ACWA's ten regional divisions, monitors litigation and has determined that this case involves significant issues affecting ACWA member agencies. Specifically, since ACWA member agencies often act as lead agencies under the California Environmental Quality Act (CEQA) for important water supply and infrastructure projects, they have a keen interest in ensuring that CEQA's standards governing the proper designation of lead agencies are applied in a legally consistent and practical manner in accordance with state policy.

AMICUS BRIEF OF ASSOCIATION OF CALIFORNIA WATER AGENCIES

I. INTRODUCTION

In California, water supply and infrastructure projects are crucial to the state's social and economic prosperity, now more than ever. In November, 2014, the State passed Proposition 1, a $7.5 billion dollar bond measure to fund new water supply and storage projects. (Pub. Res. Code §§ 5096.968 *et seq.*; Water Code §§ 79700 *et seq.*) To further facilitate the development of water projects, Governor Brown issued a state of emergency declaration in January, 2014 that exempted certain water transfer projects from the California Environmental Quality Act (CEQA) due to the ongoing drought.[1] These measures were passed in recognition of the fact that, with population growth, drought, and new environmental challenges, water projects are increasingly fundamental to our state's future.

The size of California water projects varies, from the massive State Water Project and Central Valley Project, to water purchases and wheeling arrangements between agencies in the same county. Many water projects must be carried out outside of an agency's jurisdiction. Regardless of the size or location of a project, the effective management of water resources in California requires collaboration between public agencies. Yet, where there

[1] The Governor's January 17, 2014 drought state of emergency declaration can be read at: http://gov.ca.gov/news.php?id=18379.

are multiple agencies involved in carrying out and approving water projects, disputes may arise regarding which agency should be the lead agency under CEQA.

CEQA, however, has a mechanism to address that situation. Section 15051 of the CEQA Guidelines[2] sets forth criteria for selecting the lead agency where multiple agencies are involved with a project. Further, the Guidelines allow agencies to agree among each other which agency should be the lead agency based on certain factors.

After reviewing Appellant Center for Biological Diversity's (Appellants) briefs regarding CEQA, ACWA is concerned that, if adopted by the Court, the following positions taken by Appellants could have an undue impact on the development of water projects in the future:

- That the proper lead agency for a water project is the agency in whose jurisdiction the majority of the environmental impacts of the project occur. (Appellants' Opening Brief (AOB) at pp. 22-25.)

[2] The CEQA Guidelines are codified at Title 14, Division 6, Chapter 3 of the California Code of Regulations.

- That little to no deference should be accorded to interagency agreements under CEQA Guidelines Section 15051(d). (AOB, pp. 30-31.)

Both positions are incorrect as a matter of law and policy. The first position would effectively read out of CEQA Guidelines Section 15051(a) the language that states that an agency that is carrying out a project outside of its jurisdiction is still the lead agency. Thus, there is no statutory basis for Appellants' position, which could eliminate the ability of agencies to carry out water projects outside their jurisdiction. Regarding the second position, ACWA believes sound policy mandates that courts give deference to interagency agreements under CEQA Guidelines Section 15051(d). To hold to the contrary would result in increased litigation over the lead agency question, which would only delay important water projects needed to ensure that water is available for all of California's citizens. Therefore, ACWA urges the Court to not to adopt the Appellants' positions regarding lead agency determinations in extra-jurisdictional projects.

II. LEGAL ARGUMENT

A. California Water Projects Often Involve Multiple Jurisdictions And Public Agencies

Millions of California's citizens live in locations where native water resources are insufficient to meet their needs. Over the past century, water

projects have supplied that need by importing water to millions of people across the state and creating new sources such as recycled water. These projects are operated at every level of government and often traverse multiple jurisdictions, which requires the collaboration and approval of multiple public agencies.

Some noteworthy projects are operated statewide by the state government, including the State Water Project. The State Water Project consists of 21 dams and reservoirs (including Oroville Dam and Lake Oroville on the Feather River, a tributary of the Sacramento River), five power plants, 16 pumping plants, and 662 miles of aqueduct. *In re Bay-Delta etc.* (2008) 43 Cal. 4th 1143, 1155. Originally approved in 1951, the State Water Project is operated by the Department of Water Resources (DWR), which entered into contracts with 29 agricultural and urban wholesale water suppliers to provide water to local water agencies, who in turn provide the water to 25 million Californians and 750,000 acres of irrigated farmland. *Santa Clarita Organization for Planning the Environment v. County of Los Angeles* (2007) 157 Cal. App. 4th 149, 152.

Water projects in California are also operated by the federal government. California's Central Valley Project (CVP) is the nation's largest water reclamation project and California's largest water supplier. To achieve

its purposes, the CVP operates 21 reservoirs, 11 power plants, and 500 miles of major canals and aqueducts. *In re Bay-Delta etc.,* 43 Cal.4th at 1154, n. 1. The CVP delivers 7 million acre feet of water per year, about 5 million acre feet of which go to farmland, enough to irrigate 3 million acres. To place the figure of 7 million acre feet of water in perspective, a single acre foot of water is roughly 326,000 gallons.

Large extra-jurisdictional water projects are also operated by local government entities. In the *Quantification Settlement Agreement Cases* (2011) 201 Cal.App.4th 758, 788-789, Imperial Irrigation District, Coachella Valley Water District, Metropolitan Water District, and San Diego County Water Authority settled a longstanding disagreement over the quantification and prioritization of rights of 4.4 million acre feet per year of Colorado River water rights. The agreement also involved water transfers between the Imperial Irrigation District and the other three agencies. *Id.*

Smaller scale water projects also involve multiple jurisdictions and agencies. As one example, Castaic Lake Water Agency ("Castaic") entered into an agreement in March, 1999 to purchase a permanent entitlement of 41,000 acre feet of water per year from Wheeler Ridge-Maricopa Water Storage District ("Wheeler Ridge"). Wheeler Ridge received the water from Kern County Water Agency, a State Water Project contractor, which

received the water from the Department of Water Resources. *Planning & Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal. App. 4th 210, 220-221. Thus, this project had to be approved by four separate agencies at every level of state and local government, even though the deal did not involve the construction of new infrastructure.

As demonstrated above, large scale and small scale water projects alike are often carried out over multiple jurisdictions and require multiple government approvals. Often times, as with the *Quantification Settlement Agreement Cases*, agencies carrying out projects do so outside their own jurisdictions. *See Quantification Settlement Agreement Cases*, 201 Cal.App.4th 788-789.

B. CEQA Provides A Mechanism For Deciding Lead Agency Status For Extra-Jurisdictional Projects

As discussed above, water projects that traverse multiple jurisdictions often involve multiple government agencies, which raises the question of which agency should serve as the lead agency and conduct CEQA review. CEQA has a mechanism for resolving that issue. Section 15051 of the CEQA Guidelines sets forth the "Criteria for Identifying the Lead Agency" where two or more public agencies will be involved with a project. Relevant to the matters addressed in this brief, subsections (a) and (d) of Guideline Section 15051 provide as follows:

> (a) If the project will be carried out by a public agency, that agency shall be the lead agency *even if the project would be located within the jurisdiction of another public agency.*
>
> ....
>
> (d) Where the provisions of subdivisions (a), (b), and (c) leave two or more public agencies with a substantial claim to be the lead agency, the public agencies may by agreement designate an agency as the lead agency. An agreement may also provide for cooperative efforts by two or more agencies by contract, joint exercise of powers, or similar devices.

(CEQA Guidelines § 15051 (emphasis added).)

1. Contrary to Appellants' Argument, Agencies Carrying Out Projects Outside Their Jurisdiction Are Allowed to Conduct CEQA Review For Those Projects

Of concern to ACWA is the argument in Appellants' Opening Brief that, based on CEQA's mandate that "informed public participation requires that the proper community be engaged in the process ... and that the agency be fully accountable to that public," CEQA review cannot effectively be carried out by an agency whose project exists outside its jurisdiction because that agency is not "accountable to the public" most affected by the project. (AOB, p. 23.) If such a position were adopted by the Court, it would compromise the ability of water agencies to carry out water projects outside their jurisdiction by taking the ability to conduct CEQA review out of the hands of the agency carrying out the project. Moreover, the argument is plainly contrary to the CEQA Guidelines and case law.

Appellants' argument effectively reads CEQA Guidelines Section 15051(a) out of existence. That provision states that "[i]f the project will be carried out by a public agency, that agency shall be the lead agency *even if the project would be located within the jurisdiction of another public agency*." (CEQA Guidelines § 15051(a) (emphasis added).) Thus, CEQA allows environmental review to be conducted by agencies whose projects extend beyond their jurisdictional boundaries. Further, that same Guideline makes no mention of any exception to that rule for cases where the majority of a project's impacts will occur outside the lead agency's jurisdiction.

Moreover, judicial and regulatory standards under CEQA require lead agencies to prepare environmental documents that fully inform and enable other agencies from affected jurisdictions to render decisions in line with CEQA's mandates. For instance, *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795 involved one of the City of Los Angeles' Owens Lake projects, in which multiple wells would pump groundwater near Owens Lake and then transmit the water to the city via the Los Angeles Aqueduct. The City of Los Angeles prepared the EIR for the project as the lead agency. The propriety of that lead agency status was not questioned by the court. Further, in deciding that the City of Los Angeles was obligated to prepare an EIR that analyzed impacts in Inyo County, the court stated:

> [Inyo] County is the site of the project, the area in which the ecological damage, if any, will occur, and in which reside those citizens most directly concerned by any such adverse effect upon the environment. The answer to the question posed is suggested by the above cited language from *Environmental Defense Fund, Inc. v. Coastside County Water Dist., supra* (27 Cal.App.3d at p. 704) that 'Those who prepare the EIR may not limit their vision by the boundaries of the district, nor by purely physical auxiliaries or obstacles to a project's success which may be found beyond the borders.'

Id. at 810 (quoting *Environmental Defense Fund, Inc. v. Coastside County Water Dist.* (1972) 27 Cal.App.3d 695, 704.)

Thus, a lead agency is not absolved of its duties under CEQA as to environmental impacts outside its jurisdiction. Instead, lead agencies have a duty to produce comprehensive environmental documents that will be of use to other agencies with permitting authority over a proposed project, which are referred to as responsible agencies under CEQA. *Save San Francisco Bay Association v. San Francisco Bay Conservation and Development Commission* (1992) 10 Cal.App.4th 908, 922. To ensure environmental documents are useful to responsible agencies, lead agencies must consult with responsible agencies early in the CEQA process "prior to determining whether a negative declaration or environmental impact report is required." (Pub. Res. Code § 21080.3(a).) For projects requiring EIRs, a lead agency must consult with responsible agencies as to both the "scope" of the draft EIR and its substance. (CEQA Guidelines §§ 15082 (determination of

15086(a)(1) (consultation regarding draft EIR).) Where there are significant environmental impacts within a responsible agency's jurisdiction, the responsible agency may submit to the lead agency proposed mitigation measures. (*See* Pub. Res. Code § 21081.6(c); CEQA Guidelines §§ 15204(f), 15086(d).)

In light of these CEQA requirements, lead agencies are obligated to conduct appropriate analyses requested by responsible agencies. *See, e.g., San Francisco Bay Association, supra*, 10 Cal.App.4th 908 (lead agency [City of San Francisco] properly analyzed full range of alternatives for a project in San Francisco Bay, which is regulated by the Bay Conservation and Development Commission.)

Thus, recognizing that a lead agency's project may extend into other jurisdictions, CEQA establishes a process that takes into account the concerns raised by Appellants herein. Specifically, the lead agency must prepare a CEQA document that analyzes impacts outside of its jurisdiction, and it must do so in close consultation with responsible agencies in those jurisdictions. In the instant case, the trial court found the agencies followed that process, ruling that the roles of the lead and responsible agencies were performed in accordance with CEQA, and a substantial EIR was produced,

reviewed, and certified. The process and the EIR were upheld by the trial court.

ACWA urges the Court to uphold the use of that process in this case and reject Appellants' argument that an agency with an extra-territorial project is precluded from acting as the lead agency because the project's impacts may occur outside that agency's jurisdiction. Appellants would have this court rewrite the express provisions in CEQA Guideline 15051(a), with a consequence that would hinder important water projects throughout California that extend beyond a water agency's jurisdiction. Such a legal position has not been embraced by courts in CEQA challenges to extra-territorial water projects. *See, e.g., Planning & Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal. App. 4th 210, 220-221 (Court denied challenge to the lead agency status of Castaic Lake Water Agency for Kern-Castaic water transfer under CEQA Guidelines Section 15051(a), holding that despite the required approval and expertise of DWR, Castaic was the "prime mover" of the project); *Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4th 859 (a county water agency was lead agency for its project to divert river water outside of its jurisdiction.) Nor should this Court embrace that unfounded legal position in this case.

2. Appellants' Arguments Regarding Interagency Agreements Are Contrary to CEQA And Ignore The Deference That Should Be Accorded To Such Agreements

Recognizing that agencies, including water agencies, carrying out projects beyond their territory may act as the lead agency under CEQA and have a "substantial claim" to that role, any disputes among agencies as to lead agency status must be resolved by the provisions of CEQA Guideline 15051(d). Yet, Appellants' arguments regarding interagency agreements for lead agency status under CEQA Guideline 15051(d) runs contrary to the language and policy of that Guideline. The Appellants' Opening Brief states:

> an improper designation of lead agency is prejudicial error regardless of the technical sufficiency of the environmental review by the improper lead agency... even if SMWD has a "substantial claim" to the lead agency designation ... if that designation violates the informational requirements of CEQA ... it cannot be permitted.

(AOB, at pp. 30-31.)

Appellants' position is in clear contravention of CEQA Guidelines Section 15051(d) and should be rejected by this Court. That provision unequivocally states that where more than one agency has a "substantial claim" to be the lead agency as defined in the provision, the agencies may agree among themselves which agency will act as the lead agency. (CEQA Guidelines § 15051(d).) There is no exception to that rule stated in the

Guidelines that is based on the "informational" requirements of CEQA or any other provision of CEQA. Moreover, the "substantial claim" language in Guideline Section 15051(d) reflects the acknowledgement that the designation of the lead agency is not always clear, that more than one agency can fulfill the criteria under Guideline Section 15051(a)-(c), and that the agencies themselves are in the best position to evaluate their respective claims and resolve them by agreement. *See, e.g., Quantification Settlement Agreement Cases*, 201 Cal.App.4th 788-789 (Rejecting challenge to program EIR where four agencies to water Colorado River water deal served as "co-lead agencies.") Appellants' proffered exception to interagency agreements authorized under Guideline 15051(d) runs contrary to the sound public policy of promoting the early resolution of disputes concerning lead agency status so important public projects may promptly proceed with the environmental review process.

In stark opposition to the position urged by Appellants, the correct approach to Section 15051(d) agreements was taken by the court in *Sierra Club v. West Side Irrigation Dist.* (2005) 128 Cal. App. 4th 690, 700. In that case, the City of Tracy entered into contracts with two irrigation districts to purchase water. The two purchases were treated as separate projects under

CEQA, and pursuant to agreements of parties, the irrigation districts were to serve as lead agencies. Regarding the agreements, the court stated that:

> The Districts also committed no error by serving as lead agencies for their respective projects. Under CEQA regulations, they and the City were qualified to serve as lead agencies. When that situation occurs, the regulations allow the agencies to designate by agreement which entity will serve as lead agency. (CEQA Guidelines, § 15051, subd. (d).) Here, the City and the Districts lawfully agreed each District would serve as lead agency for its own assignment.

128 Cal. App. 4th 690, 700.

Similarly, in *Habitat & Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277, an environmental group challenged a City of Santa Cruz EIR on substantive grounds regarding a project to amend the city's sphere of influence that would allow the city to serve water to a project outside the city. The court noted that both the city and the Local Agency Formation Commission (LAFCO) (which would approve the sphere of influence amendment) had a "credible claim" to be lead agency. *Id.* at 1298. The city and the LAFCO, however, entered into an agreement under CEQA Guidelines Section 15051(d), whereby the city would be the lead agency and the LAFCO would be a responsible agency. While the court did not rule on lead agency agreement, it did accept its validity and noted that under the agreement "The Regents and the City acknowledge that the EIR was required to provide both City decision makers and LAFCO decision makers with

information about the environmental consequences of the decisions that they would be making with regard to the whole project." *Id.*

We urge this Court to reject Appellants' flawed argument that a lead agency designation determined by an agreement between two agencies with a "substantial claim" to lead agency status can be found to be improper based on the ill-defined factors posited by Appellants. ACWA instead urges this Court to determine that interagency agreements under CEQA Guideline 15051(d) deserve substantial judicial deference. For multi-jurisdictional water projects, such deference could be the difference between moving forward with an important water project and years of protracted litigation over the issue of the appropriate lead agency. Avoiding such protracted litigation is the very aim of Guideline 15051(d), and this Court should uphold that policy.

III. CONCLUSION

With the availability of significant bond money for much needed water projects, the next decade promises to be one in which many multi-jurisdictional water projects are initiated. These projects are crucial to California's future, and clear and proper application of CEQA's requirements is critical to their expeditious development.

Accordingly, the legally incorrect assertions advanced by Appellants regarding the determination of the proper lead agency under CEQA Guideline 15051 should be soundly rejected. Under CEQA Guideline 15051, an agency carrying out a project outside its jurisdiction may properly serve as a lead agency, and interagency agreements involving multiple agencies with a substantial claim to lead agency status are permitted, encouraged, and should be given great deference. Therefore, ACWA urges this Court to deny Appellants' arguments to the contrary.

Dated: August 25, 2015

Respectfully submitted,

Edward J. Casey
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FOR

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CERTIFICATION OF WORD COUNT

(California Rule of Court 8.204)

Pursuant to California Rules of Court, Rule 8.204, counsel for Amicus Curiae hereby certifies that the Application to file Amicus Brief and Amicus Brief Contains 4556 words, as counted by the MS Word software used to generate this application.

DATED: August 25, 2015

Respectfully submitted,

FOR

EDWARD J. CASEY

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 333 S. Hope Street, 16th Floor, Los Angeles, CA 90071. My electronic notification address is dana.camacho@alston.com.

On August 25, 2015, I served the foregoing document described as AMICUS BRIEF to the email addresses listed below.

I also served the foregoing document by United States mail in sealed envelopes to the persons listed below. I placed the envelopes for collection and mailing, following ordinary business practices. On the same day that 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.

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I declare under penalty of perjury that the foregoing is true and correct. Executed on August 25, 2015, at Los Angeles, California.

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