

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

MINUTE ORDER

DATE: 08/20/2014 TIME: 03:16:00 PM DEPT: CX101

JUDICIAL OFFICER PRESIDING: Gail A. Andler

CLERK: Mary White

REPORTER/ERM: None

BAILIFF/COURT ATTENDANT:

CASE NO: **30-2012-00594355-CU-WM-CXC**CASE INIT.DATE: 08/28/2012

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

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

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 Decison

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 THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE - CIVIL COMPLEX CENTER

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 POLITICAL
SUBDIVISION OF THE STATE OF
CALIFORNIA; et. al.

Real Parties in Interest.

Case No. 30-2012-00594355-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).

Delaware Tetra Technologies, Inc. (Tetra) filed a Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief (Petition) on August 28, 2012 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 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 acre-feet (MAF) of fresh water, most of which is currently unused. There are only a few scattered

1 residents and two salt mining companies, including Tetra, located in the Project area watersheds.
2 The residents use minimal amounts of groundwater annually, and Tetra uses up to 500 AF of
3 water per year. The groundwater beneath Cadiz's property is confined within a closed basin that
4 ultimately flows downhill to two saline groundwater sinks, the Bristol and Cadiz Dry Lakes. As
5 the water reaches the Dry Lakes, it mixes with the highly saline groundwater and evaporates
6 through the surfaces of the Dry Lakes. In order to intercept groundwater before it flows down to
7 the Dry Lakes, the Project will establish a wellfield on Cadiz's property to pump and lower
8 groundwater levels, and thus establish hydraulic control of the groundwater flow to minimize
9 losses.

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

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

18 SMWD prepared an EIR to evaluate the Project, including the draft GMMMP, which was
19 designed to manage the groundwater extractions. The Draft EIR analyzed Phase 1 at a project
20 level and analyzed Phase 2 at a programmatic level. On July 31, 2012, SMWD's Board of
21 Directors voted to certify the FEIR as complying with CEQA and approve the Project. On the
22 same day, SMWD approved the Purchase and Sale Agreement and the Updated GMMMP, and
23 adopted CEQA Findings, Statement of Overriding Considerations and a Mitigation Monitoring
24 and Reporting Program Report (MMRP).

25 **B. Conclusions**

26 **1. First Cause of Action**

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

11 **2. Second Cause of Action: The EIR's Analysis and Mitigation of Hydrology**
12 **Impacts Complied With CEQA**

13 Tetra claimed that the Draft EIR improperly deferred consideration of the GMMMP by
14 failing to analyze the final GMMMP and improperly deferring mitigation for hydrologic impacts.
15 Based on its review of the record, the Court finds that the EIR properly evaluated all potentially
16 significant impacts of the Project, and adopted appropriate mitigation where necessary to lessen
17 impacts or reduce them to less than significant levels. The mitigation measures in the MMRP
18 comply with CEQA's definition of mitigation (Guidelines §15370) and contain extensive
19 monitoring requirements, triggering thresholds to provide early warning signs of potential
20 impacts, and corrective measures to insure the Project's impacts to the basin will remain less than
21 significant. Tetra has not met its burden because it did not cite to or critique a single mitigation
22 measure in the EIR. *Defend the Bay v. City of Irvine* (2004) 119 Cal. App. 4th 1261, 1266.

23 The Court also rejects Tetra's claim that the EIR improperly deferred mitigation because
24 the "final" GMMMP was approved by the County after SMWD certified the EIR. The County's
25 subsequent actions with regard to the GMMMP are irrelevant to the adequacy of the EIR and the
26 MMRP adopted by SMWD in July of 2012. The County, as responsible agency, may choose to
27 impose monitoring and mitigation provisions more conservative than those required by CEQA
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1 and identified in the EIR. Guidelines §15096(g). As lead agency, SMWD adopted an MMRP
2 that is fully enforceable, separate and apart from any County approvals or agreements. .
3 Accordingly, the Court finds for Respondents and against Tetra on the Second Cause of Action.

4 **3. Third Cause of Action: The Project Was Not Improperly Segmented**

5 Tetra alleged that the Project was improperly segmented because the EIR did not analyze
6 the Project's interconnection with the CRA. The Court finds that there was no project
7 segmentation. As required by CEQA, the EIR analyzed the whole of the Project, including the
8 Project's potential tie-in options to the CRA. The Project Description dedicates five pages to
9 discussion and depiction of the proposed tie-in options for the CRA and provides adequate
10 analysis under CEQA. Accordingly, the Court finds for Respondents and against Tetra on the
11 Third Cause of Action.

12 **4. Fourth Cause of Action: EIR Properly Analyzed Draft GMMMP**

13 Tetra argued that because the GMMMP was the critical component of the Project for
14 understanding long-term groundwater management for the Project, the County-approved
15 GMMMP should have been subject to public review and comment as part of draft EIR process.
16 Tetra contended that the EIR violated CEQA because it only included a draft GMMMP and not
17 the County-approved GMMMP. The Court finds that the GMMMP is just one of the approvals
18 required for the Project, as the Project's groundwater extractions are just one of the Project's
19 components. The Court concludes that the draft GMMMP was properly analyzed in the EIR as a
20 Project design feature and as a future Project approval that would be submitted to the County for
21 review, as a responsible agency, under its Ordinance. The draft GMMMP was not merely a
22 "concept" of the GMMMP, as Tetra argues, but a fully developed and detailed 100-plus page
23 management plan.

24 As lead agency, SMWD had the option of imposing its own mitigation measures through
25 the MMRP or Project design features. See, e.g., *AIR*, 107 Cal.App.4th at 1397–98 (lead agency
26 entitled to make its own determination that mitigation measures would mitigate potential impacts
27 to listed species). The Court finds that there was no error in preparing, analyzing and approving
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1 the Updated GMMMP as a Project design feature, then submitting it to the County for its
2 discretionary review and approval as a responsible agency, particularly where modifications
3 strengthened the protective provisions of the plan. Guidelines §15086. As a responsible agency,
4 the County would review any future changes made to the Updated GMMMP to determine if any
5 subsequent environmental review was required under Public Resources Code section 21166 and
6 Guidelines section 15162, if necessary. The Court finds that consideration of the GMMMP
7 approved by the County was not a requirement of SMWD's environmental review of the Project
8 as a whole, or its approval of the Project. Therefore, the Court finds for Respondents and against
9 Tetra on the Fourth Cause of Action.

10 **5. Fifth Cause of Action: The EIR's Mitigation Measures Comply With CEQA**

11 The Court adopts Respondents arguments that its adoption of the MMRP was adequate
12 mitigation.

13 To the extent that Tetra's claim that the EIR improperly deferred mitigation because the
14 "final" GMMMP was approved by the County after SMWD certified the EIR can be interpreted
15 as being in support of its Fifth Cause of Action, this Court rejects that claim and incorporates its
16 findings as to the Third Cause of Action into the Fifth Cause of Action. To the extent that Tetra's
17 arguments challenging the mitigation for hydrology impacts supports its Fifth Cause of Action,
18 this Court incorporates its findings as to the Second Cause of Action into the Fifth Cause of
19 Action. Therefore, the Court finds for Respondents and against Tetra on the Fifth Cause of
20 Action.

21 **6. Sixth Cause of Action: The EIR's Project Alternatives and Project Objectives**
22 **Comply With CEQA**

23 Tetra did not brief or argue this cause of action. Failure to brief an issue constitutes
24 waiver of those issues. *Paulus*, 139 Cal.App.4th at 685; *Tisher*, 231 Cal.App.3d at 361.
25 Therefore, the Court finds for Respondents and against Tetra on the Sixth Cause of Action.

26 **7. Seventh Cause of Action: The EIR's Analysis and Mitigation of Potential**
27 **Impacts Related to Mineral, Air Quality, Agricultural and Forestry, Biological, and**
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1 **Geology and Soils Resources Complies with CEQA**

2 Tetra did not brief or argue this cause of action as it relates to analysis and mitigation of
3 impacts related to air quality, agricultural and forestry, and biological impacts. Failure to brief an
4 issue constitutes waiver of those issues. *Paulus*, 139 Cal.App.4th at 685; *Tisher*, 231 Cal.App.3d
5 at 361. The Court finds that the analysis and mitigation of potential impacts related to mineral
6 resources (brine migration) and geology and soil resources (subsidence) complies with CEQA.
7 8:1945-97; 8:170- 205; 14:4097, 4104-06, 4112, 4135, 4143-44, 4209-10. The record shows that
8 the Project model analyzed the Project's impacts on potential movement of the freshwater-saline
9 water interface and the amount of potential subsidence. 9:720-36 ; 9a:797, 828; 12:2214-15;
10 12:2251-55. The EIR's mitigation measures include "early warning" monitoring features for brine
11 migration and subsidence and objective, numeric performance standards concerning changes in
12 the brine water levels and land levels, which if exceeded, require corrective actions. 8:191-92;
13 8:202; 9a:902-03. Therefore, the Court finds for Respondents and against Tetra on the Seventh
14 Cause of Action.

15 **8. Eighth Cause of Action: The EIR's Responses to Comments Comply With**
16 **CEQA and No Recirculation Was Required, Further SMWD's Statement of Overriding**
17 **Considerations Complies With CEQA**

18 To the extent that Tetra's argument that the Draft EIR improperly deferred consideration
19 of the GMMMP by failing to analyze the final GMMMP can be viewed as supporting Tetra's
20 Eighth Cause of Action, the Court incorporates its findings from the Second Cause of Action
21 here.

22 Tetra did argue that the Updated GMMMP, with the maximum drawdown floor, rate of
23 decline, and salt water migration distance should have been evaluated in the Draft EIR. To the
24 extent that this argument can be viewed as supporting Tetra's Eighth Cause of Action, the Court
25 finds that the inclusion of the Updated GMMMP in the Final EIR was not significant new
26 information which would trigger the need to recirculate the EIR because the revisions did not
27 alter the analysis or findings in the Draft EIR regarding the potential significant impacts of the
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1 Project, or present any new information that would require recirculation. 8:33–34; Guidelines
2 §15088.5(a)(1)–(4); *Laurel Heights II*, 6 Cal.4th at 1120. Therefore, the Court finds for
3 Respondents and against Tetra on the Eighth Cause of Action.

4 **9. Ninth Cause of Action: The EIR’s Project Description Complies With CEQA**

5 Tetra did not brief or argue this cause of action. Failure to brief an issue constitutes
6 waiver of those issues. *Paulus*, 139 Cal.App.4th at 685; *Tisher*, 231 Cal.App.3d at 361.

7 Therefore, the Court finds for Respondents and against Tetra on the Ninth Cause of Action.

8 **10. Tenth Cause of Action: Project Approvals Issued By SMWD Did Not Require**
9 **NEPA Compliance**

10 Tetra did not brief or argue this cause of action. Failure to brief an issue constitutes
11 waiver of those issues. *Paulus*, 139 Cal.App.4th at 685; *Tisher*, 231 Cal.App.3d at 361.

12 Therefore, the Court finds for Respondents and against Tetra on the Tenth Cause of Action.

13 **11. Eleventh Cause of Action: The Project Approvals Did Not Amend the**
14 **County’s Desert Groundwater Management Ordinance Nor Did They Violate the**
15 **Ordinance**

16 Tetra alleged that the Project violates the Ordinance and the common law because it
17 permits overdraft of the Project aquifers by expanding the Ordinance’s and common law’s
18 definitions of “overdraft” and “temporary surplus.” Tetra also argues that the Project violated the
19 Ordinance because the MOU was entered into before the GMMMP was approved. The Court
20 finds that these claims conflate questions of the sufficiency of the 2012 Memorandum of
21 Understanding (2012 MOU) and GMMMP under the Ordinance with the question of whether the
22 EIR properly considered the potential environmental impacts of the Project (an issue for SMWD,
23 as lead agency, to consider and the subject of the instant lawsuit). The remedy Tetra sought in its
24 Petition is SMWD’s rescission of its July 31, 2012 approvals. Petition, ¶ 4–5; Prayer, ¶ 1(a). It
25 did not allege that the County made any administrative decision as part of the challenged SMWD
26 decisions. As a result, the Court finds that the County is not a proper respondent here, and Tetra’s
27 inclusion of claims concerning compliance with the Ordinance are improper. See *Pinnacle*
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1 *Holdings, Inc. v. Simon* (1995) 31 Cal.App.4th 1430, 1437 (“[I]t is fundamental that a person
2 should not be compelled to defend himself in a lawsuit when no relief is sought against him.”).

3 Even if these claims had been properly raised in the Petition, the Court finds that
4 groundwater extractions are excluded from the Ordinance by well operators that (1) enter into an
5 enforceable MOU with the County; and (2) institute a County-approved GMMMP that is
6 consistent with County Guidelines. 168:17616 (Ord. § 33.06552(b)); 9:453–54. The Ordinance
7 unambiguously states that it “shall not apply to any well” that qualifies under the Ordinance’s
8 exclusion provisions. 168:17616 (Ord. § 33.06552(b)). Because the challenged Project
9 proceeded under an exclusion from the Ordinance, the definitions of the Ordinance are not
10 controlling here. Further, the 2012 MOU fulfilled the Ordinance’s only two requirements
11 pertaining to groundwater MOUs: that the parties share groundwater monitoring information and
12 data and coordinate their efforts to monitor groundwater resources in the County; and that the
13 measures identified in any County-approved Groundwater Management, Monitoring and
14 Mitigation Plan will be fully implemented and enforced. 849:52396–97, 168:17616 (Ord. §
15 33.06552(b)). The Court also finds that contrary to Tetra’s claims, the Ordinance does not
16 require that the County approve a GMMMP and 2012 MOU in any particular order, as the plain
17 language of the Ordinance includes no such requirement. 168:17616 (Ord. § 33.06552(b)).
18 Lastly, the Court finds that Tetra’s claims regarding groundwater law are not relevant to this case,
19 which does not involve an adjudication of groundwater rights. Nonetheless, the Project complies
20 with groundwater law principles, including those set forth in Article X, section 2 of the California
21 Constitution, which “declares the state’s policy to achieve maximum beneficial use of water and
22 prevention of waste, unreasonable use and unreasonable method of use” (*Erickson v. Queen*
23 *Valley Ranch Co.* (1971) 22 Cal.App.3d 578, 584–585) and in the California Supreme Court’s
24 decision in *City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199. For the foregoing
25 reasons, the Court finds for Respondents and against Tetra on the Eleventh Cause of Action.

26 **12. Twelfth Cause of Action: Declaratory Relief**

27 Having found against Tetra on all of its causes of action, the Court denies Tetra’s request
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1 for declaratory relief.

2 **13. Thirteenth Cause of Action: Injunctive Relief**

3 Having found against Tetra on all of its causes of action, the Court denies Tetra's request
4 for injunctive relief.

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7 Dated: AUG 20 2014



Gail A. Andler
Judge of the Superior Court