

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

MINUTE ORDER

DATE: 08/20/2014

TIME: 02:18:00 PM

DEPT: CX101

JUDICIAL OFFICER PRESIDING: Gail A. Andler

CLERK: Mary White

REPORTER/ERM: None

BAILIFF/COURT ATTENDANT:

CASE NO: 30-2013-00636391-CU-WM-CXCCASE INIT.DATE: 02/28/2013

CASE TITLE: **Delaware Tetra Technologies, Inc. vs. County of San Bernardino**

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

EVENT ID/DOCUMENT ID: 72011871

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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CASE
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SAN FRANCISCO, CA 94104-2857

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

DELAWARE TETRA
TECHNOLOGIES, INC., a
Delaware Corporation

Petitioner/Plaintiff,

vs.

COUNTY OF SAN
BERNARDINO; COUNTY OF
SAN BERNARDINO BOARD OF
SUPERVISOR,

Respondent/Defendants.

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

Real Parties in Interest

Case No. 30-2013-00636391 (CEQA)

Assigned for all Purposes to the
Honorable Gail A. Andler

STATEMENT OF DECISION
(COUNTY MOU)

1 **STATEMENT OF DECISION**

2
3 **I. PROCEDURAL HISTORY**

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 and
6 Storage Project (Project).

7 In its Second Amended Petition for Writ of Mandate, Tetra alleged five causes of action
8 against the County, SMWD and Cadiz, including four causes of action asserting California
9 Environmental Quality Act (CEQA) violations.

10 **II. FINDINGS**

11 Upon due consideration of the Administrative Record, the trial briefs of the parties, Requests
12 for Judicial Notice, and the oral arguments of counsel, the Court issues the following decision:

13 **A. Factual Background**

14 Cadiz owns 34,000 acres of land in eastern San Bernardino County's Cadiz and Fenner
15 Valleys, overlying extensive groundwater supplies. The Project is a public-private partnership
16 designed to actively manage the groundwater basin underlying a portion of the Cadiz and Fenner
17 Valleys and capture groundwater that would otherwise flow to the hyper-saline Bristol and Cadiz Dry
18 Lakes and evaporate. Cadiz proposed using wells to intercept the groundwater and capture it before
19 it reaches the highly-saline brine. Once implemented, the Project would extract and sell water for
20 beneficial use throughout southern California.

21 In 2010, SMWD entered into an Option Agreement, and Environmental Cost Sharing
22 Agreement (ECSA) with Cadiz for water supply and carry-over storage, and for sharing costs related
23 to CEQA review of the Project. Respondents' RJN, EXH 1-26; 359:3166.

24 SMWD and the County entered into a June 2011 Memorandum of Understanding (2011
25 MOU) pursuant to CEQA Guidelines section 15051(d). Cal. Code Regs., title 14, State CEQA
26 Guidelines (Guidelines) §15051(d). The 2011 MOU established that SMWD would be lead agency,
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1 and affirmed that the Project's groundwater extractions would be subject to the County's Ordinance.
2 By entering into the 2011 MOU, SMWD agreed to a limited waiver of its immunity by voluntarily
3 submitting the groundwater extractions to the County for review under the Ordinance.

4 One method of complying with the Ordinance is to qualify for an "exclusion" from its
5 permitting requirements for groundwater withdrawals. (Ord. §33.06552(b)). The Ordinance
6 excludes well operators from permitting requirements if: (1) the operator has developed a [GMMMP]
7 approved by the County consistent with County guidelines; and (2) the County and the operator have
8 executed a memorandum of understanding that requires sharing of groundwater monitoring data and
9 ensures implementation and enforcement of measures set forth in the GMMMP. (Ord. §33.06552(b))

10 In May 2012, the County, SMWD, and Cadiz negotiated and entered into an MOU to frame
11 the County's future GMMMP review process under the Ordinance. County Staff concluded that
12 CEQA was not required for entering into the 2012 MOU because "[t]he County, at this time, is not
13 committing to approve or undertake the Cadiz Project." The County approved the MOU at the May
14 1, 2012 special meeting and the next day filed a Notice of Exemption with the State Office of
15 Planning and Research, stating that the 2012 MOU was exempt from CEQA because it did not
16 constitute an "approval" of a "project" under CEQA or the Guidelines. 1:1.

17
18 **B. Discussion**

19 **1. First Cause of Action: The MOU Did Not Improperly Amend the**
20 **County's Groundwater Management Ordinance Nor Did It Violate the**
21 **Ordinance**

22 Tetra asserted that the County violated its Ordinance by approving the 2012 MOU prior to the
23 GMMMP and by approving an MOU that does not fulfill the Ordinance's substantive requirements.
24 Tetra also argued that the County's approval of the 2012 MOU violates the County Ordinance and
25 common law principles of water law because the MOU's terms permit overdraft of the Project
26 aquifers by expanding the County Ordinance's and common law's definitions of "overdraft" and
27 "temporary surplus." .
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1 The Ordinance does not require that the County approve the 2012 MOU and GMMMP in any
2 particular order, as the plain language of the Ordinance includes no such requirement. (Ord.
3 §33.06552(b)). Therefore, County approval of the 2012 MOU before consideration of the GMMMP,
4 which was still under development, was appropriate and complied with the Ordinance. (County
5 Resolution No. 2012-55 and MOU §3(a) & (b)). Further, the 2012 MOU fulfilled the Ordinance's
6 only two requirements pertaining to groundwater MOUs: first, that the parties share groundwater
7 monitoring information and data and coordinate their efforts to monitor groundwater resources in the
8 County; and second, that the measures identified in any County-approved groundwater management,
9 monitoring and mitigation plan will be fully implemented and enforced. (MOU §§3(h), 4(a), 7). The
10 Ordinance does not require the MOU to set *any* substantive parameters for groundwater extraction,
11 provided that it meets the foregoing requirements. (Ord., §33.06552(b)).

12
13 As to Tetra's arguments that the 2012 MOU unlawfully expanded the concept of temporary
14 surplus and overdraft under the Ordinance, the Court finds that the MOU was consistent with the
15 Ordinance. Groundwater extractions are excluded from the Ordinance when the well's operator (1)
16 enters into an enforceable MOU with the County; and (2) institutes a County-approved GMMMP that
17 is consistent with County Guidelines. (Ord. §33.06552(b)). The Ordinance unambiguously states
18 that it "shall not apply to any well" that qualifies under the Ordinance's exclusion provisions. Though
19 the decision to approve a GMMMP or grant an exclusion was not yet before the County when the
20 2012 MOU was approved, the MOU was intended to satisfy the first element of the Ordinance's
21 exclusion provisions. 2:2-3 (County Resolution No. 2012-55 and MOU Recitals F, H, and §4(a)).
22 Where a well operator proceeds under an exclusion, the Ordinance's definitions are not controlling.
23 See 3:31 (MOU at §4(a)); 49:814 (Ord. §33.06552(b)). The Court rejects Tetra's claims that the
24 MOU is inconsistent with California groundwater law and its concepts of "temporary surplus,"
25 "overdraft," and "safe yield." Overdraft and the amount of temporary surplus available in a particular
26 basin are not rigid concepts, and are instead determinations that must be considered "in light of the
27 facts of [each] case." *City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199, 280.
28

1 Further, the 2012 MOU did not itself authorize any extraction of groundwater or any other
2 physical action. 3:31 (MOU at §4(a)); 49:814 (Ord. §33.06552(b)). The Court therefore finds that,
3 with regard to the application of certain terms under California water law, Tetra has not met its
4 burden to show that the County's approval of the MOU failed to follow the law or that it was entirely
5 lacking in evidentiary support. The terms and conditions of the 2012 MOU are consistent with
6 principles of California groundwater law, including Article X, section 2 of the California Constitution
7 and the state's policy of achieving "maximum beneficial use of water and prevention of waste,
8 unreasonable use and unreasonable method of use." *Erickson v. Queen Valley Ranch Co.* (1971) 22
9 Cal.App.3d 578, 584-585; *San Fernando*, 14 Cal.3d at 105.

10 The Court accordingly finds for Respondents and against Tetra on the First Cause of Action.
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12 2. Second Cause of Action

13 The Court finds that the 2012 MOU did not constitute a commitment by the County to
14 approve a project and therefore CEQA does not apply to the County's decision to enter the MOU (see
15 Third through Fifth Causes of Action). Because the County's decision to enter into the 2012 MOU
16 was not subject to CEQA, there was no action to review under CEQA and thus the Second Cause of
17 Action is not properly before the Court in the above-captioned case. Because the 2012 MOU was
18 entered into before SMWD approved the Project, no final EIR is part of the record and the court
19 cannot evaluate whether the lead designation was necessarily prejudicial. *Planning and Conservation*
20 *League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 904-907 (PCL). Even if the
21 Second Cause of Action were properly before the Court, the Court finds that, while it has concerns
22 regarding the lead agency designation, it is not persuaded that those concerns constitute a CEQA
23 violation under existing law. Based on the applicable law, the Court is unable to conclude that the
24 failure to designate the County as Lead Agency, without more, constitutes a CEQA violation where
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1 the SMWD may be considered to have a substantial claim to be the lead agency. *PCL*, 83
2 Cal.App.4th at 904–907; Guidelines §15051(a)&(d); Pub. Resources Code, §21067; Gov. Code,
3 §§53091(d)–(e), 53096; see *Central Delta Water Agency v. State Water Resources Control Bd.*
4 (2004) 124 Cal.App.4th 245.

5
6 Further, Tetra has not shown that the County's actions as a responsible agency amounted to prejudicial error
7 under CEQA. *Neighbors for Smart Rail v. Exposition Line Construction Authority* (2013) 57 Cal.4th 439, 463; *Planning and*
8 *Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 907.

9 Accordingly, the Court finds for Respondents and against Tetra on the Second Cause of
10 Action.

11 **3. Third Cause of Action: The County's Determination That The 2012 MOU**
12 **Was Exempt From CEQA Review Was Appropriate**

13 While Tetra did not brief or argue that the County's use of an exemption under CEQA was
14 invalid, Tetra asserted that the County's approval of the 2012 MOU was the "approval" of a "project"
15 under CEQA and, thus, the MOU required CEQA review before approval. It argued that the 2012
16 MOU is a binding agreement that limited the County's power to consider the full range of
17 alternatives and mitigation measures for the Project's groundwater extractions.

18 The Court finds that the County's decision to enter into the 2012 MOU did not constitute an
19 "approval" of a "project" requiring CEQA review. Applicable law and the record confirm that the
20 MOU was a conditional agreement that did not commit either the County or SMWD to a definite
21 course of action and could not, by itself, result in any potential physical environmental impacts
22 because the MOU is not a physical component of the Project. *Save Tara*, 45 Cal.4th 116, 139; *Cedar*
23 *Fair*, 194 Cal.App.4th 1150, 1161–66; Pub. Resources Code, §§21000(a), 21065, 21080; Guidelines
24 §15378(a), (c). The 2012 MOU's purpose was "to establish a process for completing a GMMMP that
25 comports with the County Ordinance and CEQA." 2:10 (MOU §4(b)). The 2012 MOU merely
26 defined the parameters of the approval to be sought from the County under the Ordinance and set
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1 forth the process for how the completion of the details of the GMMMP would be accomplished. 2:9-
2 10 (MOU §3). While the 2012 MOU provided the framework for development of the GMMMP,
3 which defined specific Project activities that would have potential physical impacts, the MOU itself
4 had none.

5 The Court further finds that the 2012 MOU did not commit the County to a definite course of
6 action because it contains many conditions that must be fulfilled before the MOU may become
7 effective, including future compliance with CEQA and the ability to modify mitigation measures,
8 consider alternatives, deny the project, and modify the MOU if needed as a result of CEQA
9 compliance. 2:7, 9,10 (MOU Recital G and §§3(b) & (d), 4(a) & (b)); 3:20; see *Cedar Fair*, 194
10 Cal.App.4th at 1165, 1170-74 (court found that approval of a detailed term sheet for a football
11 stadium, which was approved after NOP issued for stadium Draft EIR, was not a CEQA project
12 because the term sheet did not commit a city to a definite course of action or rule out any mitigation
13 measure or alternative). In addition to the express terms of the 2012 MOU, the circumstances
14 surrounding the County's May 1, 2012 approval, set forth in the administrative record, affirm that the
15 MOU merely establishes a framework and was not an "approval" of a "project." See 2:7, 9, 10, 12-
16 13 (MOU Recital F and §§3(a) & (b), 4(b), 11); 3:17-20; 5:65, 66, 73-74, 106-107; 478:6372-73;
17 709:6955-56.

18 The Court also finds that, even if the 2012 MOU was a project, it was exempt under the
19 "common sense" exemption because there is no possibility that the activity in question—the MOU—
20 may have a significant effect on the environment. See Guidelines §15061(b)(3); *California Farm*
21 *Bureau Federation v. Cal. Wildlife Conservation Bd.* (2006) 143 Cal.App.4th 173, 194. Accordingly,
22 the Court finds for Respondents and against Tetra on the Third Cause of Action.
23

24 **4. Fourth Cause of Action: CEQA Did Not Require The County to Prepare**
25 **An Initial Study With Regard To The 2012 MOU**

26 This Cause of Action is substantially the same as the Third and Fifth Causes of Action and
27 therefore this Court incorporates its findings here. Because the County's approval of the 2012 MOU
28 was not a "project" requiring CEQA review, the County did not fail to conduct an initial study and/or

environmental assessment before approving the MOU. Therefore, the Court finds for Respondents and against Tetra on the Fourth Cause of Action.

5. Fifth Cause of Action: The County Did Not Defer Environmental Analysis When It Approved the 2012 MOU

This Cause of Action is substantially the same as the Third and Fourth Causes of Action and therefore this Court incorporates its findings from the Third and Fourth Causes of Action here. Because the County's approval of the MOU was not a "project" requiring CEQA review, the County did not improperly defer environmental analysis. Therefore, the Court finds for Respondents and against Tetra on the Fifth Cause of Action.

E. Relief

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

Dated: AUG 20 2014

By: Gail Andler

GAIL A. ANDLER

JUDGE OF THE SUPERIOR COURT