

3.10 Master Response on SMWD as CEQA Lead Agency

3.10.1 Introduction

Overview

This master response addresses comments raised about Santa Margarita Water District (SMWD) serving as the CEQA Lead Agency rather than the County of San Bernardino (County).

This master response is organized by the following subtopics:

- 3.10.2 SMWD as CEQA Lead Agency
- 3.10.3 County of San Bernardino Role and Involvement

3.10.2 SMWD as CEQA Lead Agency

Summary of Issues Raised by Commenters

Commenters stated that the County of San Bernardino should serve as the CEQA Lead Agency and that SMWD does not have authority or jurisdiction under CEQA to be the lead agency. Some commenters expressed the opinion that the County possesses general governmental powers under State law thus requiring the County to be the lead agency for a CEQA document for the Project, and that the County has the principle responsibility for approving the Project, while SMWD has no approval or enforcement authority over the Project. Concerns were expressed that because SMWD is a Project Participant it should not also serve as CEQA Lead Agency and, further, that the Project is being carried out by Cadiz and not by SMWD. Also, comments were expressed that SMWD is not a participant in the Imported Water Storage Component and should not serve as lead agency for the program level analysis.

Comments were received stating that the proposed pipeline to be built in the railroad right-of-way running through BLM land requires BLM approval that would require BLM to be the lead agency under National Environmental Protection Act (NEPA). Also, comments expressed concerns that use of a natural gas pipeline under the Imported Water Storage Component would require BLM approval and compliance with NEPA.

Response

Lead Agency

Pursuant to CEQA Guideline section 15051(a), “if [a] 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.” Accordingly, contrary to concerns expressed by some commenters regarding a potential conflict of interest, CEQA Guidelines section 15051 (a) specifically allows an agency to serve as the lead agency for a project the agency is carrying-out,

and that agency may be a lead agency for a project that originates outside its jurisdiction. Further, pursuant to CEQA Guideline section 15051(b), “if [a] project is to be carried out by a nongovernmental person or entity, the lead agency shall be the public agency with the greatest responsibility for supervising or approving the project as a whole.”

SMWD Is The Proper Lead Agency As It Is Carrying-Out the Project

As part of a public-private partnership with Cadiz Inc., SMWD will be the public agency carrying out the Project. SMWD’s role as the public agency carrying-out the Project was first established by the Option Agreement between SMWD and Cadiz which provides for SMWD to (1) participate in “alternative public financing of some or all of the capital costs attributable to conveying water to and from Cadiz Inc.’s property to the [Colorado River Aqueduct] CRA” (2) establish standards and specifications for and approve design and construction of the wells, pipelines, and conveyance facilities for the Project, obtain financing for these facilities, and manage and oversee operation of the Project; and (3) negotiate for the acquisition of real property interests owned by Cadiz Inc.

SMWD’s role as the public agency carrying-out the Project is further detailed in the Purchase and Sale Agreement (“PSA”) — the agreement SMWD will execute should it certify the EIR and approve the Project. Multiple provisions of the PSA confirm that SMWD is the public agency carrying-out the Project.

First, SMWD will carry-out and supervise the Project as the managing member of FVMWC, and is also contemplated to be the largest shareholder. Accordingly, all responsibilities of the FVMWC, which include collecting payments received for the sale of water, complying with all regulatory requirements for the operation of a public water system, including the requirements of the Department of Public Health, and carrying out the day to day implementation of mitigation measures contained in the EIR and the corrective measures contained in the GMMMP, will be overseen by the SMWD, as the managing member of FVMWC.

Second the PSA requires that SMWD control and operate the Fenner Joint Powers Authority (“JPA”). The JPA will be formed pursuant to Government Code Section 6509, with SMWD being the “designated entity.” The PSA requires that the Joint Powers Agreement between SMWD and the Fenner Valley Mutual Water Company (“FVMWC”) provide SMWD with full management and operational control of the JPA. The JPA, under the management and control of SMWD, will review and approve the Project designs and specifications, manage and oversee the operation of the Project facilities in coordination with FVMWC, and oversee compliance of the Project with the GMMMP.

Third, the PSA requires that, upon completion of the construction of the Project facilities, Cadiz will provide the JPA with exclusive possession of Project facilities through a long term lease arrangement (“Facility Lease”). When the Facility Lease expires, the PSA provides that title to all Project facilities must transfer to the JPA. Hence, the JPA, with SMWD as the managing and controlling member, will hold an undivided interest in the Project facilities. Separate and apart from the Facility Lease, SMWD standing alone will, at all times, have an easement over Project facilities which gives it the priority right to use the Project facilities to take its contracted share of water.

Fourth, the PSA requires that FVMWC coordinate the pumping and delivery of water pursuant to a facility operation agreement with the JPA (the “Facility Operation Agreement”). The JPA, under the management and control of SMWD, will ensure all regulatory permits and mitigation measures under the GMMMP are fully implemented by FVMWC. The Facility Operation Agreement will also provide that the JPA has the power to contract with another participating agency, another local public agency or contract operator to provide staffing for the day to day operation and maintenance of the Project, as well as bookkeeping and administration.

Lastly, because compliance with the GMMMP is a condition of SMWD’s approval of the Project, SMWD in its discretion, will also consider the findings and actions taken or recommended by FVMWC and the TRP (Technical Review Panel) through the GMMMP, and will exercise its own independent judgment concerning whether the triggering of the action criterion is attributable to Project operations, whether the triggering of the action criterion involves a potential adverse impact or Undesirable Result, and to determine the appropriate corrective measure(s) necessary to avoid or mitigate the potential adverse impact or Undesirable Result. If SMWD determines that appropriate corrective measure(s) are necessary to avoid or mitigate the potential adverse impact or Undesirable Result but the County does not, SMWD will independently impose those corrective measures it determines necessary to avoid adverse impacts to critical resources or Undesirable Results provided that independent enforcement by SMWD shall be subject to the same procedural requirements and remedies applicable as if the County were enforcing the GMMMP.

SMWD Is The Proper Lead Agency As It Has The Greatest Approval Role

If a project is to be carried out by a non-governmental entity, the public agency with the greatest responsibility for supervising or approving the project as a whole must be the lead agency.(CEQA Guideline section 15051(b).) Accordingly, in addition to carrying-out the Project, as part of a public-private partnership with Cadiz Inc., SMWD will be the public agency with the greatest responsibility for approving the Project as a whole. This is because the Project consists of, among other components, designing and constructing infrastructure for transportation of groundwater and negotiating contracts for and constructing storage facilities for the Phase 2 Storage Component. (Since the EIR must analyze the proposed Project in its entirety, SMWD must, under CEQA prepare an EIR which analyzes both Phase 1 and Phase 2, even if only programmatic review of Phase 2 is currently possible.) In short, the Project, as a whole, consists of much more than just the pumping of groundwater and the implementation of the GMMMP. For instance, in its role as the managing member of FVMWC and managing member of the JPA, SMWD will direct, review and approve the design and construction of Project facilities including pipeline conveyance and interconnection with the CRA, and negotiation, review and approval of terms for the conveyance of water to and within the Metropolitan Water District of Southern California CRA. Further FVMWC, with SMWD as its managing member, will be the contracting entity for storage participants for the Imported Water Storage Component of the proposed Project. Accordingly, SMWD will have the greatest responsibility for approving the Project as a whole within the meaning of CEQA Guidelines section 15051(b).

Commenters have contended that, under CEQA Guideline section 15015(b), the County, not SMWD, should be the lead agency because certain Project facilities will be constructed and operated in the County and the County has approval authority over construction and operation of the Project. This is not the case. Even if SMWD were not already *per se* the lead agency pursuant to the CEQA Guideline section 15015(a), State agencies, such as SMWD, have sovereign immunity from local regulation, such as the County's local building and zoning ordinances, unless such immunity has been waived. Specifically, Government Code sections 53091(d) and (e) and section 53096 provide an exemption from local regulation for water projects. Accordingly, SMWD is not required to comply with the County's local zoning and building regulations. Thus, the County does not have permitting authority over SMWD's water projects. Further, as discussed above, SMWD intends to form a Joint Powers Agency with FVMWC to provide for the joint exercise of powers common to each for the construction, development, operation, and overall implementation of the Project. Pursuant to Government Code section 6509, the JPA will have the powers of its "designated entity" – SMWD - including its immunities.¹

SMWD has agreed to County regulation only in one limited aspect. SMWD has agreed to a limited waiver of its immunity through its June 2011 Memorandum of Understanding (MOU) with the County which states that Cadiz and SMWD will comply with the County's Groundwater Management Ordinance (Ordinance). SMWD will approve the GMMMP that was prepared to comply with the Ordinance as an excluded Project.

SMWD Is the Proper Lead Agency As The Agency Which Will Act First On the Project

Finally, pursuant to CEQA Guideline section 15051(c) "Where more than one public agency equally meet the criteria in subdivision (b), the agency which will act first on the project in question shall be the lead agency." As stated in the Draft EIR Vol. 1, Chapter 1 Introduction, Section 1.3, SMWD is the lead agency for the Project because it is the first public agency with a discretionary decision regarding the proposed Project since it was the first Project Participant to enter into an Option Agreement for the largest portion of Project water supply and carry-over storage and proposed to execute the PSA pursuant to that Option Agreement. Without SMWD's agreement to consider receiving Project water, CEQA review for the proposed Project could not have been conducted.

CEQA requires that environmental analysis be conducted at the earliest possible time. Here, CEQA review of the Project could not have commenced without an identified purchaser of Project water. (*Delta Water Agency v. State Water Resources Control Board* (2002) 124 Cal.App.4th 245, 271-2, holds that environmental review of a water project cannot proceed unless and until end users of the water were designated.) In other words, it is SMWD's approval of the PSA that is the required first approval action on the Project. Environmental review of the Project by any other public agency, such as the County, prior to SMWD's execution of the PSA would be premature, because no end user of the Project water would yet have been designated. Accordingly, even though the County will act as a responsible agency in reviewing and considering approval of one permit for the Project, the GMMMP, that approval is not (and could

¹ See *Zack v. Marin Emergency Radio Authority* (2004) 118 Cal.App.4th 617.

not be) the first approval of the Project, and thus the County is not the appropriate lead agency under CEQA Guideline section 150151(c).

The County Has Confirmed That SMWD Is The Proper Lead Agency

To resolve any confusion, and in recognition of SMWD's role as the agency carrying-out and approving the whole of the Project, in June 2011, the County and SMWD entered into a Memorandum of Understanding expressing acknowledging that "SMWD is the lead agency for the Project pursuant to CEQA with all the traditional rights and responsibilities of a Lead Agency to evaluate the environmental impacts of the Project with the discretionary to certify the Final Environmental Impact Report ("FEIR") and approve or disapprove the Project."

Under all three criteria of CEQA Guideline section 15051, SMWD is the proper lead agency for the Project.

Accordingly, SMWD has properly conducted the CEQA environmental review process for the proposed Project and prepared the EIR in accordance with the requirements of CEQA and the CEQA Guidelines. SMWD has appropriately served as lead agency and will exercise its discretion when it determines whether or not to certify the EIR and to approve or reject the Project.

Responsible Agencies

As described in the Draft EIR Vol.1, Chapter 3 Project Description, several other agencies serve in the role of Responsible Agency for this Project. A Responsible Agency is a public agency, other than the lead agency, which has some discretionary authority for carrying out or approving all or aspects of a project (see Guidelines § 15381). Some of these agencies have a regulatory approval role for the Project, generally related to a particular element or aspect of the Project (see Guidelines §§ 15041(b), 15096(a), 15096(g), and 15381). The County of San Bernardino is one of the many agencies that has such an approval role. As described in more detail in the following section, the County of San Bernardino's approval role for the Project is related to compliance with the County Groundwater Ordinance.

The other Project Participants are also Responsible Agencies as they will make a discretionary decision regarding whether to ultimately approve participation in the Project. Responsible Agencies take action after the Lead Agency has certified the EIR and has made its decision regarding project approval. Once and only if the Lead Agency approves a project and authorizes implementation is it appropriate for Responsible Agencies to subsequently take their actions to approve permits and conditions relevant to how the project is implemented. For this Project it is appropriate that SMWD serve as the CEQA Lead Agency in that it will exercise the first tier discretionary action regarding whether to proceed with Project implementation or not, and because it has discretionary authority over approval and implementation of the entire Project.

Federal Permitting

Commenters have asserted that NEPA review and a NEPA lead agency would potentially be required for the Project because the pipeline routes being considered, including the natural gas pipeline right-of-way, involve federal lands. However, at this stage, there are no federal approvals or permits required, and therefore a NEPA lead agency is not required. The ARZC right-of-way is a private easement, and though use of existing natural gas pipelines may require NEPA review in the future for Phase 2, CEQA programmatic analysis is adequate until project-level review of the Imported Water Storage Component and use of the pipelines is found to be feasible. Please see **Master Response 3.13** Right-of-Way and NEPA.

Regarding potential use of the natural gas pipeline as part of Phase 2, only options to purchase natural gas pipelines have been executed, and their use for either component of the proposed Project is speculative at this time. Cadiz Inc. entered an option agreement with El Paso Natural Gas in September 2011 for an option to purchase an idle 220-mile natural gas pipeline for potential conversion to transmit water. The pipeline runs over land controlled by the Bureau of Land Management (BLM) and its use will likely require approval by BLM if Cadiz Inc. pursues that course of action for imported storage as a second phase of the Project. NEPA directs that all federal agencies shall consider the environmental impacts of every “major federal action significantly affecting the quality of the human environment.”² Therefore, the NEPA process is initiated when a proposal for federal action exists. At this time, no application for such approval has yet been made, and no NEPA compliance for the potential use of the natural gas pipeline is required at this time.

3.10.3 County of San Bernardino Role and Involvement

Summary of Issues Raised by Commenters

Commenters request that the County of San Bernardino have approval authority over the Project and GMMMP.

Response

As noted above, the County of San Bernardino is a Responsible Agency for this Project because it has a limited, discretionary, regulatory approval role under the County’s Groundwater Management Ordinance. As discussed above, the County will consider the GMMMP but the Project consists of a multitude of other components, such as the design and construction of Project facilities including pipeline conveyance and interconnection with the CRA, and the conveyance of water to and within Metropolitan’s CRA. Further, as also noted above, Cadiz and SMWD’s compliance with the Groundwater Ordinance is being conducted pursuant to a limited waiver granted by SMWD given that the Project is otherwise exempt from local zoning and building regulations of the County.

² 42 U.S.C. § 4332(2)(C); *see also* 40 C.F.R. § 1501.4

The County's Groundwater Management Ordinance is described in the Draft EIR Vol.1, Chapter 2 Project Background, Section 2.3.1. The Desert Groundwater Management Ordinance³ imposes permitting requirements and procedures for certain new groundwater extraction wells in the Desert Region of the County. However, the Ordinance does not apply to entities that have prepared a County-approved groundwater management plan (for this Project, it is called the Groundwater Management, Mitigation and Monitoring Plan or GMMMP and is currently in its revised form in the Final EIR Vol. 7, Appendix B1 Updated GMMMP) and that have entered into a Memorandum of Understanding with the County.

The County as a responsible agency will review the Final EIR and proposed Updated GMMMP for compliance with its ordinance pursuant to the MOU. As described in the Draft EIR and Updated GMMMP (Final EIR Vol.7, Appendix B1 Updated GMMMP and **Master Response 3.8** GMMMP) five of the fifty-one mitigation measures recommended in the EIR are also corrective measures contained in the Updated GMMMP (**AQ-5, GEO-1, HYDRO-2, HYDRO-3** and **MIN-1**). The County will have enforcement authority with regard to the corrective measures in the GMMMP, but SMWD, as lead agency, will have the responsibility of ensuring the implementation of those five corrective measures that are also mitigation measures. Pursuant to CEQA Guideline section 15097(a), SMWD will delegate enforcement authority of **AQ-5, GEO-1, HYDRO-2, HYDRO-3** and **MIN-1** to the County, but SMWD will, as lead agency, have the right to terminate the Project's approvals for violations of the MMRP, including failure to comply with Mitigation Measures **AQ-5, GEO-1, HYDRO-2, HYDRO-3**, and **MIN-1**.

³ San Bernardino County Code of Ordinances, Title 3, Division 3, Chapter 6, Article 5, Section 33.06551.