



Via Electronic Mail

April 30, 2012

Laura K. Welch
Clerk of the Board
San Bernardino County Board of Supervisors
385 N. Arrowhead Ave., 2nd floor
San Bernardino, CA 92415-0130

Dear Ms. Welch,

Please accept and distribute to Board staff and members this public comment on the following agenda item:

RESOLUTION APPROVING A MEMORANDUM OF UNDERSTANDING BY AND AMONG THE SANTA MARGARITA WATER DISTRICT, CADIZ, INC., FENNER VALLEY MUTUAL WATER COMPANY, AND THE COUNTY OF SAN BERNARDINO RELATED TO COUNTY ORDINANCE FOR DESERT GROUNDWATER MANAGEMENT

(For consideration at the San Bernardino County Board of Supervisors special meeting on May 1, 2012)

The Center for Biological Diversity **opposes** the Board's approval of the above-referenced MOU because it will exempt the Cadiz project from the County's Desert Groundwater Management Ordinance, both (A) depriving the people of San Bernardino County from full environmental review of the Cadiz project and (B) preventing effective monitoring and enforcement against unlawful and/or harmful project activities.

A. Approval of the MOU Deprives the County of Lead Agency Environmental Review of permitting under the Desert Groundwater Management Ordinance and CEQA

The MOU will function to exempt the Cadiz project from the Desert Groundwater Management Ordinance, under which the project would otherwise require a permit from the County to operate.

While permitting the project under the Ordinance would require the County to prepare and approve an Environmental Impact Report as lead agency under CEQA, under the proposed MOU the County will approve an EIR used for the Cadiz project and prepared by Santa Margarita Water District as lead agency. However, the County's approval of exemption from the

Ordinance without acting as lead agency is presumptively unlawful because the County would otherwise act as the lead agency for the permit.

Please explain the status of the County as lead or responsible agency for approval of the EIR for the Groundwater Management Plan, and how the County's role changes from approval of the Cadiz project as a responsible agency to the GMMMP EIR as a lead agency (if it changes at all).

Please explain why the County is choosing to exempt the Cadiz project rather than permit it.

B. The MOU and Groundwater Management Plan (GMMMP) Are Unenforceable and Do Not Provide Adequate Monitoring and Enforcement Opportunity

A project such as Cadiz may be exempted from the Desert Groundwater Management Ordinance if it features a County-approved MOU and Groundwater Management Plan (GMMMP).

In choosing to exempt this project, rather than permit it under the Ordinance, the County appears to be arguing that monitoring and enforcement against unlawful activity will be approximately equal to that if the project had been permitted under the Ordinance.

Please explain in the County's view if enforcement under the MOU and a permit are equivalent, and what the differences are between enforcement under a permit and enforcement under the MOU.

The Center contributed extensive comments on the Cadiz project, attached, which explained why the GMMMP was a flawed and largely unenforceable document; these comments are attached for your reference.

Some key problems with using the GMMMP and the MOU to monitor and enforce against the project include:

To enforce using the MOU, the County has to show that the damage is immediate and irreparable, which seems nearly impossible when drawdown takes decades and could be theoretically "repaired" by pumping in more water, and overdraft (Section 2(g)) is only measured by a 10 year period in the MOU-- meaning that the County would have to wait ten years before even trying to enforce. The 10 year wait does not appear to be an effective or lawful means to enforce against unsafe yield and drawdown of the underlying aquifer.

Please explain how unsafe yield could be detected and stopped through legal enforcement within a year or less of discovering harm (or on a comparable, rigidly defined timeline).

Worse, whether the project is complying appears to be up to Fenner Valley (the quasi-public mutual water company created to manage the project), which determines whether changes are attributable to project operations. (GMMMP pp.79 and 82-83) Again the County is not involved in this process, which appears to allow the project operator itself to make the primary determination whether it is in violation. This provision appears to prevent the County from gaining timely information for demonstrating unsafe yields and/or aquifer drawdown, and appears to add an element to the GMMMP which is not present in the plan itself: proving that the project itself was responsible for the harm before corrective measures may be taken (including County enforcement, if necessary).

Please explain how, as specifically as possible, the County will routinely monitor and perform enforcement within the MOU and GMMMP given the Fenner Valley pre-approval requirement, and how and whether disclosures of GMMMP violations are performed without Fenner Valley first determining whether the project was responsible.

Enforcement under the MOU requires finding of Overdraft or Undesirable Results as defined in 2(g) and (k) of the MOU, which do not equal unsafe yield. Because unsafe yield can occur without triggering enforcement under these terms, requiring such findings are unlawful and against the terms of the Desert Groundwater Management Ordinance. "Undesirable Results" (2(k)) is full of caveats to caveats-- it requires the county to set a "floor" and a "rate of decline" in the groundwater management plan-- which they do not specify in the MOU and I cannot find (though they may be hidden) in the groundwater management plan. (Though even with these terms defined, moreover, the County does not possess the authority to define these terms on its own.) Then per the 2(k) terms there has to be proven damage to the external environment to even trigger the "Undesirable Results" condition, such as land subsidence-- a mere year-in-year-out depletion of the aquifer would not trigger these provisions. Moreover the whole trigger process seems at odds with the limited disclosure of harmful conditions under the GMMMP, which requires Fenner Valley MWC to first determine harm (see p.79-83 above.)

Please explain how a positive finding under the "Overdraft" and "Undesirable Results" terms, which require either a 10 year wait or physical harm to the environment, comply with the safe yield provisions of the Ordinance and California Law.

In sum, the Center requests that the Board disapprove the MOU and commence the permitting process for the Cadiz project under the County Groundwater Management Ordinance, including preparation and approval of an EIR under CEQA in its capacity as lead agency for the project.

Sincerely,


Adam Lazar