



VIA email and U.S. Mail

May 31, 2012

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RE: Cadiz Valley Water Conservation, Recovery, and Storage Project; Draft Environmental Impact Report, State Clearinghouse #2011031002 (“Cadiz Project”)

MOU Concerning Cadiz Project Exemption from Groundwater Management Ordinance

Request for MOU Inclusion in Record, EIR Analysis of MOU Definitions and Terms, and Re-Circulation of EIR for Public Comment (Cal. Pub. Resources Code § 21092.1)

Dear Supervisors Gonzales and Derry, and Mssrs. Schatz, Ferons and Barnes:

On May 2, 2012, the San Bernardino County Board of Supervisors approved a Memorandum of Understanding (“MOU”) for the Cadiz Water Project, which, when combined with the approval of the related Groundwater Mitigation Monitoring and Management Plan

("GMMMP"), exempts the Cadiz Project from the County's Desert Groundwater Management Ordinance. The MOU is attached as Exhibit 'A' to this letter, which was subsequently approved by Santa Margarita Water District ("SMWD") on May 11, 2012.

Upon careful review, the MOU appears to contain important additional terms and conditions neither presented nor analyzed in the Cadiz Project's Environmental Impact Report (EIR) and associated Groundwater Management Mitigation and Monitoring Plan (GMMMP). In conjunction with the GMMMP, many of these definitions and terms severely limit the County's monitoring and enforcement abilities. The MOU also reserves 20% of the water (Term 11) and 25,000 initial acre-feet (Term 10) for San Bernardino County, conditions whose existence—and extensive impacts—are also missing from the EIR and GMMMP, as is a description of the presumptive responsible agencies for handling this component of the project.

Many citizens remain unaware that the County's forthcoming approval of the Cadiz EIR (and by association the GMMMP) will also function to fully exempt the project from the County's desert groundwater ordinance. Such ignorance is a shame, because the MOU operates in tandem with the GMMMP to effectively deprive San Bernardino County (or any other local government entity) of effective monitoring and enforcement authority over an aquifer fully within county boundaries and currently supplying critical water to local ranchers, businesses, and the Mojave National Preserve. At best, the move to exempt the project seems deeply unwise.

Because SMWD is currently acting as lead agency for environmental review, the Center requests SMWD include the MOU in the administrative record for the project, fully analyze the definitions and terms in the MOU within the context of the EIR and GMMMP, then re-circulate the EIR for public review and comment pursuant to CEQA (Public Resources Code § 21092.1).

"Overdraft" Re-Defined

Safe groundwater extraction is premised on the avoidance of "overdraft." Unfortunately, the MOU fundamentally re-defines "overdraft" to limit the ability of the County to enforce against the concept as it is commonly understood and accepted.

Here is a definition of annual overdraft in the California Water Code:

§ 75506. "Annual overdraft"

"Annual overdraft" means the amount, determined by the board, by which the production of water from ground water supplies within the district or any zone or zones thereof during the water year exceeds the natural replenishment of such ground water supplies in such water year.

Overdraft isn't hard to understand: it simply means extracting more water than is being replenished. Yet when this definition is compared with the tortured version of "overdraft" introduced in the MOU, it becomes clear that the new definition of "overdraft" functions to severely constrain monitoring and enforcement against aquifer drawdown.

1. “Overdraft” and Reliance on 10-Year Average

The MOU defines “overdraft” in Definitions (Term (2)(g)) to be spread over a ten year period, and only when “temporary surplus” is exceeded. Overdraft can and should be measured and prevented on an annual basis, not the proposed 10-year period for determination, which will force the County or other enforcement authority to wait for 10 years before finding a condition of overdraft. This means that the project could operate with continual deficits for years without the County or any other enforcement body being able to stop it or even call it “overdraft,” creating an effective barrier to enforcement against harm to the aquifer. It appears difficult, if not impossible, to enact Term 8’s enforcement of “immediate and irreparable harm” provision if the project requires waiting 10 years to make a finding of overdraft. The 10 year provision must be analyzed at length in both the EIR and GMMMP to assess the effectiveness of Cadiz project enforcement and monitoring. Even better, the MOU should be revised and the term removed.

2. “Groundwater Safe Yield” and “Overdraft”

The MOU’s defines “Groundwater Safe Yield” (Term 2(e)) as avoidance of the limited “overdraft” concept of Term (2)(g), even though “safe yield” is normally defined by the SWRCB to mean drawdown that adversely impacts the aquifer *levels*. “Groundwater safe yield” also is defined as “not adversely affecting aquifer health,” but “aquifer health” (Term 2(a)) is only defined as the *geologic* integrity of the aquifer, its *storage* capacity, and the *quality* of water within the aquifer.

Such a definition begs the question: is greater storage capacity a sign of “good” or “bad” “aquifer health” and why? Of course, an obvious sign of aquifer health would be its level, but this quality is conspicuously absent from the definition. Thus the “safe yield” concept as defined in the MOU (2)(e) does not contemplate aquifer drawdown beyond the strained and extremely narrowly-defined definitions of “overdraft” and “aquifer health” present in the MOU. Clearly, these terms require careful analysis in the EIR and GMMMP.

3. “Temporary Surplus” and “Overdraft”

Further, the MOU Term 2(j) limits a finding of “overdraft” to where there is no “temporary surplus.” This definition suggests “temporary surplus” is a standard and widely-accepted concept, but it is not. The GMMMP presents the concept of “temporary surplus” within a crude and incorrect legal analysis (page 33), but the concept is not tied to overdraft in the case cited. More importantly, the argument that “temporary surplus” should be allowed is not specified as a *required* criteria in the GMMMP and EIR as a condition that defeats overdraft. In other words, the MOU has taken a stretched interpretation of a Supreme Court case and transformed it into a legally-enforceable limitation on a finding of “overdraft.” In fact, the Supreme Court case cited by the GMMMP appears to be considers whether water withdrawn is being beneficially used, and not whether it is creating an overdraft condition. At any rate, the case does not permit a new definition of “overdraft.” Further, since re-charge from the Colorado River was not considered a full project component, it is impractical and disingenuous to suggest that it is now part of the “overdraft” equation when SMWD cannot even say whether recharge will occur. Separately, it appears that SMWD could just increase its estimated recharge amount and instantly increase its “temporary surplus” to counter any finding of “overdraft,” making it virtually impossible for the condition to be met. Again, the mere possibility of recharge is not sufficient to create “temporary surplus,” and the case cited by the GMMMP does not provide for

it to be considered as such. The additional concepts included in “overdraft” in the MOU, both in ten-year measurements and incorporation of a new definition of “temporary surplus,” must be considered for their impacts in the ability of the GMMMP to adequately monitor project activities and enforce against aquifer depletion.

4. “Undesirable Results” Fails to Include Predicted Recharge Rates

Term 2(k) “Undesirable Results” in the MOU means any of the following: (i) the progressive decline in groundwater levels and freshwater storage below a “floor” to be established by the County through the GMMMP; (ii) the progressive decline in groundwater levels and freshwater storage at a rate greater than the rate of decline to be established by the County through the GMMMP where the decline signifies a threat of other physical impacts enumerated in this subparagraph 2(k); (iii) land subsidence, (iv) the progressive migration of hyper-saline water from beneath the Cadiz or Bristol Dry Lakes toward the Project well sites; (v) increases in air quality particulate matter; (vi) loss of surface vegetation; or (vii) decreases in spring flows.

None of the above terms triggering review under “undesirable results” include the most obvious: a drawdown of the aquifer that provides evidence contrary to the Applicant’s claimed recharge rates. In other words, if the Cadiz project is indeed based on the Applicant’s scientific recharge studies, then project impact should be judged by whether it meets the recharge rates depicted in those studies. If withdrawal occurs in excess of recharge, the water level will decline, and Cadiz project exports should be adjusted to match. By ignoring the recharge studies in the MOU, the Applicant implies these recharge studies are unreliable and cannot be used as a solid basis for measuring project impacts. Without a scientific basis to determine aquifer health and overdraft, the determination of “undesirable results” is arbitrary and without basis in law.

Likewise, it does not appear that any groundwater “floor” as indicated in Term (2)(k) was established by the County in the GMMMP, despite this term’s inclusion in the MOU. If such “floor” is indeed buried somewhere in the EIR and GMMMP, it is also unclear on what basis the County, as a merely responsible agency for the project, has used as its scientific basis for its determination, nor whether alternative “floor” levels were considered. The determination of the “floor” and associated analysis must be included in the GMMMP and EIR. Likewise, the “progressive decline” rate to be determined by the County does not appear to have been set in the GMMMP, but the County may not set such a rate, per the terms of the MOU, beyond that which causes physical impacts such as subsidence; again, the County is not allowed to set a floor or level that would merely place limited use and as a paramount goal—another loss of enforcement discretion that should be analyzed in the EIR and GMMMP.

5. Mandatory Arbitration

As a further severe limit to enforcement ability, Term 8 of the MOU allows judicial review by the County to enforce against drawdown and unsafe yields only in the event that “Overdraft” or “Undesirable Results” occur, which, as explained above, are very limited concepts when considered against their common, accepted use outside the scope of definitions in the Cadiz MOU. Without meeting these two conditions, the MOU requires parties to enter into arbitration, so that, for example, aquifer measurements which provide evidence that scientific estimates of recharge are not being met, would nonetheless be subject to a lengthy arbitration

process without the certainty that the County can limit or enforce against this harm. The use of arbitration is not explained or analyzed in the GMMMP and MOU. The EIR and GMMMP should explain the function of the arbitration and explain if and how the County can enforce against aquifer drawdown in the instance that the arbitration panel decides against the County, or if the County determines there is harm occurring outside of the very limited definitions in the MOU for “Overdraft” and “Undesirable Results.”

Role of Inland Empire Utilities Agency

As part of the MOU’s additional terms describing a 20% and 25,000 AF reservation of water for San Bernardino County, the MOU describes a role for the Inland Empire Utilities Agency to take 30,000 acre-feet of water (Term 10(d)). Please update the EIR to include the specific role of IEUA in distributing the water allocated to the County, along with an analysis of proposed impacts to its use of 30,000 acre-feet of Project water.

San Bernardino County must act as Lead Agency for EIR, GMMMP, and Exemption

Finally, the Center once again requests a re-assessment of the role of San Bernardino County in the multiple permits and approvals required for the Cadiz project under CEQA. Cadiz is a private project proponent and CEQA requires the County to act as lead agency for the EIR. Further, the County was required to perform CEQA review as lead agency under the County desert groundwater management ordinance; approving an *exemption* to the ordinance requires the same level of discretionary approval, so that the County must act as lead agency under CEQA for the exemption as well. Under both legal regimes, the County is improperly limiting its role to that of a responsible agency, and in doing so, undermining the legality of the EIR, the GMMMP, and the exemption from County law.

Thank you for your attention to these matters.

Sincerely,

A handwritten signature in black ink, appearing to read 'DALazar', with a stylized flourish at the end.

Adam Lazar