

MOU Allocating Responsibility for Development of Groundwater Management Plan Not a Project Under CEQA

Fresh water from a well flows out into an old bucket. Shallow depth of field for focus on water. The Fourth Appellate District has held that a memorandum of understanding between a water district, county, property owner, and water company outlining mutual responsibilities for preparing a groundwater management plan governing the installation and operation of groundwater extraction wells was not a "project" requiring review under CEQA. The court based its decision on its conclusion that the memorandum itself did not constitute the groundwater management plan, but rather established a process for completing the plan. The court reasoned that after the groundwater management plan was completed, the county would retain full discretion to consider the final EIR, approve or disapprove the proposed plan and project, and could require additional mitigation measures or alternatives. *Delaware Tetra Technologies, Inc., v. County of San Bernardino*, 247 Cal.App.4th 352 (2016).

Background In 2002, the County of San Bernardino approved an ordinance governing the pumping of groundwater within the county. The ordinance required that operators of groundwater wells, unless specifically excluded, obtain a permit and comply with specified standards to maintain the health of aquifers in which pumping occurs. Several years after the ordinance was enacted, a landowner and water company proposed to install a number of groundwater wells, extract groundwater from the wells for fifty years, and transport the water through a pipeline to an aqueduct, from which the water ultimately would be distributed by a water district to end-users. In 2011, the water district released a draft EIR covering the proposed project for public review and comment. The following year, the water district, county, property owner and water company negotiated a memorandum of understanding governing the proposed project. In the MOU, the parties agreed that a groundwater management plan, which would include monitoring, and mitigation components, would be developed in conjunction with finalization of the EIR. The county thereafter approved a resolution finding that the MOU satisfied the exclusion provisions of the ordinance, and that a permit for the proposed project therefore would not be required. Petitioner, a company that alleged its business would be harmed by the proposed project, challenged the resolution, arguing that the county was obliged, but failed, to perform a full review under CEQA before approving the MOU. The trial court disagreed, and upheld the county's actions. The petitioner appealed.

The Court of Appeal's Decision In the published portion of its opinion, the court of appeal affirmed the judgment of the trial court and held that the county was not required to perform an environmental review under CEQA before approving the MOU. The court observed that an agency has no duty to comply with CEQA unless its actions constitute "approval" of a "project." A "project," the court said, exists only if, among other things, an activity "may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment...." The MOU, the court concluded, merely established a framework for completion of the groundwater management plan, and required that the plan ultimately be submitted to the board of supervisors, at which time the county would have full discretion to consider the final EIR, approve or deny the project, or require additional mitigation measures or alternatives necessary to avoid or substantially lessen the environmental impacts of the project. Therefore, the court concluded, the county did not violate CEQA by approving the MOU without undertaking a full environmental review. In reaching its decision, the court distinguished the cases (beginning with the California Supreme Court's decision in *Save Tara v. City of West Hollywood*) in which the agency took steps which committed it to a definite course of action regarding the project. By contrast, the county's MOU did not hamper its full discretion to approve, deny, or condition the groundwater management plan, or the proposed groundwater pumping project, in the future.

The Take Home Message The *Delaware Tetra Technologies* court declined to rule that approval of the first step towards adoption of the groundwater management plan amounted to approval of the proposed groundwater pumping project. The

project could not go ahead without 1) approval by the county of the MOU, 2) approval by the county of the groundwater management plan, 3) approval by the water district of the groundwater management plan, and 4) approval by the water district of a water purchase and sale agreement. Since the MOU merely established the procedural framework for development of the groundwater management plan, and the county would later have full discretion to approve, deny, or condition the plan, the approval of the MOU did not "cause" a change in the environment, either directly or indirectly, and therefore did not constitute a "project" requiring CEQA review.

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