

Public/Private Partnerships: New Guidance on Designating the CEQA Lead Agency

With public/private partnerships becoming more common, a California appellate court has outlined – with a new test – how to determine the CEQA lead agency for a project in which a private entity partners with multiple public agencies. *Center for Biological Diversity v. County of San Bernardino* (G051058) 4th Dist., May 10, 2016. Cadiz, Inc. partnered with Santa Margarita Water District, San Bernardino County, and Fenner Valley Mutual Water Company – a private, nonprofit entity Cadiz formed – to pump fresh groundwater from an aquifer below Cadiz's Mojave Desert property to customers in nearby counties. The purpose of the project was to conserve groundwater and improve water supplies to California communities. The county and water district entered into an agreement designating the water district as the lead agency and the county as a responsible agency for environmental review purposes. Several environmental organizations challenged the project's approval, alleging that the water district was improperly designated as the lead agency. They argued that the county, rather than the water district, should have been the lead agency because the county had general governmental powers to approve or exempt the project from the county's permitting requirements for pumping. The court of appeal held that the water district was properly designated as the lead agency. Where there is more than one public agency involved in a project, the CEQA Guidelines delineate which should be the lead agency. Section 15051 (a) of the Guidelines provides that if a public agency will carry out the project, that agency shall be the lead agency even if the project is located in another agency's jurisdiction. Subsection (b) states that if a nongovernmental entity will carry out the project, then the public agency with the greatest responsibility for supervising or approving the project as a whole shall be the lead. Subsection (c) provides that if there is more than one public agency that satisfies (b), then the lead agency shall be the one which acts first on the project. And subsection (d) provides that if more than one public agency has a substantial claim to be the lead agency, they may enter into an agreement designating which will serve as lead. The court found that while the water district hadn't acted first, it satisfied the other three tests in Guidelines section 15051. Having closely examined the water district's responsibilities in comparison to Cadiz and the county, the court determined that "[t]he final EIR provide[d] sufficient evidentiary support for the designation of [the water district] as the lead agency based on its cooperative partnership with Cadiz in implementing, carrying out, supervising, and approving the Project as a whole." The court cited, among other things, the water district's responsibilities of obtaining financing; approving design, construction, and project terms; and managing and overseeing the project operation. Although the county had authority over pumping, the court recognized that the project encompassed more than that and that the water district had more authority over the project as a whole. The court also concluded the agreement the water district and county had entered into properly designated the water district as lead agency because an agency need not have an equal or greater claim to be lead agency, but merely a substantial one in order to be designated by agreement. Additionally, the court noted, the lead agency may benefit from a project as long as it remains able to provide the information necessary for environmental review. The court also provided guidance – in the form of a new test based on section 15051 – for analyzing projects conducted in partnership between a public agency and a nongovernmental entity. It held that, in a public/private partnership, the lead agency may be either "(1) the public agency that is a part of the public/private partnership, or (2) the public agency with the greatest responsibility for supervising or approving the project as a whole." Citing the evidence in the EIR, the court ruled that the water district was properly designated as the lead agency under either prong of the new test. This opinion demonstrates the close attention that must be paid to different agencies' responsibilities when determining the lead agency for a project. It also confirms that an agency with a limited purpose may be designated lead agency on a project if it is "the public agency that shoulders primary responsibility for creating

and implementing a project . . . even though other public agencies have a role in approving or realizing it."

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