CASE NO. G050858

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION THREE

DELAWARE TETRA TECHNOLOGIES, INC.,
Plaintiff and Appellant,

v.

COUNTY OF SAN BERNARDINO, et al.,
Defendants and Respondents.

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND PROPOSED BRIEF OF CALIFORNIA STATE ASSOCIATION OF COUNTIES AND CALIFORNIA ASSOCIATION OF SANITATION AGENCIES

Appeal from the Judgment of the Superior Court
State of California, County of Orange on September 29, 2014
The Honorable Gail A. Andler, Judge Presiding

Orange County Superior Court Case No. 30-2013-00636391-CU-WM-CXC

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, Fourth **APPELLATE DISTRICT, DIVISION** Three	Court of Appeal Case Number: G050858
ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):* Sabrina V. Teller, SBN 215759 Gwynne B. Hunter, 293241 Remy Moose Manley, LLP 555 Capitol Mall, Suite 800 TELEPHONE NO.: 916-443-2745 FAX NO. *(Optional):* 916-443-9017 E-MAIL ADDRESS *(Optional):* steller@rmmenvirolaw.com ATTORNEY FOR *(Name):* Amici Curiae CA State Assoc. of Counties, et al.	Superior Court Case Number: 30-2013-00636391 ***FOR COURT USE ONLY***
APPELLANT/PETITIONER: DELAWARE TETRA TECHNOLOGIES, INC., RESPONDENT/REAL PARTY IN INTEREST: COUNTY OF SAN BERNARDINO, e	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS *(Check one):* ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

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1. This form is being submitted on behalf of the following party (*name*): Amici Curiae CA State Assoc. of Counties, et al.

2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	**Nature of interest *(Explain):***
(1)	
(2)	
(3)	
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(5)	

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The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: August 12, 2015

Sabrina V. Teller
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APPLICATION TO FILE AND STATEMENT OF INTEREST OF AMICI CURIAE

Pursuant to Rule 8.200, subdivision (c), of the California Rules of Court, the California State Association of Counties (CSAC) and the California Association of Sanitation Agencies (CASA) submit this application to file an *Amici Curiae* brief in support of the position of Respondents County of San Bernardino and Santa Margarita Water District in this matter.

CSAC is a non-profit corporation. Its membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide. The Committee has determined that this case raises important issues that affect all counties.

CASA is a nonprofit mutual benefit corporation organized and existing under the laws of the State of California. CASA is comprised of 115 local public agencies throughout the state, including cities, sanitation districts, sanitary districts, community services districts, sewer districts, county water districts, California water districts, and municipal utility districts. CASA's member agencies provide wastewater collection, treatment, water recycling, renewable energy and biosolids management services to millions of California residents, businesses, industries and institutions. CASA is advised by its Attorneys Committee, and engages in litigation of statewide significance that has the potential to yield significant benefits to, or to avoid burdens upon, a large number of CASA member agencies.

Our purpose in filing this brief is to provide the Court with CSAC and CASA's perspective regarding the following issue: What constitutes "approval" of a project under CEQA? The answer to this question has evolved over the course of CEQA's 45-year history, and

is far more complex than Appellant suggests in its briefs. Public agencies such as CSAC and CASA's members need the latitude to negotiate and to enter into preliminary or framework agreements that may contain some binding terms but that guide the development of additional technical details, studies, and project-defining elements without adding the costly and time-consuming hurdle of first having to prepare an EIR. This Court's consideration of the variety of circumstances in which public agencies negotiate and contract will assist to dispel Apellant's attempt to cast every negotiation and every act "required by law" as a "project approval" under CEQA. The facts of this case provide an excellent platform on which to consider these issues because the need to secure reliable water sources will prompt development of similar projects in the coming years, and the legal concepts at issue apply in other agency scenarios. Clear legal guidance is critical to ensuring future California water management proceeds properly and efficiently.

No party or counsel for a party in this case authored any part of the accompanying Amicus Curiae brief. No party or party's counsel made any monetary contribution to fund the preparation of the brief. This brief has been prepared pro bono solely on behalf of Amici Curiae.

Amici Curiae respectfully request that this Court accept the accompanying brief for filing in this case.

DATED: August 12, 2015 REMY MOOSE MANLEY, LLP

By: Sabrina Teller
Sabrina V. Teller

Attorney for Amici Curiae
CALIFORNIA STATE ASSOCIATION OF COUNTIES and CALIFORNIA ASSOCIATION OF SANITATION AGENCIES

AMICI CURIAE BRIEF

INTRODUCTION

This brief[1] will explore the question: what constitutes "project approval" under the California Environmental Quality Act? Plaintiff/Appellant Delaware Tetra Technologies (Tetra) argues that the Memorandum of Understanding (MOU) entered into between the Santa Margarita Water District (SMWD), Fenner Valley Mutual Water Company (FVMWC), and the County of San Bernardino (County) regarding how the parties would eventually comply with a County ordinance constitutes a project approval under the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.[2]) and therefore could not be adopted before environmental review was conducted. In making this argument, Tetra oversimplifies the complex case law on this topic and takes two positions that cause Amici significant concern.

First, Tetra argues that CEQA review was required before negotiations in this matter were final or complete. However, CEQA does not require environmental review before agencies conduct negotiations – indeed, the Supreme Court in *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 136, noted that not every agreement necessitates CEQA review.

Second, Tetra assumes that every act or agreement that might be required by a local ordinance constitutes an "entitlement" and thus an "approval." That argument ignores the practical realities of the development and approval process and grossly overstates the statutorily-defined role of the MOU in the County's ordinance considerations. Many acts and agreements are required by local ordinances; not all of them constitute "entitlements" or "project approvals" under CEQA requiring prior environmental review.

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[1] Because this case and the related matter of *Delaware Tetra Technologies, Inc. v. Santa Margarita Water District*, Case No. G05864, raise identical issues, Amici have prepared and submitted identical briefs for the Court's consideration in both cases.

[2] All subsequent statutory citations are to the Public Resources Code, unless otherwise noted.

ARGUMENT

1. Preliminary agreements or initial steps in a process do not necessarily constitute "project approvals" under CEQA.

Public agencies need the flexibility to conduct negotiations and enter into all kinds of framework agreements without having to incur the substantial time and expense of preparing environmental review first. This is particularly true when such agreements might contain binding terms but are otherwise preliminary, and most importantly, do not commit the agencies to actions that effect physical changes in the environment or constrain their discretion to shape or even disapprove projects in response to environmental review. While the CEQA statute, implementing "Guidelines," and 40 years of interpretive case law make clear that public agencies may not *commit* themselves to or approve a public or private course of action that would result in significant effects on the environment without first considering and potentially mitigating those effects, the reality is that complex, expensive undertakings often require substantial discussion, negotiation, technical analysis, and definition before such projects can be considered for possible approval. The courts have recognized this reality and provided guidance for agencies to follow in entering into agreements, such as predevelopment agreements or other project framework agreements such as term sheets, discussed further below.

Tetra argues that the 2012 MOU entered into between SMWD, Cadiz, FVMWC, and the County regarding ordinance compliance for a contemplated Groundwater Monitoring Management and Mitigation Plan (GMMMP) was the first step in an approval process and thus effectively constituted an "approval" of a project that necessitated prior CEQA review. The court below found that the MOU did not constitute a commitment by the County to approve the GMMMP or the groundwater extraction and conservation project, and thus CEQA did not apply to the County's decision to enter the MOU. That was the correct conclusion. The MOU was a

conditional agreement that did not commit either the County or SMWD to a definite course of action. An agency's preliminary activities designed to *facilitate* a project—but that do not irrevocably *commit* the agency to the project—are not "project approvals" under CEQA. (*Save Tara, supra,* 45 Cal.4th at pp. 136-137.)

Under CEQA, "[a]ll lead agencies shall prepare, or cause to be prepared by contract, and certify the completion of, an environmental impact report on any project which they propose to *carry out or approve* that may have a significant effect on the environment." (§§ 21100, 21151, emphasis added.) The CEQA Guidelines define "approval" as "the decision by a public agency which commits the agency to a definite course of action in regard to a project intended to be carried out by any person. The exact date of approval of any project is a matter determined by each public agency according to its rules, regulations, and ordinances." (Cal. Code of Regs., tit. 14, § 15000 et seq. (CEQA Guidelines), *id*, § 15352, subd. (a).) This definition of "approval" applies to both public and private CEQA projects. (*POET, LLC v. Cal. Air Resources Bd.* (2013) 218 Cal.App.4th 681, 719.) "With private projects, approval occurs upon the earliest commitment to issue or the issuance by the public agency of a discretionary contract, grant, subsidy, loan, or other form of financial assistance, lease, permit, license, certificate, or other entitlement for use of the project." (Guidelines, § 15352, subd. (b).) However, the negotiations, studies, term sheets, or development of parameters that may ultimately shape the final contracts, permits, or entitlements are not themselves subject to CEQA, for good reason. An interpretation of CEQA that would require preparation of environmental review before parties could even determine the details of what *might* be approved, or not, ultimately, would lead to absurd, costly and wasteful results.

Agencies must not take any action that significantly furthers a project in a manner that forecloses their ability to consider a full range of alternatives or mitigation measures that would ordinarily be part of CEQA review for that project before conducting CEQA review. (*Save Tara, supra,* 45 Cal.4th at p. 139.) If, as a practical matter, the agency has foreclosed any meaningful options other than going forward with the project, then for purposes of CEQA the agency has approved the project. Courts must look not only to the terms of the agreement, but also to the surrounding circumstances to determine whether the agency has committed itself to the project. But "approval" does not equate with an agency's mere interest in or inclination to support a project, no matter how well defined. (*Id.* at p. 136.)

A claim that the lead agency approved a project with potentially significant environmental effects before preparing and considering an EIR for the project is predominantly one of improper procedure, which an appellate court reviews de novo. Agencies are afforded some discretion in making this decision and thus, the facts of each case influence the outcome. (*Id.* at p. 131.)

a. Under *Save Tara*, "approval" occurs when an agency commits to a definite course of action regarding the project.

The seminal case dealing with this issue is *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, in which the California Supreme Court addressed the question of whether and under what circumstances an agency's agreement, conditioned on future CEQA compliance, constituted approval of a project within the meaning of sections Public Resources Code sections 21100 and 21151. The court concluded that the city's conditional agreement to sell land for private development, coupled with financial support, public statements, and other actions by its officials committing the city to development, was an approval of the project that should have been preceded by review under CEQA.

The facts in *Save Tara* were critical to the court's holding. The project was development of low-income senior housing units on an historic estate, with funding support from a federal grant. The project architect and housing manager explained to the city council that though the exact building design had not yet been determined, staff had already rejected alternative uses of the site, and the recommended actions would commit the city as long as the developer delivered. (*Id.* at p. 125.) The city approved a draft conditional agreement for conveyance and development of the property. Conditions included satisfying all applicable CEQA requirements and obtaining all entitlements—but, critically, the city manager could waive CEQA compliance, and the city would loan nearly half a million dollars to the developer with no provision for repayment if the project were denied.

Later, after public criticism, the city revised the agreement to revoke the city manager's discretion to waive CEQA requirements. The revised agreement also expressly recognized that it imposed no duty on the city to approve any documents prepared pursuant to CEQA. Petitioners argued that, notwithstanding these later revisions, the agreement was a project approval and should have been preceded by CEQA review.

The Supreme Court recognized agencies must strike a balance between competing policy considerations important to the timing of EIR preparation: EIRs should not be prepared before a project is well enough defined to allow for meaningful assessment, but their preparation should not be delayed beyond when they can practically serve their intended function of informing and guiding decision-makers. (*Id.* at pp. 129-130.) The tricky part, the court stated, is determining "when an agency's favoring of and assistance to a project ripens into a 'commitment.'" (*Id.* at p. 130.) Thus, the key question under CEQA is not whether an agency approves an agreement that

triggers the requirement of prior CEQA compliance, but whether that agreement constitutes a *commitment* to the project that would preclude effective, good faith CEQA review.

The City of West Hollywood argued that the agreement was not a project approval because it was expressly conditioned upon future CEQA compliance, which inherently involved assessing potential impacts before proceeding with the project. The court disagreed. It found that mere insertion of a CEQA compliance condition would not save an agreement from being considered an approval if the agreement otherwise essentially committed the public agency to the project. (*Id.* at p. 132.) The court declined to extend two cases that had previously upheld agreements solely due to their inclusion of CEQA compliance clauses, but did not disapprove those cases. (See *Stand Tall on Principles v. Shasta Union High School Dist.* (1991) 235 Cal.App.3d 772; *Concerned McCloud Citizens v. McCloud Community Services Dist.* (2007) 147 Cal.App.4th 181.) These cases remain good law under the parameters articulated by the Supreme Court in *Save Tara* and further evince the need to preserve agency discretion to enter into pre-CEQA Compliance agreements.

At the same time, the *Save Tara* court disagreed with the contention that an agreement is an approval of a project under CEQA simply because at the time the agreement is made the project is sufficiently defined to conduct a meaningful assessment. It also recognized private projects often need some form of government consent or assistance to get off the ground well before formal approval, and noted that requiring agencies to engage in the often lengthy and expensive EIR process before reaching even preliminary agreements with developers could unnecessarily burden the planning process. (*Id.* at p. 137.)

The *Save Tara* court applied the general principle that before conducting CEQA review, agencies must not take any action that significantly furthers a project in a manner that forecloses

alternatives or mitigation measures that would ordinarily be part of CEQA review of that public project. In both versions of the agreement at issue in *Save Tara*, the city agreed to lend the developer money that was not conditioned on CEQA compliance. Furthermore, the city manager told the federal government that the city had approved the sale of the property and would commit up to $1 million in financial aid. Once the federal grant was awarded, the city's mayor announced it would be used for the project, and a city newsletter stated that the city would use the grant to redevelop the property. City staff had told residents that the development was an "obligation" the city "must" pursue. And the city had proceeded with existing tenant relocation, which was likely irreversible. All of these actions tended to show that the city's commitment to the project was not contingent on its future review in an EIR. (*Id.* at p. 142.)

The totality of the circumstances of the case showed the city had committed to a definite course of action: it made public announcements that it would proceed with the development project; it acted in accordance with that determination (by preparing tenants for relocation); it made a substantial, nonrefundable financial contribution; and it expressed a willingness to bind itself to convey the property. In light of these facts, the *Save Tara* court reasonably found the city had "approved" the project. Those facts do not exist here.

b. Other cases have required very high levels of commitment to find an "approval" has occurred.

Cases following *Save Tara* have clarified that the level of agency commitment that should be considered an "approval" under CEQA is high—a "firm commitment." In *North Coast Rivers Alliance v. Westlands Water District* (2014) 227 Cal.App.4th 832, the court analyzed whether a project had been "approved" prior to CEQA's enactment, and thereby fell within a statutory exemption. The court laid out the rule that, generally speaking, an agency acts to approve a proposed course of action when it makes its earliest firm commitment to it. (*Id.* at p.

859.) The court determined that a water district, by means of contractual commitments and other agency determinations, had committed itself to the project.

In 1965, Westlands Water District entered into a contract with the Bureau of Reclamation providing for the construction of a "water distribution and drainage collector system." By executing the contract, the Bureau agreed to construct the facilities, and Westlands agreed to repay the construction costs and related expenses over a 40-year period. Westlands approved the contract. Afterward, Westlands merged with an adjacent water district and adopted a resolution requesting and authorizing the Bureau to immediately begin construction of a water delivery system for the enlarged district. A supplemental contract provided Westlands would receive an additional 1.4 million acre-feet of water within a 10-year period. The court found this evidence "more than sufficient to show that prior to [CEQA's enactment], Westlands Water District (and the Bureau) had committed to a definite course of action (i.e., given approval) as to the proposed construction and layout of the facilities...." (*Id.* at p. 861.)

In pre- and post-*Save Tara* cases, courts have similarly considered surrounding circumstances and evidence in making "approval" determinations. In *Santa Margarita Area Residents Together v. San Luis Obispo County Bd. of Supervisors* (2000) 84 Cal.App.4th 221, the court found the county had committed itself to a definite course of action when it approved a development agreement that "establishe[d] the scope of the Project and precise parameters for future construction as well as a procedure to process Project approvals" and was "aimed at assuring construction of the Project, provided certain contingencies are met." (*Id.* at p. 229; see also *Citizens for a Megaplex-Free Alameda v. City of Alameda* (2007) 149 Cal.App.4th 91, 106-108 [agreement was "indisputably a commitment by the City to issue grants, loans, and other forms of financial assistance" where it obligated the city to perform demolition, grading, and

remediation work at the site, to lease property, and to cooperate in securing subsequent permits and approvals]; *Save Panoche Valley v. San Benito County* (2013) 217 Cal.App.4th 503, 530 [board's cancellation of Williamson Act contracts constituted a definite course of action for the project].)

In *City of Chula Vista v. County of San Diego* (1994) 23 Cal.App.4th 1713, the minutes of the county's Board of Supervisors meeting unequivocally showed that a lease agreement for operation of a hazardous waste facility was "approved," despite later assertions that the county merely authorized "negotiations" regarding the agreement. (*Id.* at p. 1720.) The resolution adopted by the Board of Supervisors also clearly indicated it "approve[d] and authorize[d]" its staff to negotiate *and award* a five-year facility operation agreement. (*Ibid.*) The record indicated that a city council member had spoken against approval of the agreement, and thus the city could not deny knowledge of the approval.

In *Fullerton Joint Union High School District v. State Bd. of Education* (1982) 32 Cal.3d 779, upon which Tetra relies heavily in its reply brief, the court determined the State's approval of a school district secession plan prior to consideration by voters to be a project approval requiring prior environmental review. In *Fullerton*, one key factor in the court's determination that the State's approval was a "project approval" under CEQA was the fact that once the voters approved the secession plan, the new school district would have to build a high school, and the old school district would have to adjust to the loss of the separated students. The alternative of continuing the status quo could not be considered if the voters approved the plan. (*Id.* at p. 797.)

The MOU at issue here bears none of the hallmarks of the agreements determined to be "approvals" in the foregoing cases. It set forth a process to be followed for the finalization of a GMMMP which, *if later approved*, would govern a complex program of groundwater production

under the specific requirements of the County ordinance. That process necessarily entailed extensive coordination of technical studies and data sharing between public agencies, private operators, and experts and consultants on all sides in addition to that which occurred through the County's role as responsible agency. It was entirely reasonable for the County and SMWD to, at that point in the administrative process, set forth their mutual expectations for how the GMMMP would be presented to the County under its ordinance, and what sort of enforcement mechanisms would be employed *if approved.* One key factor that distinguishes the MOU from the cases discussed above and relied upon by Tetra is that the Respondents retained the option to *not approve* the ultimate groundwater project that would effect changes in the environment. Thus, the MOU was not the kind of approval that necessitated prior CEQA review.

Public agencies such as CSAC and CASA's members need the latitude to enter into such preliminary agreements to guide these kinds of complex administrative processes without adding the costly and time-consuming hurdle of first having to prepare an EIR when there has not yet been any irrevocable commitment to an action that would affect the environment.

Amici fear that if the Court adopts Tetra's view of pre-project agreements, their member agencies will be precluded from negotiating and resolving preliminary issues early in the administrative process, such as funding for studies and site review, private-public partnership agreements, municipal services financing agreements, initial capital outlays for project development, and a host of other early issues that have proven crucial to public agencies.

c. *Cedar Fair* held term sheets and preliminary agreements, like the MOU at issue, are not project approvals.

The court in *Save Tara* "express[ed] no opinion on whether any particular form of agreement, other than those involved in [that] case, constitute[d] project approval." (*Save Tara, supra*, 45 Cal.4th at p. 137.) Cases decided since then have offered more insight into what types

of agreements do and do not fall within *Save Tara*'s purview. Importantly, pre-project agreements do *not* constitute project approvals.

In *Cedar Fair v. City of Santa Clara* (2011) 194 Cal.App.4th 1150, the court applied *Save Tara*'s analytic framework and reached the opposite conclusion regarding the agencies actions—the term sheet in that case was not a project approval *even though it contained binding terms* that would govern the project *if* it were later approved. The court characterized it as a nonbinding preliminary agreement distinguishable from the agreement that had committed the City of West Hollywood in *Save Tara*. In *Cedar Fair*, a "Stadium Term Sheet" set forth basic terms of a proposed transaction to develop a stadium for the San Francisco 49ers in the City of Santa Clara. Appellants argued that the approval of the term sheet constituted approval of the project, emphasizing the term sheet's length—39 pages—and high level of detail, the large amount of money already invested by the redevelopment agency in the process, and the fact that the term sheet was put to a public vote by the City Council.

The Sixth District Court of Appeal disagreed. The court noted at the outset that the *Save Tara* court had rejected any bright-line rule dictating when approval occurs. (*Id.* at p. 1161.) Rather, the guiding principle is that agencies must not take any action that significantly furthers a project in a manner that forecloses the agencies' ability to consider alternatives or mitigation measures that would ordinarily be part of CEQA review for that project. The court acknowledged that determining on which side of the line the term sheet fell was not an easy judgment call. The term sheet explicitly stated its purpose was to memorialize the preliminary agreements that had been negotiated among the parties, and to inform the public regarding the goals and principles identified by city staff and city council that would guide the proposal to develop the stadium throughout the public review process. Some of those preliminary terms were

binding terms. The agreement's introduction described the project as well-defined, and noted that the parties would enter into leases. (*Id.* at p. 1168.)

But the agreement in *Cedar Fair*, much like the MOU here, also included conditions—that the stadium would not proceed until the parties had negotiated, executed, and delivered mutually acceptable agreements based upon information produced from the environmental review process and other public review and hearing processes, subject to all applicable governmental approvals. (*Id.* at p. 1169.) The term sheet noted that while many details had been agreed to, many essential terms and conditions had not yet been agreed upon, and that in order to effectuate the project, the parties would have to negotiate, agree to, and submit subsequent binding agreements. The term sheet in *Cedar Fair* was a binding agreement in certain respects, but it still was not a project approval requiring CEQA compliance because it did not commit the city to the stadium project in a manner that limited the city's discretion under CEQA. (*Id.* at pp. 1172-1173.)

The *Cedar Fair* court recognized that "the negotiation of a complicated, multiparty development agreement can involve a long process of hammering out a multitude of issues," not every step of which commits the parties to the project, even if it commits the party to terms of the project that will enable CEQA review to occur. (*Id.* at p. 1171.) Furthermore, "the modern phenomenon of 'public-private partnerships' for development makes the time of 'approval' under CEQA more difficult to ascertain since a local agency may be a vocal and vigorous advocate of a proposed project as well as an approving agency." (*Id.* at p. 1173.)

The court applied the *Save Tara* test of whether the term sheet, viewed in light of all the surrounding circumstances, as a practical matter committed the city to the project so as to effectively preclude consideration of alternatives or mitigation measures that CEQA would

otherwise require, including the alternative of not going forward with the project. The court concluded that it would not.

The court distinguished *Riverwatch v. Olivenhain Municipal Water District* (2009) 170 Cal.App.4th 1186, in which a municipal water district's approval and signing of an agreement to provide recycled water to a trucking company for delivery to a landfill was an "approval" of the landfill project because it committed the district to a definite course of action. The agreement set forth specific details regarding the district's 60-year obligation to deliver recycled water, and the construction required to allow that delivery. Furthermore, the district approved and executed the agreement without a future CEQA compliance provision, clearly committing the district to the course of action set forth therein. The agreement provided that the company receiving the water—without any further consideration or action by the water district—was "solely responsible" for later complying with CEQA regarding receipt, use, and transportation of the recycled water. (*Id.* at p. 1196.) Though the *Riverwatch* agreement was conditioned on the trucking company's compliance with CEQA regarding its use and transportation of the water, it did not provide that the *water district* was responsible for complying with CEQA. (*Id.* at p. 1214.) That stands in stark contrast to the MOU at issue here, which by its terms (and surrounding circumstances) reserved to the County and SMWD the duty and obligation to complete CEQA review before committing to the project as a whole or the GMMMP specifically.

d. Other cases have similarly held that pre-project agreements do not constitute commitments to projects triggering EIR preparation.

In *Neighbors for Fair Planning v. City and County of San Francisco* (2013) 217 Cal.App.4th 540, the city executed an agreement to loan a community service center approximately four percent of the funds needed to complete a project, to be used for

predevelopment activities like design, appraisal, and preparation of environmental studies. Petitioners contended the loan impermissibly committed the city to the project before environmental review.

The court disagreed. The activities funded by the city's loan were limited to studies, were not irreversible, and would not cause physical changes in the environment. (*Id.* at p. 553.) Also, in contrast to *Save Tara*, the center was required to repay the loan whether or not the project was approved. The court was also unpersuaded by the petitioners claim that the center committed itself to the project because the deed of trust required the site to be used for affordable housing for the next 55 years, foreclosing all alternative uses. The court noted that even in *Save Tara*, the city's commitment to developing senior housing was only one of many factors in the total set of circumstances demonstrating the city's irrevocable commitment to the proposed project. (*Id.* at p. 554.)

In *City of Irvine v. County of Orange* (2013) 221 Cal.App.4th 846, the city contended the county's decision to approve an application to expand a jail facility and submit it to the state constituted an approval triggering the county's obligation to comply with CEQA. The request for applications emphasized, "[a] county's receipt of a conditional award for state financing…is merely an expression that the county is qualified, at this point, to move forward in the process." (*Id.* at p. 861.) Accordingly, the county's application was merely a preliminary step that, if approved, would authorize the county to evaluate the possibility of expanding the facility. Tetra attempts to distinguish and dismiss the application in *City of Irvine* and the court's holding as irrelevant to the MOU here, but in fact, that decision made several important pronouncements that are controlling here.

The court in *City of Irvine* made clear, in its reliance on *Cedar Fair, supra,* that an agreement could have binding terms and still not have committed the agency to a project in violation of CEQA. Instead, consistent with the Supreme Court's reasoning in *Save Tara,* what was most important was that the agency's agreement had not constrained its discretion under CEQA to modify the project, impose mitigation, or consider alternatives to respond to the results of the later environmental analysis of the actual project under consideration. (*City of Irvine, supra,* 221 Cal.App.4th at pp. 859-860.) As further discussed below, while the MOU has some binding terms that would apply if the project were approved, the Respondents did not bargain away their discretion to undertake a good faith review under CEQA and to modify or deny that project at the culmination of that review.

2. The MOU is a preliminary agreement, analogous to the term sheet in *Cedar Fair*, and is not an irrevocable commitment to the whole project as in *Save Tara*.

Tetra attempts to distinguish *Cedar Fair* by arguing that the term sheet there was not a project component required by city ordinance, and its approval was not legally required for the project to proceed. Tetra also argues that approval of any project component is approval of the project. Tetra is mistaken. As explained below, the MOU is not a separate physical component of any project, and the MOU—whatever role in might later serve in the County's consideration of the GMMMP—did not represent an entitlement to undertake the ultimate physical changes in the environment that would occur with the groundwater extraction and conservation program. The fact that elements of it may be used to implement the GMMMP which would effect a change in the physical environment *if* the GMMMP were approved after CEQA compliance, does not change the character or status of the MOU at the time it was considered.

In its reply brief, Tetra cites to *Citizens for the Restoration of L Street v. City of Fresno* (2014) 229 Cal.App.4th 341, 354, for the proposition that any "first step" entitlement necessarily constitutes "approval" of the project. (Tetra Reply Brief, at p. 14.) The court in *Citizens for the Restoration of L Street*, however, was not faced with similar issues as here and thus is not authoritative on the issue of when a pre-project agreement ripens into an approval. In any event, the case lends further support to the County and SMWD. The entitlement granted in *Citizens for the Restoration of L Street* was a permit to demolish an historic structure. That is unquestionably an entitlement to undertake a physical change in the environment. That stands in stark contrast to the MOU here, which does not authorize any well installation or pumping activity whatsoever, either in the MOU or as the MOU is envisioned in the County's Ordinance.

The MOU, unlike the agreement in *Save Tara*, does not establish precise construction parameters, obligate financial assistance, or otherwise firmly commit the County to the GMMMP, an element of the groundwater project. The agreement states the parties are bound to its terms, but critically, those terms are conditioned upon the County's unfettered exercise of its discretion to approve, deny or conditionally approve the GMMMP following compliance with CEQA. The MOU provides the County may approve or disapprove the GMMMP, and that the proposed groundwater project may be altered as the parties see fit. The MOU is thus highly distinguishable from the binding development agreement at issue in *Save Tara*.

The County retained its full discretion to approve or disapprove the GMMMP following environmental review, and to ensure compliance with applicable laws and agreements: "Following certification of the Final EIR, the [Groundwater Management, Monitoring, and Mitigation Plan (GMMMP)] will be subject to County approval and a discretionary consistency

determination that the GMMMP conforms to this MOU and the County Ordinance." (MOU, Recital 6.)

Multiple clauses in the agreement convey its nonbinding and discretionary nature. First, the MOU states that "[t]he Board of Supervisors of the County will consider whether to approve the GMMMP at a noticed public meeting . . . . ." (Paragraph 3(a).) Paragraphs 3(b) and 3(e) outline important Project terms and features yet to be determined, including identifying minimum groundwater levels and establishing a projected rate of decline. Any Project features already defined are flexible; "the County will retain full authority and discretion to modify Project operations." via the GMMMP. (Paragraph 3(d).) *Save Tara* and *Cedar Fair* held that an agreement's level of detail does not dictate whether it is an approval.

The MOU clearly contemplates that only when "the GMMMP is completed and the *Project is approved by the county*" will the groundwater project commence operation in compliance with the GMMMP. (Paragraph 3(e), emphasis added.) Furthermore, the groundwater extraction element of the project is prohibited from moving forward until the parties have complied with all required procedures: "The Project *shall not proceed* and the Project's exclusion from the Ordinance *shall not become effective*, however, unless and until the Parties have finalized the GMMMP based upon information produced from the CEQA environmental review process and following public review and all legally required procedures." (Paragraph 4(a), emphasis added.)

The MOU is explicitly intended to serve a procedural role in the GMMMP's development, with no mandated outcome:

> This MOU is entered into to establish a *process* for completing a GMMMP that comports with the County Ordinance and CEQA. Pending completion and approval of the GMMMP, the Project *remains subject to the County's full exercise of discretion* as a Responsible Agency under CEQA to consider the Final EIR certified by SMWD and to

> *approve or disapprove* the Project and to require the Project to undertake mitigation measures or alternatives as may be set forth in the Final EIR or under the County's Ordinance. ...The Parties further acknowledge and agree that any modifications to the Project resulting from SMWD's or the County's compliance with CEQA *may necessitate amendments to this MOU* in a mutually acceptable manner.

(Paragraph 4(b), italics added.)

The MOU contains a CEQA compliance clause ("[t]he obligations of the Parties under this MOU are conditioned upon compliance with CEQA"). While *Save Tara* held that such a clause is not by itself sufficient to prevent an otherwise binding agreement from being considered a project approval, the MOU contains additional qualifying clauses that plainly predicate implementation of the MOU's terms on SMWD's approval and the County's own discretion. "In no event shall SMWD or the County be required to implement any provision of this MOU prior to SMWD's approval of the Project, and the County's taking discretionary action as a responsible agency, other than the County's obligation under Paragraph 4(c) to exercise its discretion within 90 days of certification of the Final EIR." (Recital 7.)

As the MOU's language discussed above plainly shows, the County indicated in the MOU that it would perform environmental review before making any commitment to the approval of a GMMMP for the groundwater project, and nothing indicates that the County otherwise circumscribed or limited that discretion; rather, its discretion was explicitly retained in the terms of the agreement. Thus, the County's actions are distinguished from those of the agency in *Save Tara*, and more akin to those found acceptable as framework-defining, pre-project approval steps in *Cedar Fair.*

These sorts of practical pre-project agreements are crucial to the ongoing ability of CASA and CSAC member agencies to be responsive to administrative demands. The reported

cases have shown that agencies can enter such agreements while preserving the sanctity of the CEQA review process. That discretion should be preserved.

CONCLUSION

In both *Save Tara* and *Cedar Fair*, the courts acknowledged the balancing act inherent in determining the proper timing of CEQA review. If every agreement that settles on a *process* were considered a project approval, agencies would be forced to engage in CEQA review to develop the technical and procedural information necessary to define a project, which would then again be subject to CEQA review. The practical consequences that would flow from Tetra's interpretation of CEQA as applied to the 2012 MOU would be to sow significant confusion and additional unnecessary expense for public agencies and private applicants.

* * *

Amici Curiae respectfully request that the Court consider these arguments in ruling on the petitions.

Dated: August 12, 2015

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WORD COUNT CERTIFICATION [CRC 8.204(c)]

Counsel for the CALIFORNIA STATE ASSOCIATION OF COUNTIES and CALIFORNIA ASSOCIATION OF SANITATION AGENCIES certify that the Application for Leave to File Amicus Curiae Brief contains 511 words and the Amicus Curiae Brief contains 5790, for a total of 6301 words as measured by the Microsoft Word 2013 word processing software used in the preparation of the application and the brief.

Dated: August 12, 2015

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Delaware Tetra Technologies, Inc. v. County of San Bernardino, et al.,
Fourth Appellate District Court of Appeal, Division Three Case No. G050858
(Orange County Superior Court Case No. 30-2013-00636391)

PROOF OF SERVICE

I, Rachel N. Jackson, am a citizen of the United States, employed in the City and County of Sacramento. My business address is 555 Capitol Mall, Suite 800, Sacramento, California. My email address is rjackson@rmmenvirolaw.com. I am over the age of 18 years and not a party to the above-entitled action.

I am familiar with Remy Moose Manley, LLP's practice whereby the mail is sealed, given the appropriate postage and placed in a designated mail collection area. Each day's mail is collected and deposited in a U.S. mailbox after the close of each day's business.

On August 12, 2015, I served the following:

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND PROPOSED BRIEF OF CALIFORNIA STATE ASSOCIATION OF COUNTIES AND CALIFORNIA ASSOCIATION OF SANITATION AGENCIES

☒ On the parties in this action by causing a true copy thereof to be placed in a sealed envelope with postage thereon fully prepaid in the designated area for outgoing mail addressed as listed below

☐ On the parties in this action by causing a true copy thereof to be delivered via Federal Express to the following person(s) or their representative at the address(es) listed below

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SEE ATTACHED SERVICE LIST

I declare under penalty of perjury that the foregoing is true and correct and that this Proof of Service was executed this 12th day of August, 2015, at Sacramento, California.

_____
Rachel N. Jackson

Delaware Tetra Technologies, Inc. v. County of San Bernardino, et al.,
Fourth Appellate District Court of Appeal, Division Three Case No. G050858
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