# **Fifth Appellate District Invalidates Kern County Oil and Gas Ordinance**

Newstex Blogs

JD Supra

March 13, 2020 Friday 7:55 PM EST

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**Length:** 1171 words

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**Body**

Mar 13, 2020( JD Supra: http://www.jdsupra.com Delivered by Newstex) On Tuesday, February 25, 2020, the Fifth Appellate District invalidated ***Kern*** County's 2015 ***Oil*** and Gas Ordinance (the 'Ordinance'), which was intended to streamline the permitting process for a variety of ***oil*** and gas activities within unincorporated portions of the County, including for ***oil*** and gas production wells and related infrastructure such as well pads and pipelines. Although the Court's decision does not impact permits that were already issued under the Ordinance, the Court's decision requires the trial court to issue a writ of mandate vacating and setting aside the Ordinance. Accordingly, and at least for now, future project applicants will not be able to obtain streamlined review under the County's Ordnance. Summary of the Case The underlying case dealt with ***Kern*** County's programmatic Environmental Impact Report ('EIR') under the California Environmental Quality Act ('CEQA') to evaluate amendments to the County's general zoning ordinance governing local permitting for ***oil*** and gas exploration, development, and production activities.

The County's amendments to the general zoning ordinance still required permits for all new ***oil*** and gas activities, but subjected permit applications to a ministerial '***Oil*** and Gas Conformity Review.' If correctly classified as 'ministerial,' permits issued under the Ordinance could proceed without any additional environmental review.In December 2015, several groups challenged ***Kern*** County's EIR and Ordinance on several grounds, including CEQA. In March 2018, the trial court held that the County's EIR violated CEQA on two issues related to the Ordinance's impacts on rangeland and road paving mitigation measures intended to reduce dust and the project's impacts on air quality. However, the trial court did not vacate the County's EIR or Ordinance, and instead allowed project applicants to continue applying for coverage under the Ordinance while the County addressed the EIR's deficiencies. Several petitioners appealed the trial court's decision. The Court of Appeal's Decision In a partially published decision, the Fifth District reversed and remanded the trial court's decision. In the published parts of the decision, the Court held that the County's EIR: (1) inappropriately deferred, and failed to sufficiently address, the implementation of mitigation measures designed to address impacts to water supplies; (2) failed to sufficiently address or mitigate impacts from the project's conversion of agricultural lands (e.g., agricultural conservation easements do not sufficiently offset the loss of agricultural lands); and (3) failed to sufficiently address the project's noise impacts because the County determined the significance of those impacts based only on a single threshold—whether the estimated ambient noise level with the project would exceed the 65 decibel threshold set forth in the County's general plan.On the water supply issue, the Court observed that some of the mitigation measures the County selected in the EIR required applicants to increase or maximize their use of produced water, and decrease or minimize their use of municipal and industrial ('M&I') water to the extent feasible. The Court held in relevant part that these measures improperly deferred mitigation and lacked specific performance standards. Although there are exceptions to the general rule under CEQA that mitigation measures should not be deferred until some point in the future (e.g., where an agency 'commits' itself to specific criteria), the Court reasoned that an improper deferral existed because the mitigation measures would not be determined and implemented until the project applicant requested a permit and received an approval from the County. As such, the County did not commit itself to the implementation of specific measures included in the plan.The Court's conclusion that the County failed to sufficiently account for impacts from the project's conversion of agricultural lands through the use of conservation easements is particularly notable since these types of mitigation measures are frequently used to mitigate project impacts under CEQA. (Masonite Corporation v. County of Mendocino (2013) 218 Cal.App.4th 230 [holding that conservation easements are not legally infeasible mitigation for loss of farmland].) Indeed, the Court's conclusion on this issue is somewhat contradictory because, in an unpublished portion of the Court's decision, the Court held that the County's separate mitigation measures to address impacts to biological resources and habitat loss through the use of conservation easements and land preservation credits from mitigation banks did not violate CEQA.Finally, with respect to the County's analysis of noise impacts from the project, the Court held that the County's EIR violated CEQA because the County determined the significance of noise impacts based solely on the County's 65 decibel threshold set forth in the County's plan. In relation, the County failed to provide any analysis to support its use of a single quantitative method to accurately describe changes in noise levels. The Court reasoned in part that the cumulative noise level of 65 decibels did not provide a complete and reasonable method of evaluating the significance of noise impacts because increases in ambient noise at different sites and compared to the single threshold level would not provide a complete picture of noise impacts that would result from the project as a whole.In the unpublished parts of the decision, the Court held that the County: (1) inadequately addressed air quality impacts in relation to fine particulate matter (PM2.5) even though the County addressed impacts from PM10; and (2) failed to include a cumulative health risk assessment in the Draft EIR that the County conducted, thus there was no meaningful public review and comment on the assessment.Unlike the trial court, the Fifth District ordered that the County set aside its EIR and Ordinance. As noted above, although the Court concluded that permits already issued under the Ordinance could remain in effect, the Court held that any permits issued after the trial court's writ of mandate setting aside the Ordinance within 30 days should be invalidated. Therefore, pending the County's efforts to comply with CEQA and address the deficiencies in the EIR, applicants will not be able to rely on the County's Ordinance. Instead, project applicantswill have to proceed under the prior County code (to the extent it covers such activities in the first place). Finally, although ***Kern*** County filed a petition for rehearing on March 11, 2020, which is the next step before seeking review of the Fifth District's decision before the California Supreme Court, it is too early to tell whether ***Kern*** County's petition and any subsequent appeal will be successful.[View source[1].] [ 1]: https://www.ceqachronicles.com/2020/03/fifth-appellate-district-invalidates-***kern***-county-***oil***-and-gas-ordinance/

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