

King and Gardiner Farms v. County of Kern
(Feb. 25, 2020) ___ Cal.App.5th ___

This case centered on the County’s ordinance for new oil and gas wells in agricultural areas. Prior to its adoption, oil and gas wells (and exploration) were allowed by right in agriculturally zoned areas of the county. This led to conflict between the county’s two most powerful constituencies: the oil and gas industry and the agricultural industry. In particular, farmers were outraged that new wells could be drilled on their lands at will (based on underlying mineral rights), disrupting their agricultural activities and production. The ordinance required a ministerial “Oil and Gas Conformity Review” from the County before any well could be developed.

The ordinance was primarily drafted in conjunction with representatives of the oil and gas industry, which acted as the project applicant. It was adopted by the County Board of Supervisors in November 2015.

KG Farms sued, alleging that the EIR prepared for the ordinance was inadequate. The trial court held in favor of KG Farms on some issues and in favor of the County on others. The Court of Appeal found that a number of KG Farms arguments had merit and set aside the ordinance and the EIR. It remanded the case to the trial court, with the following order:

First, the County’s CEQA determination—namely, the certification of the EIR—shall set aside. Second, the County shall set aside its approval of the Ordinance, effective 30 days from the date this opinion is filed. Third, the Ordinance itself shall be invalidated, effective 30 days from the date this opinion is filed and, therefore, the County’s review and approval of permit applications pursuant to the Ordinance will cease. Fourth, with respect to permits issued under the Ordinance before the date of its invalidity, those permits may remain in effect. Fifth, if the County decides to readopt the Ordinance (in its present or modified form), the County must take the corrective action necessary to bring the EIR and the mitigation measures into compliance with CEQA, which corrective action shall include recirculating revised EIR and Multi-Well Health Risk Assessment [an issue addressed in the non-published part of the opinion] and allowing and responding to comments, before recertifying a revised EIR and approving the project.

As part of its instructions for the remand of the EIR, the Court ordered that the baseline for the updated water supply analysis be “brought up to date,” rather than relying on a baseline that ignored the new county-wide groundwater sustainability plan adopted under the Sustainable Groundwater Management Act (SGMA).

The published parts of the opinion addressed claims related to the inadequacy of analyses and mitigation of water supply, agricultural land, and noise impacts. With regard to water supplies, the Court found that the EIR’s approach to water supply assessment based on regional groundwater basins was reasonable. However, the mitigation measures for the project’s significant impacts to water supplies inappropriately deferred formulation of the measures or delayed the actual implementation of the measures. Proper deferment requires the agency to commit to feasible enforceable mitigation measures (MMs), establish performance standards

to ensure the effectiveness of the measures, and make sure that the mitigation will be in place at the time the project is implemented. Three of the EIRs water supply mitigation measures failed to meet one or all of these requirements.

MM 4.17-2 required the applicant to “increase the re-use of produced water and shall reduce its use of municipal and industrial ground or surface water to the extent feasible. The Court noted that the terms “increase” and “reduce” were not specific performance standards and that this MM was improperly deferred. MM 4.17-2 also required the applicants for future permits to:

... work with the County to review water use data submitted to Division of Oil Gas and Geothermal Resources under Senate Bill 1281 and identify the five biggest oil industry users of municipal and industrial water by volume. The five biggest oil industry users of municipal and industrial water shall work together to develop and implement a plan identifying new measures to reduce municipal and industrial water use by 2020. The plan shall address the following activities, as appropriate: steam generation; drilling and completions (including hydraulic fracturing); dust control; compaction activities related to construction; and landscaping. Through the KernFLOWS initiative or other efforts (e.g., Groundwater Sustainability Agency), the five biggest oil industry users of municipal-and-industrial water shall also work with local agricultural producers and water districts to identify new opportunities to increase the use of produced water for agricultural irrigation and other activities, as appropriate. Any produced water treated and used for agricultural irrigation or other activities shall be tested and monitored to assure compliance with applicable standards for such agricultural irrigation or other uses.

The Court found that this measure was improperly deferred because:

First, MM 4.17-2 lacks specific performance standards for the “plan identifying new measures to reduce municipal and industrial water use by 2020.” Second, nowhere in MM 4.17-2 did the County commit itself to the measures ultimately included in the plan. Instead, the measure states the five biggest oil industry users of M&I water “shall work together to ... implement a plan.” Thus, implementation was assigned to unidentified third parties—parties that may or may not agree to participate in the task and, if they do participate, may or may not act in good faith. Furthermore, assuming the five biggest oil industry users successfully develop the plan and are able to implement it, the County did not commit itself to adopting the plan and requiring applicants for permits to comply with the plan’s measures. Consequently, the provision relating to M&I water does not include the commitment necessary to qualify for the exception allowing deferred formulation of mitigation measures.

... In addition to the deferred formulation and related lack of enforceability, the provisions in MM 4.17-2 relating to the five biggest oil industry users of M&I water suffer from another defect—delayed implementation. The Ordinance became effective on December 9, 2015. Yet, any measures prescribed by the plan would not be implemented until sometime in 2020. Consequently, the Ordinance and MM 4.17-2

allowed permits for oil and gas activity to be issued (and wells to be drilled) without being subject to the measures contained in the plan. The delayed implementation of mitigation measures is a type of delay distinct from deferred formulation. In POET I, we noted this distinction and addressed delayed implementation by stating that “[o]nce the project reaches the point where activity will have a significant adverse effect on the environment, the mitigation measures must be in place.” (POET I, *supra*, 218 Cal.App.4th at p. 738.) The relevant “activity” under the Ordinance is the oil and gas activity described in a permit application. Here, the plan mentioned in MM 4.17-2 was not in place when permits began to be issued and oil and gas activity commenced. Consequently, the plan clearly violates the principle against the delayed implementation of mitigation measures.

MM 4.17-3 addresses the use of water produced from oil and gas activities. In particular, it provides:

In the County’s required participation for the formulation of a Groundwater Sustainability Agency, the Applicant shall work with the County to integrate into the Groundwater Sustainability Plan for the Tulare Lake-Kern Basin, best practices from the oil and gas industry to encourage the re-use of produced water from oil and gas activities, and (with appropriate treatment) to produce new water supplies for other uses such as agricultural irrigation and groundwater recharge. The produced water re-use goal is 30,000 acre-feet per year, which would offset more than the current use of imported water and groundwater from non-oil bearing zones by the oil and gas industry. (*Italics added.*)

The Court concluded that this was improper deferral of mitigation because the County did not commit to specific performance standards and “referred to a nonexistent plan intended to be adopted over four years later.” While the MM includes a re-use goal, the Court found that the goal was not a commitment, as required for proper deferral.

MM 4.17-4 addresses available water supplies. It states:

The Applicant shall work with the County on the Groundwater Sustainability Plan to increase Applicant use of reclaimed water and reduce the Applicant’s use of municipal- and-industrial quality imported surface water or groundwater. The Applicant will provide copies of water use reports produced under SB 1281 to the Groundwater Management Agency, which will then integrate this information into the Groundwater Sustainability Plan required under the Sustainable Groundwater Management Act.

The Court found that this measure was improperly deferred for the reasons explained under MMs 4.17-2 and 4.17-3.

The Court concluded that the EIR’s disclosures about the mitigation measures were inadequate and, as a result, the adoption of a statement of overriding considerations did not render harmless these failures to comply with CEQA. In order for MMs of uncertain effect such as 4.17-2 through 4.17-4 to satisfy CEQA’s findings requirements “the lead agency “must find

(1) the measures are at least partially effective, (2) all feasible mitigation measures have been adopted, and (3) the environmental impacts will not be mitigated to less than significant levels. The findings must be supported by substantial evidence. (§ 21168.5.)” The record does not show that the measures will be partially effective.

The EIR concluded that the project, which would result in approximately 300 acres of agricultural land to be converted to other uses annually, would have a less than significant impact on agricultural land conversion with the implementation of MM 4.2-1. That measure required mitigation at a ratio of 1:1 for oil and gas exploration and extraction activities on agricultural land that has been actively farmed five or more of the last 10 years. The measure offers four options for mitigation: (a) funding and/or purchasing agricultural conservation easements or similar instrument acceptable to the County; (b) purchasing of credits for conservation of agricultural lands from an established agricultural farmland mitigation bank or an equivalent agricultural farmland preservation program managed by the County; (c) restoring agricultural lands to productive use through the removal of legacy oil and gas production equipment, including well abandonment and removal of surface equipment; or (d) participating in any agricultural land mitigation program adopted by the County that provides equal or more effective mitigation than the measures listed above. The Court looked at the effectiveness of each of the options to reduce the loss of agricultural land to a less than significant level. With regard to option (a), the Court found:

... the implementation of agricultural conservation easements for the 289 acres of agricultural land estimated to be converted each year would not change the net effect of the annual conversions. At the end of each year, there would be 289 fewer acres of agricultural land in Kern County. Accordingly, under the thresholds of significance listed in the EIR, this yearly impact would qualify as a significant environmental effect. Therefore, we agree with KG Farms’ contention that MM 4.2-1.a does not provide effective mitigation for the conversion of agricultural land.

Regarding option (b), the Court found a similar flaw:

We conclude the record does not contain substantial evidence showing the mitigation banks or preservation programs referred to in MM 4.2-1.b were available. It follows that the record does not contain substantial evidence to support a finding that participation in a banking or preservation program actually would offset the conversion of agricultural land to oil and gas activities like MM 4.2-1.c. Any such programs might operate like the agricultural conservation easements specified in MM 4.2-1.a, which do not actually offset the applicant’s conversion of agricultural land. Consequently, we conclude MM 4.2-1.b does not provide effective mitigation for the project’s conversion of agricultural land.

By contrast, the Court concluded that option (c), taken by itself, could be effective:

... Here, the restoration of agricultural land to productive use would offset the loss of agricultural land caused by the County’s approval of a permit for oil and gas activity. Furthermore, the use of the 1:1 ratio would result in full compensation for the loss of

agricultural land. As a result, the net change in the amount of agricultural land would be zero—that is, the impact would be fully mitigated. Therefore, we conclude MM 4.2-1.c provides effective mitigation for the conversion of agricultural land.

The Court found that option (d) was an open-ended measure that failed to adequately commit to mitigation. “Because the record does not identify any program that qualifies as an “agricultural land mitigation program adopted by Kern County” for purposes of MM 4.2-1.d, we conclude that option does not provide available, effective mitigation for the project’s conversion of agricultural land.”

KG Farms suggested in its comments on the EIR that the County include a mitigation measure that would require the clustering of future oil infrastructure sited on farmland. The County’s response noted that there were similar requirements under County General Plan policies and claimed that the suggestion was similar to Alternative 3 (“Reduced Ground Disturbance”). However, the response did not describe why the suggestion would not be effective. The Court concluded that:

... The response did not separately address the clustering of wells and infrastructure as a possible measure for mitigating the significant environmental impact resulting from the estimated conversion of agricultural land, particularly the proposal to require the clustering of wells and infrastructure when feasible. As a result, the response did not provide a detailed, reasoned analysis of why the suggested measure for clustering of wells and infrastructure when feasible was not accepted. As such, the response did not comply with the requirements of Guidelines section 15088, subdivision (c) or CEQA.

Regarding noise impacts, the County determined the significance of those impacts based solely on whether the estimated ambient noise level with the project would exceed the 65 decibels (dBA) threshold set forth in the County’s general plan. Commenters on the draft EIR, and the EIR’s own noise study suggested that an increase of 5 dBA over current ambient noise levels would make a reasonable threshold. Based on prior case law, the Court concluded that the magnitude of the noise increase over ambient levels must be addressed to determine the significance of change in noise levels. Here, the EIR did not include an analysis, supported by substantial evidence, explaining why the magnitude of an increase in ambient noise, as opposed to meeting an absolute noise threshold such as 65 dBA, need not be addressed to determine the significance of the project’s noise impact. The Court explained:

The cumulative noise level of 65 dBA DNL does not provide a complete and reasonable method of evaluating the significance of noise impacts because an increase in ambient noise of 20 dBA at monitoring site number 12, which was recorded as being 44.8 dBA, would not be a significant, adverse change in the noise environment. In contrast, a 2 dBA increase at monitoring site number 2, which was recorded as being 63.9 dBA, would be considered a significant adverse change in the noise environment. The EIR does not provide a rational explanation for this approach to environmental change. Simply saying the cumulative noise level would not be exceeded at site number 12 and would be exceeded at site number 2 does not provide a rational explanation for why a 20-dBA increase is an insignificant increase at site 12.