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Fifth District Clarifies That Agricultural Conservation Easements (ACE's) Qualify As Legally Permissible "Compensatory Mitigation" For Agricultural-Land Conversion Impacts Under CEQA Despite Not Ensuring No Net Loss

By Arthur F. Coon on March 21, 2024

In a partially published (but mostly unpublished) opinion filed on March 7, 2024, the Fifth District Court of Appeal reversed the trial court's judgment and writ-discharge order which had upheld Kern County's most recently revised "streamlined permitting" ordinance for oil and gas wells and its associated CEQA review. *V Lions Farming, LLC v. County of Kern, et al. (California Independent Petroleum Association, et al., Real Parties)* (2024) ___ Cal.App.5th ___. The Court of Appeal instead directed entry of a judgment and writ setting aside the County's revised ordinance and related certification of a revised supplemental recirculated EIR (SREIR) and addendum. It held (in *unpublished* portions of its opinion) that the SREIR's discussion of cancer risk from the potential drilling of multiple wells near a sensitive receptor was informationally deficient, and that the County also erred in analyzing the significance of lowering groundwater levels in wells by misconstruing CEQA to prohibit consideration of the social and economic impacts on disadvantaged communities in making that significance determination. (These and other *unpublished* portions of the opinion will not be discussed in any further detail in this post.)

The "Main Event" Issue: Do ACE's Qualify As CEQA Mitigation?

The only published – and, hence, the only precedential – portion of the opinion's analysis concerns the issue "whether an agricultural conservation easement (ACE) *partially* mitigates a conversion of agricultural land caused by the project." (Emph. added.) In an earlier appeal in the litigation concerning the County's approval of a prior version of the streamlined permitting ordinance, the Court of Appeal addressed and decided a *narrower* issue in holding that "ACE's were not effective at reducing the project's conversion of agricultural land *to a less than significant level* for purposes of CEQA." (Citing *King & Gardiner Farms, LLC v. County of Kern* (2020) 45 Cal.App.5th 814, emph. Court's, my 3/3/20 post

on which can be found *here*.) (Note: Due to a 2021 amendment of its articles of organization, appellant's name was changed from King and Gardiner Farms, LLC to V Lions Farming, LLC.) As indicated in my prior post, that narrower issue was necessarily shaped by the "no net loss" threshold of significance adopted by the County for agricultural land conversion impacts, along with the well-established legal principle that cases are not authority for propositions not considered; nonetheless, some of the Court's broader statements cast doubt on whether ACE's constituted legally valid mitigation for CEQA purposes to *any* extent. The Court's previous statements concerning this issue appeared to potentially conflict with the reasoning and holding of the First District's decision in *Masonite Corp. v. County of Mendocino* (2013) 218 Cal.App.4th 230 (my 8/2/13 post on which can be found *here*). The trial court's ruling here that Kern County need not adopt ACE's – on the ground that the Fifth District's 2020 decision held they do not provide effective mitigation – teed up the broader legal issue now confronting the Court, i.e., whether ACE's even qualify as a permissible type of CEQA mitigation for agricultural land conversion impacts.

The Court's analysis of this issue was extensive, exceeding 20 pages of its 106-page opinion. After first emphasizing the narrowness of its prior holding – i.e., that ACE's were not "effective" at accomplishing the "specific task" of reducing agricultural land conversion impacts "*to a less than significant level for purposes of CEQA*" – the Court next examined the relevant provisions of the CEQA Guidelines defining "mitigation." It held Guidelines § 15370(c) was ambiguous with respect to its definition of mitigation through the example of "[c]ompensating for the impact by … providing substitute resources" and, more specifically, whether *preserving* substitute resources – as ACE's do without ensuring no net loss – is encompassed within this definition. After reviewing the statutory basis of conservation easements generally, and the law governing interpretation of ambiguities in its own prior opinion – the interpretation of which presents a question of law, subject to independent review, under rules requiring an objectively reasonable interpretation as a whole in light of the facts and issues before the Court considered in proper context – the Court concluded its prior opinion was, indeed, ambiguous in relevant part. Some of its statements could be interpreted broadly, as County contended, to mean that ACE's are categorically ineffective and legally invalid as CEQA mitigation; on the other hand, other statements supported Lion Farming's narrower interpretation that the opinion merely held ACE's alone could not reduce the project's agricultural land conversion impacts to a less-than-significant level because they could not ensure no net loss of such lands. Concluding that in issuing its earlier opinion it "did not intend to adopt any principle of law about mitigation that was not needed to decide the particular issue presented[,]" and applying the rules of construction adumbrated above, the Court resolved the ambiguity by adopting the narrower construction of what it meant by "effective mitigation" in its earlier opinion, which interpretation was supported by the County's adoption of a threshold of significance requiring no net loss of agricultural land to determine that a conversion impact was less than significant. The County thus misread the Court's prior opinion to categorically condemn the use of ACE's even as partial mitigation.

However, the Court now needed to directly address the previously undecided issue, i.e., "whether ACE's qualify as a type of [valid CEQA compensatory] mitigation despite their inability to achieve no net loss of farmland." In analyzing that issue, now squarely before it for the first time, the Court noted that while neither CEQA nor NEPA statutorily defines "mitigation," later federal and state implementing regulations did define the term. As most relevant here, the CEQA Guidelines' definition of mitigation (which originally mirrored NEPA's in substance) was amended in 2018 to include a clause expressly referencing conservation easements, as follows: "Compensating for the impact by replacing or providing substitute resources or environments, *including through permanent protection of such resources in the form of conservation easements*." (Quoting CEQA Guidelines, § 15370(e), emph. Court's.) Noting that CEQA was modeled on NEPA, and that interpretations of the latter federal act are persuasive in interpreting CEQA, the Court undertook an extensive analysis of not only NEPA's but other federal statutes' regulations defining "compensatory mitigation." It explained that such regulations concerning, and the use of, compensatory mitigation are both prevalent, particularly in the area of federal Clean Water Act §

404 permitting and related wetlands mitigation. The upshot of this analysis was that "federal agencies treat compensatory mitigation as including preservation of existing habitat, but usually restrict the use of preservation to exceptional circumstances" although "[d]espite this restriction, preservation is a common type of mitigation."

Going on to its task of interpreting the CEQA Guidelines' relevant text, which it did as a matter of law subject to independent review under the rules governing the interpretation of statutes, the Court found the text ambiguous as to whether ACE's actually "compensate" for converted agricultural lands by "replacing or providing substitute resources or environments." It found "replacing" was not ambiguous in context and that ACE's would not compensate by "replacing" because they did not create new agricultural lands to "replace" the converted ones. "Providing" is ambiguous in context, however, as it could reasonably be interpreted either to preclude, or not preclude, preservation of existing lands. Similarly, "substitute resources" is ambiguous in context because construed narrowly it could require no net loss of agricultural lands, while under a broader interpretation it could simply refer to other land that will remain available in the future to grow crops that could no longer be grown on the converted land.

Exercising its independent review, the Court ultimately adopted an interpretation of the ambiguous Guideline language that it deemed to best effectuate CEQA's purpose of long term protection of the environment. It noted that the Natural Resources Agency's relevant 2018 amendment was expressly intended to incorporate the First District's holding in *Masonite* "that off-site agricultural conservation easements constitute a potential means to mitigate for direct, in addition to cumulative and indirect, impacts to farmland." *Masonite* rejected the argument that ACE's were legally infeasible even though they would "not replace the onsite resources" and supported this conclusion with numerous legal authorities and practical considerations, including the Guidelines, case law on offsite biological resources mitigation and ACE's, prevailing practice, and public policy. In effect, *Masonite* interpreted "providing substitute resources" to include the *preservation* (i.e., permanent protection) of *existing* agricultural lands; it saw no good reason to distinguish cases accepting offsite preservation of habitats for endangered species as compensatory mitigation for biological resources impacts from the analogous use of offsite ACE's to mitigate for conversion of agricultural lands. Additionally, *Masonite* found support for its holding in the common use of ACE's for mitigation in California and the state's important, legislatively-declared public policies to preserve agricultural lands and to do so through CEQA. *Masonite's* interpretation of what qualifies as compensatory mitigation under CEQA was recently reaffirmed by the First District, in the context of habitat mitigation, in *Save the Hill Group v. City of Livermore* (2022) 76 Cal.App.5th 1092, 1117 (my 4/4/22 post on which can be found *here*).

Ultimately, while noting it was not *bound* to follow the First District's or the promulgating agency's interpretation of CEQA Guidelines § 15370(e), the Court held that doing so "would advance CEQA's purpose of long term protection of the environment and its specific role of preserving agricultural land[,]" while not doing so would have the opposite effect. Thus, the Court held: "ACE's are a type of compensatory mitigation for the conversion of agricultural [land] even though, operating by themselves, they do not replace the converted land or otherwise result in no net loss of agricultural land." (Citing *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 523, my 12/28/18 post on which can be found *here*, for the proposition that "mitigation measures must be at least partially effective, even if they cannot mitigate significant impacts to less than significant levels.") Accordingly, the trial court erred and the County failed to comply with CEQA by ruling out ACE's as a mitigation measure for agricultural land conversion impacts where the impacts had not been reduced to less than significant – here meaning a net zero acreage loss – by other mitigation.

Conclusion and Implications

After a tortuous analytical journey, complicated by ambiguous and overbroad statements in its prior opinion, the Fifth District Court of Appeal ultimately reached the correct conclusion – i.e., ACE's constitute legally valid CEQA mitigation for agricultural land conversion impacts – in alignment with the First District's *Masonite* decision. Unfortunately for the beleaguered Kern County, it followed the Court's earlier misleading "head fake" and paid for its incorrect interpretation of the prior opinion's ambiguity by incurring another set-aside of its oil and gas well permitting ordinance. A key takeaway for other jurisdictions dealing with the issue of mitigating for agricultural land conversions with ACE's is to recognize that they possess discretion in choosing the threshold of significance for such impacts, so long as the chosen threshold is supported by substantial evidence, and they need not necessarily choose such a low significance threshold – i.e., any impact greater than zero net loss – as Kern County did here.

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