MILLER STARR REGALIA

First District Holds CEQA Class 1 Categorical Exemption Applies To Approval of Project Converting Existing Oil Well Into Produced-Water Injection Well Because Changed Use Presents "Negligible" Risk of Environmental Harm

By Arthur F. Coon on September 9, 2024

In a published decision filed September 6, 2024, the First District Court of Appeal (Div. 5) reversed the trial court's judgment granting a writ of mandate and upheld the use of CEQA's Class 1 categorical exemption (CEQA Guidelines, § 15301) by the California Department of Conservation's Division of Geologic Energy Management ("CalGEM") in approving a project to convert an oil well that previously pumped oil and water from a deep aquifer into an injection well that would pump excess water produced from oil extraction back into that aquifer. *Sunflower Alliance v. California Department of Conservation, et al. (Reabold California, LLC, Real Party in Interest)* (2024) ___ Cal.App.5th ___. Because the project involved only minor physical alterations to the well, and the factual record showed the environmental risks from the well's changed use – i.e., injecting water into the aquifer instead of pumping it out – were negligible, the project fell within the exemption.

The Project's Relevant Regulatory and Factual Background

Underground injection projects are strictly regulated under federal and state law; CalGEM oversees California's underground injection program and regulates oil and gas extraction. Federal law prohibits injection unless the EPA has exempted the aquifer from the Safe Drinking Water Act, i.e., determined for specific reasons (such as poor water quality) that it will never be a drinking water source. Aquifers containing significant quantities of oil are eligible for exemption and injection. (40 C.F.R. §§ 144.1(g), 146.4, 144.7 (2024).)

For each barrel of oil extracted, oil wells also pump several barrels of "produced water," which is separated from the oil but of poor quality and must be disposed of through injection or some other means. Injection of the produced water back into an exempt, oil-bearing aquifer through a "Class II well" is a common disposal method. (See 40 C.F.R. § 144.6(b)(1) (2024); Pub. Resources Code, § 3130(b).)

CalGEM, in consultation with the SWRCB and regional water boards, reviews Class II well applications for legal compliance, which includes a detailed technical review of the aquifer, the proposed and other area wells, and operation and monitoring plans to demonstrate, inter alia, that the injection fluid is confined to the injection zone and will not escape the exempt aquifer through any well, fault, casing flaw, or other pathway. (14 Cal. Code Regs., §§ 1724.6, 1724.7, 1724.7.1.) Any injection that allows the injected water to escape or harm persons, property or the environment is legally prohibited. (14 Cal. Code Regs., § 1724.8(a); Pub. Resources Code, § 3131(a).)

Real Party Reabold applied to CalGEM to convert a former oil well in Contra Costa County's Brentwood Oil Field to a Class II injection well. The oil well is more than 4,000 deep and located in an exempt aquifer. Dozens of Brentwood field wells have, over the past 60 years, pumped over 33 million barrels of water and 3.6 million barrels of oil from the aquifer; two injection wells have pumped about 9.4 million barrels of produced water back so far. Reabold's project seeks to dispose of about 300 barrels of water produced daily from two oil wells it operates in an adjacent oil-bearing aquifer, and would eliminate its current 10 truck round-trips per week to a disposal site 32 miles distant to dispose of the water.

CalGEM and all the water boards reviewed Reabold's application, which proposed minor physical changes to the well and site and contained engineering, geological, and hydrogeological reports concluding, inter alia, that injected water would be confined to the aquifer by 1,000 vertical feet of shale layers, and would not adversely affect any of the 22 water supply wells in the general area, none of which were over 500 feet deep. Following detailed fact-intensive review, CalGEM ultimately approved the project with regulatory conditions, and as CEQA-exempt under Class 1, noting in its NOE that "Reabold's injection equipment would be installed within the existing well boring and would require no significant surface equipment or new wells" and that "[t]he project would eliminate the need for routine trucking of the produced water" and inject water "cleaner than when it was removed."

The Court of Appeal's Opinion
Categorical Exemptions Generally

After the trial court granted petitioner Sunflower Alliance's writ petition challenging CalGEM's CEQA exemption, Reabold appealed and the Court of Appeal reversed. After briefly discussing CEQA's three-step process, the Court provided an interesting overview of the history, nature and operation of categorical exemptions, which define classes of projects that, by regulation, the Secretary of the Natural Resources Agency (Secretary) has determined do not have a significant effect on the environment. (See *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1092 [my 3/3/15 and 6/1/15 posts on which can be found *here* and *here*]; Pub. Resources Code, §§ 21084, 21080(b)(9); CEQA Guidelines, §§ 15300, 15301.)

Observing that "[c]ategorical exemptions provide a measure of certainty and predictability in the context of a statute that is famously sweeping and imprecise[,]" the Court of Appeal noted their origin in an idea suggested by the California Supreme Court in its seminal case "interpret[ing] CEQA's vague terms expansively to apply to private projects that require government approval, contrary to the [then-]general belief that it applied only to public projects[.]" (Citing *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259, 271.) The Supreme Court, "[a]nticipating an alarmed reaction to its [expansive interpretation]," predicted there would be further legislative or administrative guidance, and opined that "common sense tells us that the majority of private projects [requiring a government permit or entitlement]… are minor in scope… and hence, in the absence of unusual circumstances, have little or no effect on the public environment… [and], accordingly, may be approved exactly as before the enactment of [CEQA]." (Citing *id.* at 271-272.) From these judicially-planted seeds grew urgency legislation directing the Secretary to adopt regulations establishing classes, or categories, of exempt projects the

Secretary has found do not have a significant effect on the environment. The Secretary did so, adopting the Guidelines' categorical exemptions, which designate over 30 categorically exempt classes of projects, subject to exceptions. Per the Court of Appeal: "Categorial [sic] exemptions provide certainty for projects that occupy a precarious position – just outside of CEQA's hazy border – by clarifying that EQA does not apply to them notwithstanding their potential effect on the environment."

Injection Well Project Falls Within the Class 1 Exemption's Scope

The issue on appeal centered primarily on whether the injection well project fit within the scope of the language of the Class 1 exemption, an issue the Court reviewed de novo employing traditional statutory construction rules. Petitioner Sunflower did not contend any exceptions to the exemption applied, and to the extent CalGEM's decision turned on evidence in the record, the substantial evidence standard applied.

The Court rejected Sunflower's main argument that well conversion projects, as a group, fall outside the exemption's scope, which encompasses projects involving minor alterations of existing structures with a key requirement that they "involv[e] negligible or no expansion of existing or former use." (Guidelines § 15301.) While Sunflower argued that any *new* use of a modified well – such as converting from pumping to injection – is an impermissible expansion of use negating use of the exemption, Reabold and CalGEM contended any change in use was minor in degree, essentially just reversing the direction of fluid transported between the surface and subsurface. Per the Court: "In a sense, both sides are right: injection is a new use of the well, but it may not be a significant change." Noting the absence of on-point cases or rules in this area, the Court focused on the guideline's key term "negligible," which qualifies permissible expansions of use, and which refers to something "small, unimportant, or inconsequential." Thus, the Court reasoned, in light of CEQA's objective to protect the environment, "it makes sense that the term negligible is intended to allow changes or expansions in use that are inconsequential and to exclude changes in use that threaten environmental harm." Per the Court: "In other words, when a modified project is put to a new use, the change in use is unimportant, as far as CEQA goes, if the risk of environmental harm from the new use is negligible."

Finding this interpretation supported by the Guidelines' examples of projects exempt under Class 1, as well as the purpose of categorical exemptions and common sense, the Court proceeded to apply it to "the relatively modest type of conversion project" represented by the Class II well approval at issue. First, it was undisputed that the project involved only minor modifications to the existing well; it "makes no significant changes to existing roads, the well pad, or surrounding [sparse] vegetation, nor does it entail complicated modifications, deepening, or reconstruction of the well."

Second, the well's change in use is negligible, i.e., injecting water into the same aquifer from which oil and water was formerly pumped, and will not involve any other uses that would pose potentially significant environmental risks, such as fracking. "Part and parcel of the project's approval as a Class II well is a regulatory determination that the injected water cannot escape the aquifer and [cause environmental] harm… because the injected water will be geologically confined within the aquifer."

Having concluded that the type of well conversion proposed by the project is not categorically outside of the Class 1 exemption's scope, the Court went on to reject Sunflower's argument that CalGEM's categorical exemption determination lacked substantial evidence support. Sunflower ignored the record evidence supporting CalGEM's finding; did not dispute that almost 1,000 vertical feet of shale would confine the injected water to the aquifer; did not allege the agencies erred; and expressly waived any challenges that there was anything "unusual" about the well or aquifer that may cause significant environmental effects. And even had Sunflower not waived the issue, its speculation that the injected

water would harm the aquifer's water quality – through a corrosion-inhibitor additive or a non-sealing fault – was "pure conjecture" unsupported by the record and contrary to the expert agencies' evidence-supported contrary conclusions.

Finally, the Court rejected Sunflower's argument that CalGEM's adoption of regulatory conditions essentially improperly "mitigated into" a categorical exemption, a practice prohibited by CEQA case law. (Citing *Salmon Protection & Watershed Network v. County of Marin* (2004) 125 Cal.App.4th 1098, 1102 [as holding "agency may not evade CEQA by adopting mitigation measures simply to qualify for a categorical exemption"].) Per the Court: "An agency may, however, impose conditions on a project that address environmental issues for legitimate reasons without running afoul of CEQA." Citing to a number of appellate decisions, including primarily *Walters v. City of Redondo Beach* (2016) 1 Cal.App.5th 809 (my 7/27/16 post on which can be found *here*), the Court concluded that an agency's requiring a project to meet existing regulatory standards – here, the stringent standards for Class II wells – does not run afoul of the prohibition against mitigating into a categorical exemption. Per the Court: "Compliance with the standards is a legally mandated element of the project, not a CEQA measure to lessen the project's environmental impacts and shoehorn it into a categorical exemption."

In sum, Sunflower had failed to show CalGEM failed to proceed in a manner required by law or that its decision lacked substantial evidence support, and the trial court erred in finding otherwise.

Conclusion and Implications

The Court of Appeal's straightforward and well-reasoned opinion provides a helpful interpretation of the Class 1 exemption's language and proper application that also accords with common sense and CEQA's statutory environmental protection purpose. It also contains a succinct and interesting historical discussion of the genesis of CEQA's categorical exemptions.

Questions? Please contact Arthur F. Coon of Miller Starr Regalia. Miller Starr Regalia has had a well-established reputation as a leading real estate law firm for more than fifty years. For nearly all that time, the firm also has written Miller & Starr, California Real Estate 4th, a 12-volume treatise on California real estate law. "The Book" is the most widely used and judicially recognized real estate treatise in California and is cited by practicing attorneys and courts throughout the state. The firm has expertise in all real property matters, including full-service litigation and dispute resolution services, transactions, acquisitions, dispositions, leasing, financing, common interest development, construction, management, eminent domain and inverse condemnation, title insurance, environmental law and land use. For more information, visit www.msrlegal.com.