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EIR Improperly Deferred Formulation and Implementation of Mitigation Measures for New Oil and Gas Drilling

The Fifth District Court of Appeal found multiple defects in a Kern County EIR for a proposed ordinance streamlining the permitting process for new oil and gas wells. *King and Gardiner Farms v. County Kern* 45 Cal.App.5th 814 (2020). The published portions of the Court's 150-page opinion held the EIR: (1) impermissibly deferred supplies, farmland mitigation



impacts.

The Ordinance Kern County approved an ordinance to streamline the permitting process for new oil and gas wells under which all such activities would require a permit involving, at minimum, a ministerial conformity review. This ministerial permit review process incorporated mitigation measures identified in the EIR certified by the County, which estimated that 2,697 new producing oil and gas wells would be drilled annually from 2013 through 2040, and 2,221 old wells would be capped and abandoned each year. **Water Supply Impacts** The appellate court concluded that mitigation measures to address water supply impacts — including requiring oil industry users to work together to develop and implement a plan to reduce water use — inappropriately deferred formulation of the measures or delayed their implementation. The EIR did not commit the County itself to the measures, improperly relying on unidentified third parties who might or might not implement them at some unknown point in the future. The County's adoption of a statement of overriding considerations finding adverse water supply impacts to be significant and irreversible did not save the EIR because the County had an independent duty to (1) describe mitigation measures that were currently feasible and (2) identify and explain the uncertainty in the effectiveness of those measures. **Conversion of Agricultural Land** The court held the County lacked evidence for its conclusion that specified mitigation measures would cause the ordinance to have a less-than-significant impact on conversion of land from agricultural uses. The EIR's reliance on acquisition of agricultural conservation easements was improper because such easements did not create any new agricultural land to replace the land converted and did not otherwise offset the impact. The court likewise concluded that

requiring purchase of credits for conservation of agricultural lands from an established agricultural farmland mitigation bank or equivalent farmland preservation program was inadequate as mitigation because there was insufficient evidence in the record that such farmland mitigation banks or preservation programs actually existed. The EIR also improperly failed to consider other feasible mitigation measures, including clustering of wells, to reduce the project's conversion of agricultural land. **Significance Threshold for Noise Impacts** The County determined the significance of the project's noise impacts based solely on whether the estimated ambient noise level with the project would exceed the 65 decibels threshold set forth in the County's general plan. While recognizing the deference afforded a lead agency in establishing thresholds of significance, the court held the County failed to document how the single quantitative method — which did not consider the magnitude of the increase in noise —adequately described how changes in noise levels would affect people.

Authors