California Oil & Gas Newsletter

DAY ▪ CARTER ▪ MURPHY LLP
AN ENERGY LAW FIRM

Update on CEQA & the Kern County Oil and Gas Ordinance

New Developments for Kern County Oil & Gas Projects

There have been two recent developments concerning oil and gas projects in Kern County:

(1) Kern County published a Notice of Preparation of a Draft Supplemental Recirculated Environmental Impact Report for the County's Oil & Gas Permitting Ordinance. As discussed in DCM's February 2020 *California Oil & Gas Newsletter*, a Court invalidated the ordinance after finding various California Environmental Quality Act ("CEQA") deficiencies in the EIR that the County certified when adopting the ordinance. The County now plans to correct those deficiencies with a Supplemental Recirculated EIR.

(2) A Court recently upheld DOGGR's (now CalGEM) approval of 213 new drilling permits for a project in Kern County. These permits were approved prior to the adoption of Kern County's Oil & Gas Permitting Ordinance, which means the case provides some insights into permitting while the County's Oil & Gas Permitting Ordinance is invalid.

Read below for more information on these developments.

County to Correct Deficiencies in Oil & Gas Permitting Ordinance

The County's Notice of Preparation announces the County's plan to correct the following five areas of deficiencies identified by the Court:

(1) Mitigation of water supply impacts;
(2) Impacts from PM2.5 emissions;
(3) Mitigation of conversion of agricultural land;
(4) Noise impacts; and
(5) Recirculation of the Multi-Well Health Risk Assessment.

Key Dates for SEIR Process
The County has announced the following dates for the scoping process:

May 13, 2020 at 1:30 pm: Virtual scoping meeting. Instructions will be available 3 days before the meeting at https://kernplanning.com.

May 29, 2020 at 5 pm: Comment deadline.

As is typical after a challenge to a CEQA document, the County's analysis will only focus on these deficiencies identified by the Court. As an initial step, the County will engage in a scoping process by soliciting comments on the scope and content of the Supplemental Recirculated EIR.

Court Upholds DOGGR's Approval of Drilling Permits

California's Court of Appeal for the Fifth Appellate District recently upheld DOGGR's approval of 213 new drilling permits for a drilling project in the South Belridge oil field located in Kern County.[1] Environmental groups challenged the approval by alleging that DOGGR failed to conduct any environmental review under CEQA. DOGGR and the operator, on the other hand, argued that various statutory and categorical exemptions under CEQA applied. As discussed further below,

Significance for Drill-by-Right Areas
Operators should be aware of this case as they navigate permitting on "drill-by-right" areas in Kern County, which have been reinstated after the invalidation of the Kern County Oil and Gas Ordinance, effective March 26, 2020.

Published by Day Carter & Murphy LLP. This is an update to provide general information to clients and the public, and is not intended to provide legal advice. For more information about this Newsletter, contact Michael Sherman at msherman@daycartermurphy.com or (916) 246-7341.

the Court ultimately decided that the issuance of the permits constituted a "ministerial" act not subject to CEQA review.

This decision is noteworthy because the approval of the drilling project occurred in 2014, which was prior to the adoption of Kern County's oil and gas permitting ordinance in 2015. Prior to this zoning ordinance, drilling could occur in certain areas of Kern County "by-right," meaning the zoning ordinance did not require any approval by Kern County. Drilling, however, still required approval from DOGGR. Under this drill-by-right approach, DOGGR acted as the lead agency for CEQA purposes and would need to determine the appropriate type of CEQA review of potentially significant environmental impacts. Now that the Kern County oil and gas permitting ordinance has been invalidated, we are now back in this same drill-by-right permitting scheme and DOGGR (now CalGEM) will likely act as the CEQA lead agency when issuing permits in drill-by-right areas.

Approaches for CEQA Review in Drill-By-Right Areas

The Court's decision discussed three approaches to CEQA review when proposing drilling in a drill-by-right area, which could potentially apply for future drilling approvals issued by CalGEM while Kern County updates its Oil & Gas Permitting Ordinance as discussed above. The following three approaches are considered further below: (1) approval as a ministerial act; (2) applying the Class 1 existing facility exemption; and (3) applying the Class 4 minor alteration of land exemption.

Ministerial Act Approach. In the case, DOGGR argued that it had discretion to issue drilling permits. The operator, however, argued that DOGGR only engaged in a ministerial act when issuing drilling permits and, therefore, DOGGR's approval was exempt from CEQA. Ultimately, the Court adopted the operator's argument because:

(1) DOGGR considered the issuance of drilling permits as "routine" and "ordinary and incidental aspects … of basic ongoing operations" in a large field with a long history of production;
(2) DOGGR had previously adopted specific field rules for the South Belridge oil field that "constituted fixed objective technical standards for new drilling projects ….";
and
(3) DOGGR's only role was to verify that the drilling project conformed to the technical standards in the field rules.[2]

Cautionary Note About Unpublished Cases
The Court's decision classifying DOGGR's approval of the 213 drilling permits as a "ministerial act" is an unpublished decision. Accordingly, courts and parties cannot cite or rely on this decision until the decision has been certified for publication. Although DOGGR was a party to this case, CalGEM is only bound by the decision as applied to the 213 drilling permits at issue and could choose to ignore the decision for future approvals of drilling programs. Regardless, the decision still provides insight into how a court would review CalGEM's environmental review of drilling programs.

Based on this reasoning, operators could also argue that CalGEM engages in a "ministerial act" that is exempt from CEQA when issuing drilling permits and other permits in fields that are similar to the South Belridge oil field (e.g., large fields with a long history of production). One key consideration for relying on this ministerial act approach would be specific language in the field rules and whether those rules leave any room for CalGEM to have discretion to issue a permit or if the rules set forth specific technical standards that only require CalGEM's review for conformity.

Class 1 Existing Facility Exemption Approach. Under CEQA Guidelines, a categorical exemption exists for minor alterations to existing facilities. The Court rejected this approach because the Court did not view the entire oil field as the same "existing facility." Instead, the Court viewed the new wells as "neither a continuation nor minor alteration of some other existing facility or structure at the site."[3] The Court, however, based its conclusions on its own interpretation of the facts because DOGGR had not provided sufficient legal analysis and authority *in the record* to support the use of this exemption.

As applied in the future, a Class 1 exemption should still apply to actions involving existing facilities in a field such as reworking or drilling replacement wells. For new wells, CalGEM may be unwilling to use the Class 1 exemption but the Court left open the question of whether this exemption could apply. For example, the exemption arguably may apply in a field if new wells are interrelated to existing facilities but this would need to be determined on a case-by-case basis and adequately supported in the record when CalGEM approves a permit.

Class 4 Minor Alterations to Land Approach. This CEQA Guidelines categorical exemption exists for minor alterations to the condition of land with "negligible or no permanent effects to the existing condition of land, water, air, and/or vegetation."[4] The Court also rejected this approach because DOGGR had not relied on this exemption and accordingly the operator could not demonstrate in the record how this exemption applied. The Court's holding, however, does not prevent the use of this exemption in the future if CalGEM can adequately explain how it applies to new wells and makes the appropriate findings. In our view, we believe that CalGEM can continue to apply this Class 4 exemption to limited drilling programs that would not occur in environmentally sensitive areas.

The use of these three approaches, of course, should be determined on a case-by-case basis to best match the factual situation of the existing field and an operator's proposed project.

Contact information for Day Carter & Murphy LLP
www.DayCarterMurphy.com
3620 American River Dr., Suite 205
Sacramento, CA 95864
Ph. # 916.570.2500

Endnotes

[1] *Association of Irritated Residents v. California Department of Conservation*, 2020 WL 1698749 (Cal.App. April 8, 2020) (unreported).
[2] *Id.* at *20.
[3] *Id.* at *26.
[4] 14 Cal. Code Regs. § 1684.2.