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Local Governments and the Power to Ban Fracking and Other Forms of Unconventional Oil and Gas Activity in California

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INTRODUCTION

Many cities and counties in California have recently begun to consider passing bans or moratoriums on oil and gas development or on unconventional well-stimulation techniques such as hydraulic fracturing ("fracking"). Because the oil and gas industry frequently asserts that local governments do not have the authority to enact these ordinances,[1] the Center for Biological Diversity studied some of the main points of contention.

A review of legal authority showed that local governments have the authority to permanently or temporarily ban oil and gas development within their jurisdiction. More limited bans on fracking are also within a local government's authority and are also possible. A court reviewing the validity of a local ordinance will likely look to the specific circumstances that are unique to each city and county. Therefore, it is important for proponents of an ordinance to consult with their own counsel and analyze the facts on a case-by-case basis.

There is always some inherent legal risk in enacting such ordinances, especially when faced with aggressive opposition by the oil and gas industry, which has vast financial resources to intimidate and litigate. Nevertheless, it is our opinion that well-drafted local ordinances that address the community's need for protection from oil and gas development and extreme extraction techniques should withstand legal challenge despite claims to the contrary.

I. Cities and Counties Have the Authority to Ban All Oil and Gas Development Within Their Jurisdiction

California has long recognized the authority of a local government to use its police power and zoning power to enact local bans on all oil and gas activity. The state Constitution provides that local governments "may make and enforce all ordinances and regulations in respect to municipal affairs…. City charters … with respect to municipal affairs shall supersede all laws inconsistent therewith." Article XI, sec. 5. The California Public Resources Code confirms that local

[1] See, e.g., Letter to Matthew W. Granger, County Counsel, San Benito County, from Craig A. Moyer, Manatt, Phelps, and Phillips, LLP, dated September 18, 2012 (attached).

authorities retain the power to "enact and enforce laws and regulations regulating the *conduct and location* of oil production activities, including … zoning,… public safety, nuisance … [and] noise…" Cal. Pub. Res. Code § 3690 (emphasis added). Thus, a city using its zoning power has inherent authority to ban oil and gas development.

The courts have consistently held that city zoning ordinances, unquestionably a municipal affair, prohibiting the production of oil in designated areas are valid. A city has "unquestioned right to regulate the business of operating oil wells within its city limits, and to prohibit their operation within delineated areas and districts if reason appears for so doing." *Beverly Oil Co. v. City of Los Angeles* (1953) 40 Cal.2d 552 at 558. There can be no constitutional challenge to an ordinance banning oil development if it is reasonably related to promoting the public health, safety, comfort, and welfare, and if the means adopted to accomplish that promotion are reasonably appropriate to the purpose. *Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach* reinforced this deference to local authority. "Enactment of a city ordinance prohibiting exploration for and production of oil, unless arbitrary, is a valid exercise of the municipal police power." (2001) 86 Cal.App.4th 534, 555.

"There can be no question of the inherent right of the city to control or prohibit such production, provided it is done reasonably and not arbitrarily." *Beverly* at 558 (citing *Marblehead Land Co. v. City of Los Angeles* (1931) 47 F.2d 528; *see also* California Attorney General's Opinion (1976) 59 Ops. Cal. Atty. Gen. 461, 465 ("[I]t is our opinion that cities and counties have the power to prohibit [oil and gas] operations."). It is "well settled that the enactment of an ordinance which limits the owners' property interest in oil bearing lands located within the city is not of itself an unreasonable means of accomplishing a legitimate objective within the police power of a city." *Beverly Oil* at 558. The Supreme Court has long held that zoning "is one of the most essential powers of the government, one that is the least limitable." *Beverly* at 557, citing *Chicago & Alton R. Co. v. Tranbarger* (1915) 238 U.S. 67, 78. Thus, there is ample support showing that local authorities may prohibit oil and gas activity, and that such prohibitions are "reasonable."

Opponents of a ban frequently argue that local authority is "preempted" by state law and therefore cannot restrict oil and gas development. Preemption occurs when a state law directly regulates an activity, which trumps a local authority's ability to enact conflicting regulations. Preemption occurs only when a state law expressly preempts local laws and ordinances or when it does so impliedly.

California courts will "presume, absent a clear indication of preemptive intent from the Legislature," that traditional areas of local control such as land use "[are] not preempted by state statute." *Big Creek Lumber Co. v. Cty. of Santa Cruz* (2006) 38 Cal.4th 1139, 1150 (adding, "The party claiming that general state law preempts a local ordinance has the burden of demonstrating preemption.").

Though there is some disagreement as to whether local authorities could regulate downhole activities, ordinances enacted for the purposes of land-use control and environmental protection are thought to be within the local police power of cities and counties and not preempted by the state. The California Attorney General opined, "[A]pproval [of the activity by the state] would … not nullify a valid prohibition of drilling or a permit requirement by a county or city in all or

parts of its territory." 59 Ops. Cal. Atty. Gen. 461 (1976). A local government could approve a non-conflicting requirement related to a local concern, "such as environmental protection." *Id.* Given that a ban on oil and gas development directly relates to land use and environmental protection, not to mention public health and safety, a local ordinance should withstand a challenge on the grounds of preemption.

There are two types of preemption: express and implied. A court will first determine whether state law contains *express* language that preempts local authority. Courts interpret the absence of explicit preemption language as an indication that legislators did not intend to preempt local ordinances: "When the Legislature wishes expressly to preempt all regulation of an activity, it knows how to do so." *Big Creek Lumber* at 1155. Since California oil and gas law does not contain express language preempting local authority over land use, there is no express preemption. Moreover, the Public Resources Code explicitly preserves local authority to "enact and enforce laws and regulations regulating the *conduct and location* of oil production activities, including … zoning,… public safety, nuisance … [and] noise…" Pub. Res. Code § 3690.

Implied preemption is found only where a claimant demonstrates that the local law (1) duplicates state law, (2) contradicts state law, or (3) enters a field that is fully occupied by state law. *See Big Creek Lumber* at 1150. We do not believe that any of these arguments is applicable here.

Local bans would not duplicate state laws because they are enacted for local purposes and because the state does not dictate where and whether oil and gas development can occur. Courts review whether there is "significant local interest to be served that may differ from one locality to another." *Riverside* at 744. In such cases, courts will presume that state law does not preempt local authority. Here, there is tremendous local interest in the issue of oil and gas development, yet localities may differ in the risks they face and their priorities for health, safety, and the environment. Some communities may be especially concerned about groundwater, while other communities may see increased traffic, air quality, surface-water contamination, aesthetic impacts, or particularized effects of climate change as the predominant risk. "If there is a significant local interest to be served which may differ from one locality to another then the presumption favors the validity of the local ordinance against an attack of state preemption." *Big Creek Lumber* at 1149. Local ordinances that address a risk or concern that is particular to that local jurisdiction are more likely to withstand a challenge based on preemption.

The industry may argue that a ban contradicts state oil and gas law, which requires the state to "encourage the wise development of oil and gas." Pub. Res. Code § 3106(d). It may argue that a local ban would contradict state law, thereby triggering implied state preemption. But a court is unlikely to agree with this argument. California courts find implicit preemption over local ordinances when local laws are "contrary or inimical" to the state law. *City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.*, 56 Cal. 4th 729, 743 (Cal. 2013). A local ordinance is inimical when it "directly requires what the state statute forbids or *prohibits what the state enactment demands*." *Id.* The state law must be "so overshadowing that it obliterates all vestiges of local power as to a subject where municipalities have traditionally enjoyed a broad measure of autonomy." *Big Creek Lumber* at 1154.

A local ban is not inimical to state oil and gas law. The state has the duty to "prevent, as far as possible, damage to life, health, property, and natural resources." Id. § 3106(a). A local ban would align with this goal. In addition, the decision of whether to allow oil and gas development is not preempted by state laws dictating the manner in which oil and gas activity occurs. Furthermore, state courts have held that local prohibitions are not necessarily inimical to state laws that allow a type of activity. For example, state laws that legalized certain kinds of marijuana use did not preempt a local ordinance that banned all marijuana dispensaries. *Riverside* at 743. Similarly, state laws that prohibited local governments from "regulating the conduct of timber operations" did not preclude local governments from banning timber operations from certain areas. *See Big Creek Lumber* at 1149. A state law that regulates the *manner* of activity does not preclude a local government from regulation of the location of that activity. *Big Creek Lumber* at 1157.

Finally, implicit preemption can be found where a subject is fully "occupied" by state law. State law does not fully occupy the field of oil and gas zoning. There is no reference to where oil and gas development can occur, and no law prohibits local authorities from using its land use authority to restrict or ban such activities. Although state regulations do pertain to many aspects of oil and gas development, they do not dictate where oil development may occur. As mentioned above, the Public Resources Code explicitly preserves local authority for zoning matters.

Given the considerations above, local ordinances may be strengthened by including findings that detail the risks and concerns that are unique to that locality. An ordinance that is structured as a land use or zoning ordinance that specifies prohibited uses in all areas is least likely to be preempted by state law.

II. A Well-Drafted City or County Ban on Fracking and Other Extreme Extraction Methods Should Withstand Legal Challenge

Like the complete oil and gas ban, a fracking ban is unlikely to be held as preempted by state law. Nonetheless, industry may raise arguments that a fracking ban is preempted. California recently enacted Senate Bill 4 (SB 4), a law that regulates hydraulic fracturing within the state. The oil industry may argue that the law is evidence that the state intends to preempt local law on all matters related to fracking.

We believe it is extremely unlikely that a court will find that SB 4 preempts a local ban for several reasons. First, there is no express preemption. The law does not mention zoning or land use, nor does it refer to preemption of local law. In fact, SB 4 contains provisions that explicitly *preserve* local authority. Section 3160(n), a "savings clause," states that the division must still comply with "any other provision of existing laws, regulations, and orders." Furthermore, the author of the legislation, Senator Fran Pavley, issued a letter concurrent with the bill's passage explaining that that the bill is "not intended to preempt … local government's authority over land use…."[2] There is also no legislative history that would indicate that the bill preempts local

[2] Sen. Pavley letter to Secretary of Senate Gregory Schmidt, dated Sept. 12, 2013 ("Pavely Letter"), available at http://cleanwateraction.org/files/publications/SB%204%20letter%20to%20journal%20final.pdf.

zoning. Thus, the evidence indicates that the legislature intended to preserve local authority, not preempt it.

A court will also probably decline to find implied preemption against a fracking ban. A local authority could successfully argue that a fracking ban does not duplicate, conflict with, or enter into a field fully occupied by state law. First, there is no duplication between a local zoning ordinance and the provisions of SB 4. Local bans are enacted for local purposes and because the state does not currently dictate where and whether oil and gas development can occur. A court will also review whether the state law contemplates local authority. *Big Creek Lumber* at 1154. Implied preemption typically does not exist where the state law "recognizes local regulations." *Big Creek Lumber* at 1157. Here, in addition to the savings clause, SB 4 also explicitly contemplates that a local lead agency can and will conduct an independent environmental impact report. § 3161(b)(4)(C). These reports would be meaningless if local governments were stripped of their zoning authority. Thus, local ordinances are not duplicative.

Industry groups may argue that local bans conflict with SB 4. They will likely point to language in SB 4 that states that through January 1, 2015, "The division *shall allow*, until regulations governing this article are finalized and implemented, and upon written notification by an operator, all of the activities defined in Section 3157 [i.e., fracking and other well stimulation], provided [certain conditions] are met." § 3161(b).[3] The Division of Oil, Gas, and Geothermal Resources (DOGGR) has issued "interim" regulations that interpret section 3161(b) as mandating that DOGGR allow fracking when only a subset of the conditions listed in that section have been met.[4] To date, this interpretation has not been overturned by a court. If it is not overturned in future litigation, there is some risk that a court could interpret this language as implicitly preempting local control over fracking between now and January 1, 2015. It is important to note, however, that this argument would be applicable only for the remainder of 2014, after which this provision would be superseded by other provisions of the law which take effect on January 1, 2015.

Moreover, as discussed above, a local authority may prohibit what state laws allow. Furthermore, although SB 4 regulates *how* fracking shall be conducted, it says nothing as to *where* or *whether* it may be conducted. Moreover, the "shall allow" mandate does not extend to local authorities; it only pertains to the state's Division of Oil, Gas, and Geothermal Resources. Therefore, SB 4 does not "demand" that local governments allow oil and gas development in all cases. Consequently, a ban would probably not directly conflict with or be inimical to state law, even between now and January 1, 2015.

Finally, SB 4 does not fully occupy the field of fracking. As mentioned, SB 4 does not provide *where* and *whether* fracking shall be allowed by local authorities. In addition, preemption would mean operators would be allowed to drill wells that use fracking wherever they choose, regardless of *any* local ordinance. Such a result is counter to California's treatment of local zoning authority, which is "one of the most essential powers of the government, one that is the

[3] Section 3161(b)'s "shall allow" provision applies only to the interim regulations that will apply until the state adopts formal regulations by January 1, 2015.
[4] *See* SB 4 Interim Well Stimulation Treatment Regulations Notice of Proposed Emergency Rulemaking, at 5.

least limitable." *Beverly* at 557. Thus, a court is unlikely to find implied preemption of local ordinances regarding fracking.

Local ordinances that ban fracking can be strengthened in the same ways as a full ban on oil and gas development. An ordinance that makes clear that risks and concerns particular to the locality are the driving force behind the ban are most likely to withstand scrutiny. Structuring the ordinance as a ban on certain land uses is also likely to strengthen the ordinance by tying it to a local government's least restricted zoning power.

III. Temporary Moratoriums May Be a Useful Tool to Protect Communities in the Short Term

Given the likelihood that a permanent ban will survive a legal challenge, an outright ban is probably preferable to a temporary moratorium in most cases. However, local authorities do have the option of passing an "interim ordinance" and may find it useful in conjunction with passing a permanent ban.

The California Government Code outlines a specific process for enacting a temporary moratorium that stays in place until an issue can be fully studied. Gov. Code § 65858. While the process allows local authorities to bypass some of the formal requirements of enacting a zoning ordinance, the moratorium passed under this procedure must be passed by a four-fifths supermajority and expire in two years.[5] The advantage of a moratorium under this section is that it can be passed and take effect immediately. Some municipalities that can attain a four-fifths vote may wish to consider enacting a two-year moratorium to halt oil development or fracking immediately, allowing time to prepare permanent bans.

IV. CONCLUSION

Although a local ordinance will have to be analyzed after the exact language is finalized, local governments have clear authority in California to ban oil and gas activity within their jurisdictions. A ban specific to fracking and other types of well stimulation is also likely to be held valid, and although the oil and gas industry may argue that such ordinances are preempted by SB 4, there is substantial supporting evidence that the new state statute has not preempted local zoning authority. A moratorium provides an alternative way to halt oil and gas development or fracking in the short term. Temporary measures may allow a local government to stop certain activities while a permanent ban is enacted.

The oil and gas industry may raise additional objections to local ordinances, including claims of takings and vested rights. We believe that such objections may be a resolved when drafting an ordinance in a way that does not place the local government at financial risk or prevent it from accomplishing its environmental, health, and safety goals. Local governments should consult with their counsel and consider all of their individual circumstances when drafting oil and gas ordinances and responding to such claims.

[5] The first interim ordinance is limited to 45 days, but can be extended up to two years. Cal. Gov. Code § 65858(a).

The strongest and most appropriate language for a ban will vary for each city or county. Local authorities considering a ban should consult with their counsel for advice on how best to draft an ordinance to meet the unique circumstances of that community.

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September 18, 2012

Client-Matter: 23362-030

VIA EMAIL AND REGULAR MAIL

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San Benito County
County Administration Building
481 4th St., 2nd Floor
Hollister, CA 95023-3840

Re: Information on State Preemption of Local Regulation of Hydraulic Fracturing

Dear Mr. Granger:

Following up on our phone conversation, I am writing on behalf of the California Independent Petroleum Association ("CIPA") to provide San Benito County with information concerning the preemption of local regulation of hydraulic fracturing by California (State) oil and gas law. We note that CIPA's understanding is that San Benito County is considering whether to adopt an ordinance that would impose a moratorium on the use of hydraulic fracturing to stimulate reservoir production; this letter therefore focuses on the specific question of whether such an ordinance would be preempted by State law.

State law comprehensively addresses oil and gas operations, including the drilling, construction, and operation of oil and gas wells, and the technical question of whether to inject fluids to improve reservoir productivity. (Pub. Resources Code, § 3000 et seq.; Tit. 14, Cal. Code Regs., § 1712 et seq.) To the extent that issues associated with oil and gas operations have not been fully covered by State law, the Legislature has vested discretion over technical decisions with the State Oil and Gas Supervisor ("Supervisor"). (Pub. Resources Code, §§ 3013, 3222.) Moreover, State law evidences an intent to maximize the productivity of oil and gas operations, while addressing potential environmental effects thereof. (Pub. Resources Code, § 3106.) State law has therefore extensively covered the field of oil and gas operations, and indicated that this subject has become exclusively a matter of State concern; local regulation on this subject would therefore be preempted. (*Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 751 [citations omitted.].) Because hydraulic fracturing is a technical method used to stimulate reservoir production (i.e., a technical aspect of oil and gas operations), an ordinance establishing a moratorium on hydraulic fracturing would be preempted by State law.

I. Overview of Hydraulic Fracturing.

Hydraulic fracturing is the high-pressure injection of a mix of fluids and substances down the wellbore and into the target rock formation (i.e., into the oil or gas reservoir).[1] The process of hydraulic fracturing creates fractures in rock formations to stimulate the flow of natural gas or oil from the rock formation into the well. Wells used for hydraulic fracturing may be drilled vertically hundreds to thousands of feet below land surface and may include horizontal or directional sections that extend several thousand feet. When the process of injecting the fracturing fluid is completed, the internal pressure of the formation causes fluid to return to the surface through the wellbore; the fluid is known as "flowback" or "produced water." The produced water is typically stored on site in tanks or pits before treatment, disposal or recycling.

Hydraulic fracturing is therefore a method of reservoir stimulation for both oil and gas wells and is distinct from the construction of the well and whether or not the operator employs horizontal directional drilling. The California Department of Conservation has stated that "hydraulic fracturing has been used as a production stimulation method for more than 30 years with no reported damage to the environment." (See: http://www.conservation.ca.gov/dog/general _information/Pages/HydraulicFracturing.aspx.)

II. California Law Concerning State Preemption of Local Regulation.

Under California law, local government regulations that conflict with State general law are preempted. (Cal. Const., Art. XI, § 7.) The preemption may be express or by implication. (*Candid Enterprises, Inc. v. Grossmont Union High School Dist.* (1985) 39 Cal.3d 878, 885.) Express preemption exists where the Legislature has included in statute a statement of intent to preempt local regulations. (52 Ops.Cal.Atty.Gen. 166, 168 (1969).) Implied preemption exists under any of the following circumstances: (1) the subject matter has been so fully and completely covered by the State general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by State general law, but the context clearly indicates that State concerns will not tolerate local regulation of the same subject; or (3) the subject matter has been partially covered by State general law, and the subject is of such a nature that the adverse effects of local regulation outweigh the possible benefits to the local government. (*Morehart, supra*, 7 Cal.4th 725 at 751 [citations omitted.].) In determining whether the Legislature intended to occupy the entire field to the exclusion of all local regulation, a court will look to the "whole purpose and scope of the legislative scheme," not just the language used in the statute. (*Tolman v. Underhill* (1952) 39 Cal.2d 708, 712.) A local

[1] The overview of hydraulic fracturing is based on information provided by the California Department of Conservation and the United States Environmental Protection Agency. See: http://www.conservation.ca.gov/dog/general_information/Pages/HydraulicFracturing.aspx, and http://water.epa.gov/type/groundwater/uic/class2/hydraulicfracturing/wells_hydrowhat.cfm

regulation that is preempted by State law is void and unenforceable. (*People ex rel. Deukmejian v. County of Mendocino* (1984) 36 Cal.3d 476, 484.)

Where a local regulation falls outside of the scope of preemption (i.e., preemption of the subject is not complete), local regulation not in conflict with state law may coexist with state law if the local regulation is "supplemental to" state law and in furtherance of state policy. (*Baron v. City of Los Angeles* (1970) 2 Cal.3d 535, 541; *National Milk Producers Ass'n v. City and County of San Francisco* (1942) 20 Cal.2d 101, 109.)

III. California Law Comprehensively Regulates Oil and Gas Operations, Including the Use of Drilling and Production Methods to Stimulate Reservoir Productivity, and Therefore Preempts Local Regulation of this Subject.

In connection with the oil and gas laws, the Legislature has recognized that the people of the State of California have a primary and supreme interest in oil and gas deposits throughout the State. (Pub. Resources Code, § 3400.) State law directs the Supervisor to permit the owners and operators of wells to utilize all methods and practices known to the industry for the purpose of "increasing the ultimate recovery of underground hydrocarbons." (Pub. Resources Code, § 3106, subd. (b).) Further, oil and gas reservoirs frequently underlay multiple jurisdictions, which means that local regulation of oil and gas operations could "interfere with and frustrate the State's conservation and protection regulatory scheme." (59 Ops.Cal.Atty.Gen 461, 477 (1976).). The subject of oil and gas operations is therefore a matter of statewide concern and not merely a local or municipal affair. (*Id.*; *City of Santa Clara v. Von Raesfeld* (1970) 3 Cal.3d 239, 246 [where a subject is regional in scope or statewide in character, it is not a local or municipal affair].)

Consistent with its strong interest in oil and gas resources and intent to maximize the productivity of oil and gas wells, California has adopted statutes and regulations that comprehensively address oil and gas operations. The statutory provisions for oil and gas law are contained within Division 3 ("Oil and Gas") of the Public Resources Code, encompassing sections 3100 through 3865. These statutes address oil and gas operational issues in detail, including notice of intent to drill and abandon (§§ 3202, 3229); bonding (§§ 3204- 3207); abandonment (§ 3208); recordkeeping (§§ 3210-3216); blowout prevention (§ 3219); casing (§ 3220); protection of water supplies (§§ 3222, 3228); repairs (§ 3225); regulation of production facilities (§ 3270); waste of gas (§§ 3300-3314); subsidence (§ 3315 et seq.); spacing of wells (§§ 3600-3609); unit operations (§§ 3635-3690); and regulation of oil sumps (§§ 3780-3787).

Additionally, the Legislature has vested authority with the Director of the Department of Conservation and the Supervisor to take necessary actions to carry out the purposes of the oil and gas laws (Pub. Resources Code, § 3113), and State law expressly grants to the Supervisor the

authority to "supervise the drilling, operation, maintenance, and abandonment of wells." (Pub. Resources Code, § 3222.) Pursuant to this authority, the Supervisor has adopted regulations for the "Development, Regulation, and Conservation of Oil and Gas Resources" that are contained in Title 14 of the California Code of Regulations, section 1712 et seq. These regulations further address oil and gas operations, including regulations for well spacing, spill contingency planning, casing, blowout prevention, drilling fluids, bonding, plugging and abandonment, recordkeeping, inspections, underground injection, oil sumps and channels, tank maintenance and inspections, pipeline construction and maintenance, oilfield wastes and refuse (including water and chemicals), site restoration, unit operations, disclosure of public records, and methane gas hazards. (Tit. 14, Cal. Code Regs., § 1712 et seq.) The oil and gas regulations apply "statewide" for "onshore drilling, production, and injection operations." (Tit. 14, Cal. Code Regs., § 1712.)

Notably, State law addresses operational activities that might involve the use of hydraulic fracturing. For example, unless prohibited in an applicable lease or contract, State law authorizes a lessee or operator, with the approval of the Supervisor, to use reasonable and prudent methods to explore for and remove all hydrocarbons, including "the injection of air, gas, water, or other fluids into the productive strata, the application of pressure heat or other means for the reduction of viscosity of the hydrocarbons, the supplying of additional motive force, or the creating of enlarged or new channels for the underground movement of hydrocarbons into production wells." (Pub. Resources Code, § 3106, subd. (b).) State oil and gas law also contains provisions to address potential effects from hydraulic fracturing, including requirements pertaining to well casings, blowouts, and bore hole integrity (e.g., cementing). (Pub. Resources Code §§ 3208, 3219, 3220, 3270, 3300-3314, 3600-3609.)

State law includes extensive regulation of possible environmental effects from oil and gas operations, including provisions that would address potential impacts from hydraulic fracturing. For example, the Supervisor is directed to prevent, as far as possible, damage to life, health, property and natural resources, and damage to underground and surface waters suitable for irrigation or domestic purposes by the infiltration of, or the addition of, detrimental substances. (Pub. Resources Code, § 3106(a).) Oil operators are required to keep records (log, core record, history) related to well drilling, including information on whether "strata bearing water that might be suitable for irrigation or domestic purposes are properly protected from the infiltration or addition of detrimental substances from the well." (Pub. Resources Code, § 3211.) An owner or operator must case wells "with water-tight and adequate casing, in accordance with methods approved by the supervisor or the district deputy," "use every effort and endeavor to prevent damage to life, health, property, and natural resources," and "shut out detrimental substances from strata containing water suitable for irrigation or domestic purposes." (Pub. Resources Code, § 3221.) State law requires that oilfield wastes, including water and chemicals, be disposed of "so as not to cause damage to life, health, property, freshwater aquifers or surface

waters, or natural resources, or be a menace to public safety." (Tit. 14, Cal. Code Regs., § 1775.) Additionally, disposal sites or oilfield wastes must conform to requirements of the State Water Resources Control Board and appropriate Regional Water Quality Control Board. (*Id.*)

In summary, State law comprehensively covers the subject of oil and gas operations, including whether to use methods to stimulate reservoir productivity. Further, to the extent that State law does not address a specific issue, the Legislature has expressly granted to the Supervisor the authority to take actions needed to carry out the oil and gas laws, including authority to oversee the drilling, operation, maintenance, and abandonment of oil and gas wells. This comprehensive regulation of oil and gas operations is consistent with the State's strong interest in oil and gas resources, and intent to maximize the recovery of hydrocarbons from oil and gas reservoirs. Thus, when looking at the "whole purpose and scope of the legislative scheme," it is evident that the Legislature intended to preempt local regulation on the subject of oil and gas operations.[2] (*Tolman v. Underhill* (1952) 39 Cal.2d 708, 712.) A local regulation that attempted to impose a moratorium on the use of hydraulic fracturing would conflict with provisions of State law and would not further State policy to increase the ultimate recovery of hydrocarbons from oil and gas wells; such a regulation would therefore be preempted by State law and would be unenforceable.

CIPA appreciates the opportunity to provide our input on this topic and looks forward to addressing this issue cooperatively. Should you have any questions regarding the above analysis, please give me a call at (310) 312-4353.

Sincerely,

Craig A. Moyer

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[2] The California Office of the Attorney General reached a similar conclusion when considering the issue of State preemption of local regulation of oil and gas operations in the mid-1970s. (59 Ops.Cal.Atty.Gen. 461, 478 (1976) ["Where the statutory scheme or Supervisor specifies a particular method, material, or procedure by a general rule or regulation or gives approval to a plan of action with respect to a particular well or field or approves a transaction at a specified well or field, it is difficult to see how there can be any room for local regulation . . . We observe that these statutory and administrative provisions appear to occupy fully the underground phases of oil and gas activity."].)