Lenzi, Chelsea

From: Allen, Michael (COB)
Sent: Thursday, June 12, 2014 12:07 PM
To: Lenzi, Chelsea; Barker, Russ
Subject: FW: PUBLIC COMMENT LETTER: High Intensity Oil Production Ordinance/Ballot Measure, Legal Opinions
Attachments: NARO-CA Opinion letter Latham & Watkins CSSEF Bd of Supervisors Letter.pdf; NARO-CA Opinion letter from Renwick for NARO-CA - Final version.pdf

FYI – tomorrow...

From: Ghizzoni, Michael
Sent: Wednesday, June 11, 2014 4:53 PM
To: Allen, Michael (COB)
Subject: PUBLIC COMMENT LETTER: High Intensity Oil Production Ordinance/Ballot Measure, Legal Opinions

Mike,

Here is another public comment letter for posting.

Mike
Michael C. Ghizzoni
County Counsel
Office of County Counsel
County of Santa Barbara
(805) 568-3377

From: Edward S. Hazard [mailto:ehazard57@yahoo.com]
Sent: Wednesday, June 11, 2014 10:08 AM
To: Ghizzoni, Michael
Cc: SupervisorCarbajal; Office of Supervisor Peter Adam; Wolf, Janet; Farr, Doreen; Lavagnino, Steve
Subject: High Intensity Oil Production Ordinance/Ballot Measure, Legal Opinions

NARO CALIFORNIA

NATIONAL ASSOCIATION OF ROYALTY OWNERS - CALIFORNIA

Serving the Citizens Who Own California's Natural Resources

June 10, 2014

Mr. Michael G. Ghizzoni
County Counsel
County of Santa Barbara
105 E. Anapamu Street, Suite 201
Santa Barbara, CA 93101

VIA EMAIL

Dear Mr. Ghizzoni:

I am writing you today to share two legal opinions that specifically review why the proposed ballot measure to restrict "high intensity" oil production operations in Santa Barbara County would be both illegal under California law and unconstitutional under both the state and U.S. Constitutions. These opinions come to us from the highly respected law firms Latham and Watkins L.L.P. and Hanna and Morton L.L.P.

The "us" in this regard is the California Chapter of the National Association of Royalty Owners (NARO-CA). We represent the interests of the estimated 510,000 private citizens who own mineral rights in this state. NARO-CA works to preserve and protect the well-established right of California's royalty owners to extract oil and gas from their property. In counties such as Santa Barbara – with large oil reserves – we represent a significant portion of the local tax base as well as support for well-paying jobs in the county.

The attached opinions find that the proposed ordinance/ballot measure would violate the state's pre-emption in matters of down-hole oil extraction and would represent a "taking of private property" under both the California and United States Constitutions.

We cannot sit by and watch an illegal action strip us of our ability to feed our families, send our children to college and any number of other activities funded by royalties from our mineral rights. We urge you to advise the County Board of Supervisors to not approve the ordinance and to not take any action, including ballot arguments to support the proposed measure. The opinions I have sent you today make it clear that should the proposed ordinance/ballot measure succeed it will lead to costly litigation that the county will lose.

Sincerely,

Edward S. Hazard
President

cc: Members, Santa Barbara County Board of Supervisors

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May 20, 2014

Board of Supervisors
County of Santa Barbara
105 E. Anapamu Street, Suite 407
Santa Barbara, CA 93101

Re: Proposed Initiative to Ban "High-Intensity Petroleum Operations" Certification

Dear Honorable Supervisors,

We are writing on behalf of Californians for a Safe Secure Energy Future, a coalition created to educate the public about proven, safe oil technologies, to bring to your attention a fundamental problem with the enactment of an initiative to ban "High-Intensity Petroleum Operations" within Santa Barbara County's unincorporated area (the "Initiative"). Any such ban would raise serious constitutional questions as a regulatory taking in violation of the Fifth Amendment to the U.S. Constitution along with Article I, § 19 of the California Constitution, absent just compensation. In light of these concerns, we urge that you not go forward with the Initiative.

* * * * *

Despite the calls of some to enact a statewide ban on hydraulic fracturing, the State of California has notably declined to enact such a ban. But the proposed Initiative is impermissibly seeking to take matters into its own hands by considering a permanent measure to ban "High-Intensity Petroleum Operations," including hydraulic fracturing, cyclic steam, waterflood or steamflood injection and acid well stimulation treatments. The proposed Initiative would amend Santa Barbara County's Comprehensive Plan Policies and the Santa Barbara County Code to prohibit the use of any land within the County's unincorporated area for, or in support of, so-called "High-Intensity Petroleum Operations," including but not limited to onshore exploration and onshore production of offshore oil and gas reservoirs. The proposal states that the prohibition, if adopted, would not apply to onshore facilities that support offshore exploration or production from offshore wells or to off-site facilities or infrastructure, such as refineries and pipelines that do not directly support High-Intensity Petroleum Operations. The prohibition would apply in any zoning district within the County. Such a ban would immediately and adversely impact existing mineral rights holders lawfully and responsibly operating wells in Santa Barbara County, as well as companies with interests in developing such rights.

The Takings Clause to the U.S. Constitution and its counterpart in the California Constitution (Art. I, § 19) prohibit the taking of private property absent just compensation. This constitutional guarantee is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 123-124 (1978). As the Supreme Court has admonished, the Takings Clause is "an essential part of the constitutional structure, for it protects private property from expropriation without just compensation; and the right to own and hold property is necessary to the exercise and preservation of freedom." *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 734 (2010); *see also, e.g., Dolan v. City of Tigard,* 512 U.S. 374, 392 (1994) (emphasizing that the Takings Clause is "as much a part of the Bill of Rights as the First Amendment and Fourth Amendment"). The courts have repeatedly acted to protect those rights.

It is well established that this vital constitutional protection extends beyond actual physical takings of property to regulatory takings. *See Palazzolo v. Rhode Island,* 533 U.S. 606, 617 (2001) ("[T]here will be instances when government actions do not encroach upon or occupy property yet still affect and limit its use to such an extent that a taking occurs"). The Supreme Court has unequivocally held that where a government action deprives a landowner of "all economically beneficial use of property," the action constitutes a *per se* regulatory taking. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015-16 (1992). The only question remaining for the courts in such cases is the amount of just compensation owed to the owner. *Id.* Where an ordinance purports to institute an indiscriminate ban on all oil and gas extraction, it would deprive existing mineral rights holders of all economically beneficial use of their property rights and would constitute an impermissible regulatory taking. *Cf. Hodel v. Virginia Surface Mining & Reclamation Ass'n,* 452 U.S. 264, 295-96 (1981) (reasoning that enactment of Surface Mining Act did *not* deprive plaintiffs of "economically viable use of their property" because "[t]he Act does not categorically prohibit surface coal mining"), *cited in Lucas*, 505 U.S. at 1016.

But even where the government action is narrower in scope and leaves select economic uses intact, it may still constitute a regulatory taking. The Supreme Court has long held that where a regulation works an economic detriment on property rights owners and interferes with their "distinct investment-backed expectations," the property owners must receive just compensation. *See, e.g., Penn Central Transp. Co.*, 438 U.S. 104. Apart from the *per se* taking discussed above, the Court has generally "resist[ed] the temptation to adopt *per se* rules in . . . cases involving partial regulatory takings, preferring to examine 'a number of factors' rather than a simple 'mathematically precise' formula." *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 326 (2002). In essence, the relevant "inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." *Lingle v. Chevron U.S.A. Inc.*, 161 L. Ed. 2d 876, 889 (2005). As the Supreme Court has made clear, whether the regulatory action "substantially advance[s] legitimate state interests" or is believed to be dictated by the public interest is wholly irrelevant to whether it constitutes a taking. *Id.*

The Takings Clause squarely applies to an initiative ordinance adopted by voters. *See, e.g., Arnel Development Co. v. City of Costa Mesa*, 126 Cal.App.3d 330, 337 (1981) ("The city's authority under the police power is no greater than otherwise it would be simply because the

subsequent rezoning was accomplished by initiative."). Accordingly, an initiative cannot effectuate a "taking" without subjecting the city or county to the risk of monetary damages, invalidation of the measure, or both. *See, e.g., Chandis Securities v. City of Dana Point*, 52 Cal.App.4th 475, 484 (1996) (where a land use intitiative constitues a taking, the local jurisdiction will be required "to pay compensation to plaintiffs.").

An initiative banning hydraulic fracturing and other high intensity petroleum operations would automatically trigger serious constitutional concerns. While the Initiative purports to be a land use regulation, it amounts to an outright ban on all oil and gas extraction. The Initiative purports to ban not only hydraulic fracturing or acidizing, but also all necessary and conventional methods for extracting oil and gas in the County. It bans any land use activity that "supports" what the Initiative terms "Secondary and Enhanced Recovery Operation." (Initiative, at p. 6.) It then defines "Secondary and Enhanced Recovery Operation" as "any operation where the flow of hydrocarbons into a well are aided or induced with the use of injected substances..." (*Id.*, at p. 7.) The list of prohibited substances—which is not exhaustive—includes water, air, steam, and any other substances. By prohibiting the injection of all substances under the guise of a land use regulation, the Initiative effectively bans virtually every technique involved in producing oil and gas from wells—including many techniques currently employed in the recovery of oil and gas in Santa Barbara County.

At a minimum, such a ban would substantially interfere with the vested rights of mineral right holders and would upend their settled expectations. However labeled and formulated, a ban on virtually all extraction methods would prevent both mineral right holders and developers from making use of their rights under previously employed methods and would cause significant losses on their investments due to the severely restricted scope of operations and the highly reduced output of oil and gas. *Cf. Penn Cent. Transp.*, 438 U.S. at 138 ("The restrictions imposed [] not only permit reasonable beneficial use of the landmark site but also afford appellants opportunities further to enhance not only the Terminal site proper but also other properties."). Indeed, an outright ban would effectively deprive them of all economically viable use of their property rights and therefore rise to the level of a *per se* regulatory taking as well.

Courts have recognized that similar laws constituted impermissible regulatory takings. For example, in *Braly v. Board of Fire Com'rs of City of Los Angeles*, the California Court of Appeals noted that, "[u]nder the law of [California], the landowner has a property right in oil and gas beneath the surface, not in the nature of an absolute title to the oil and gas in place, but as an exclusive right to drill upon his property for these substances." 157 Cal. App. 2d 608, 612 (2d Dist. 1958). "This is a right"—the Court held—"which is as much entitled to protection as the property itself, and the undue restriction of the use thereof is as much a taking for constitutional purposes as appropriating or destroying it." *Id.* Thus, the Court found that the mere future possibility that petitioners may be able to drill on their land afforded no adequate means of protection or substitute for the owners' right to extract oil from their property presently, and that therefore the ordinance in question was unconstitutional and invalid. Likewise, in *Trans-Oceanic Oil Corp. v. City of Santa Barbara*, the Court of Appeals granted a writ of mandamus to compel the city, its mayor, and members of the city council to annul and rescind their revocation of a permit to drill an oil well within the city, and to reinstate such permit. 85 Cal. App. 2d 776 (2d Dist. 1948). The Court held, among other things, that since the permit had been regularly

issued and preliminary work undertaken in accordance therewith, the permittee acquired a vested property right protected by the Fifth Amendment, which could not be destroyed by the adoption of a zoning ordinance prohibiting the permitted use of the property. *Id.*

The Supreme Court has also long ago proclaimed the importance of mineral rights in the context of the Takings Clause. In the seminal case of *Pennsylvania Coal Co. v. Mahon*, a deed granted plaintiffs the surface rights to certain land but reserved to defendant the right to mine all coal under the surface owner's property. 260 U.S. 393 (1922). In an effort to protect the surface owner's interests, the state enacted—pursuant to its police powers—legislation that "forbids the mining of anthracite coal in such way as to cause the subsidence of, among other things, any structure used as a human habitation, with certain exceptions, including among them land where the surface is owned by the owner of the underlying coal and is distant more than 150 feet from any improved property belonging to any other person." *Id.* In finding that the Act constituted a taking requiring just compensation, the Court held that the "protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation." *Id.* "When this seemingly absolute protection is found to be qualified by the police power," the Court remarked, "the natural tendency of human nature is to extend the qualification more and more until at last private property disappears." *Id.* The Constitution, however, does not permit that to "be accomplished in this way." *Id.* The Court specifically cautioned against the "danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Id.*

The purported savings clause included in the proposed Initiative (§ 5) does not move the constitutionality needle. The self-serving and circular statement that the initiative is not unconstitutional because the Board will take care not to apply it in cases that would violate the Constitution cannot and does not shield the measure from review. Indeed, that provision merely serves as recognition that the sweeping ban the Initiative proposes to enact is fraught with constitutional perils. Nor does the potential for an exception resolve the problem. The provision leaves enormous, if not unfettered, discretion in the hands of the Board—an entity not equipped to evaluate a takings claim from a legal standpoint—and offers no guidance or set criteria for the issuance of a permit/exemption. And, in any event, this provision at most would transform a facial challenge into an as-applied one, without alleviating these constitutional concerns.

* * * * *

The serious constitutional problems raised by the proposed Initiative banning all "High-Intensity Petroleum Operations" strongly counsel against any further action in that direction. We therefore urge you not to endorse or act upon any proposals to that effect.

We appreciate your attention to this very important matter. Please do not hesitate to contact us should you have any questions or need further information.

Very truly yours,

George J. Mihlsten
of LATHAM & WATKINS LLP

Gregory G. Garre
of LATHAM & WATKINS LLP

cc: Mr. Michael Ghizzoni, County Counsel

HANNA AND MORTON LLP

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Edward S. Hazard
President, NARO-California
179 Niblick Rd., #418
Paso Robles, CA 93446-4845

Re: Constitutionality of Proposed Los Angeles City and Santa Barbara County Anti-Oil Production Ordinances

Dear Mr. Hazard:

You have asked us to give an opinion on whether local ordinances such as those currently under consideration in the City of Los Angeles and the County of Santa Barbara, both of which purport to ban various down-hole well stimulation methods such as hydraulic fracturing, are constitutional under the California and the United States Constitution

Our conclusion is that, although charter cities, general cities and counties have the power under the California Constitution to regulate surface impacts of oil and gas production such as zoning, fire protection, public safety, nuisance, appearance, noise, fencing, hours of operation and inspection, they do not have the power to regulate down-hole methods of oil and gas producing operations. If these ordinances should pass they will certainly be challenged in the courts. That will be an expensive proposition for all concerned, including the County of Santa Barbara and the City of Los Angeles. Moreover if, as we anticipate, such challenges are successful there is a high probability that some or all of the challengers' attorneys' fees will be recovered from the county and the city pursuant to CCP Section 1021.5.

We also conclude that if we are mistaken and local governments do have the power to regulate down-hole methods of oil and gas producing operations, the contemplated prohibitions probably amount to regulatory takings which will subject the city and the county to damages under constitutional provisions prohibiting the taking of private property for public uses without just compensation.

This opinion letter will only address our first conclusion. We have read the letter dated May 20, 2014, addressed to the Santa Barbara County Board of Supervisors by the law firm of Latham and Watkins LLP which discusses the issue of taking of property for public uses without just compensation. Their opinion is thorough, we agree with their conclusions and unless you instruct us otherwise we see no need to plough the same ground in this opinion letter.

DISCUSSION

We turn now to the issue of whether charter cities, general cities, and counties have the power under the California Constitution to regulate the down-hole activities of oil and gas production. The powers of local governments to legislate are governed by the California Constitution.

1. Article XI, Section 5 of the California Constitution provides that chartered cities "may make and enforce all ordinances and regulations in respect to *municipal affairs*, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws." (Emphasis supplied)

2. Article XI , Section 7 of the California Constitution provides a "county or city may make and enforce within its limits all *local, police, sanitary, and other ordinances and regulations not in conflict with general laws."*(Emphasis supplied).

However, the powers to legislate given to local government by the California Constitution are subject to a preemption rule. The preemption rule provides that if otherwise valid local legislation conflicts with state law it is preempted by state law and is void. Simply put a charter city is preempted because once the state has preempted the field the issue is no longer a "municipal affair." Similarly a non-charter city or a county is preempted because its otherwise valid local legislation conflicts with general law.

This of course raises the question of when does such a conflict exist? A conflict exists if the local legislation duplicates, contradicts or enters into an area fully occupied by general law either expressly or by legislative implication. The rule is stated in *Sherwin-Williams Company et al v City of Los Angeles (1993) 4 Cal 4th 893.* The California Supreme Court's detailed exposition of the rule with extensive supporting citations is set out in the following footnote.[1]:

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[1] "In order to resolve the issue, we must initially state the principles governing preemption analysis; then examine the statute and the ordinance, each on its own terms; and finally measure the latter against the former...The general principles governing preemption analysis are these. Under Article XI, Section 7 of the California Constitution, "[a] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."..."If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void." (Candid Enterprises, Inc. v. Grossmont Union High School Dist. (1985) 39 Cal.3d 878, 885, 218 Cal.Rptr. 303, 705 P.2d 876; accord, e.g., IT Corp. v. Solano County Bd. of Supervisors (1991) 1 Cal.4th 81, 90, 2 Cal.Rptr.2d 513, 820 P.2d 1023; People ex rel. Deukmejian v. County of Mendocino (1984) 36 Cal.3d 476, 484, 204 Cal.Rptr. 897, 683 P.2d 1150; Lancaster v. Municipal Court (1972) 6 Cal.3d 805, 807, 100 Cal.Rptr. 609, 494 P.2d 681.) "A conflict exists if the local legislation ' "duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication." ' " (Candid Enterprises, Inc. v. [844 P.2d 537] Grossmont Union High School Dist., supra, 39 Cal.3d at p. 885, 218 Cal.Rptr. 303, 705 P.2d 876, which quotes, without citations, People ex rel. Deukmejian v. County of Mendocino, supra, 36 Cal.3d at p. 484, 204 Cal.Rptr. 897, 683 P.2d 1150, which in turn quotes, with citations, Lancaster v. Municipal Court, supra, 6 Cal.3d at pp. 807-808, 100 Cal.Rptr. 609, 494 P.2d 681; accord, e.g., IT Corp. v. Solano County Bd. of Supervisors, supra, 1 Cal.4th at p. 90, 2 Cal.Rptr.2d 513, 820 P.2d 1023; Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist. (1989) 49 Cal.3d 408, 423, 261 Cal.Rptr. 384, 777

The issue presented by the proposed Los Angeles City legislation purporting to prohibit down-hole well stimulation and the proposed Santa Barbara County legislation purporting to prohibit "intense" methods of down-hole oil and gas operations is whether they duplicate, contradict or enter into an area fully occupied by general law either expressly or by legislative implication? That inquiry takes us first to an analysis of several sections of the California Public Resources Code.

First is Section 3106 of the California Public Resources Code which gives broad authority to the Supervisor of the Division of Oil, Gas and Geothermal Resources (generally referred to as "DOGGR" for short) to regulate down-hole oil and gas producing operations.

> "3106. (a) The supervisor shall so supervise the drilling, operation, maintenance, and abandonment of wells and the operation, maintenance, and removal or abandonment of tanks and facilities attendant to oil and gas production, including pipelines not subject to regulation pursuant to Chapter 5.5 (commencing with Section 51010) of Part 1 of Division 1 of Title 5 of the Government Code that are within an oil and gas field, so as to prevent, as far as possible, damage to life, health, property, and natural resources; damage to underground oil and gas deposits from infiltrating water and other causes; loss of oil, gas, or reservoir energy, and damage to underground and surface waters suitable for irrigation or domestic purposes by the infiltration of, or the addition of, detrimental substances.
>
> *(b) The supervisor shall also supervise the drilling, operation, maintenance, and abandonment of wells so as to permit the owners or operators of the wells to utilize all methods and practices known to the oil industry for the purpose of increasing the ultimate*

P.2d 157; Cohen v. Board of Supervisors (1985) 40 Cal.3d 277, 290, 219 Cal.Rptr. 467, 707 P.2d 840). Local legislation is "duplicative" of general law when it is coextensive therewith. (See In re Portnoy (1942) 21 Cal.2d 237, 240, 131 P.2d 1 [4 Cal.4th 898] [finding "duplication" where local legislation purported to impose the same criminal prohibition that general law imposed].) Similarly, local legislation is "contradictory" to general law when it is inimical thereto. (See Ex parte Daniels (1920) 183 Cal. 636, 641-648, 192 P. 442 [finding "contradiction" where local legislation purported to fix a lower maximum speed limit for motor vehicles than that which general law fixed].) Finally, local legislation enters an area that is "fully occupied" by general law when the Legislature has expressly manifested its intent to "fully occupy" the area (see, e.g., Candid Enterprises, Inc. v. Grossmont Union High School Dist., supra, 39 Cal.3d at p.886, 218 Cal.Rptr. 303, 705 P.2d 876), or when it has impliedly done so in light of one of the following indicia of intent: "(1) the subject matter has been so fully and completely covered by 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 general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the" locality (In re Hubbard (1964) 62 Cal.2d 119, 128, 41 Cal.Rptr. 393, 396 P.2d 809, "overruled" on another point, Bishop v. City of San Jose, supra, 1 Cal.3d at p. 63, fn. 6, 81 Cal.Rptr. 465, 460 P.2d 137; accord, e.g., IT Corp. v. Solano County Bd. of Supervisors, supra, 1 Cal.4th at pp. 90-91, 2 Cal.Rptr.2d 513, 820 P.2d 1023; Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist., supra, 49 Cal.3d at p. 423, 261 Cal.Rptr. 384, 777 P.2d 157; Cohen v. Board of Supervisors, supra, 40 Cal.3d at pp. 292-293, 219 Cal.Rptr. 467, 707 P.2d 840; Candid Enterprises, Inc. v. Grossmont Union High School Dist., supra, 39 Cal.3d at p. 886, 218 Cal.Rptr. 303, 705 P.2d 876; People ex rel. Deukmejian v. County of Mendocino, supra, 36 Cal.3d at p. 485, 204 Cal.Rptr. 897, 683 P.2d 1150)."

recovery of underground hydrocarbons and which, in the opinion of the supervisor, are suitable for this purpose in each proposed case. To further the elimination of waste by increasing the recovery of underground hydrocarbons, it is hereby declared as a policy of this state that the grant in an oil and gas lease or contract to a lessee or operator of the right or power, in substance, to explore for and remove all hydrocarbons from any lands in the state, in the absence of an express provision to the contrary contained in the lease or contract, is deemed to allow the lessee or contractor, or the lessee's or contractor's successors or assigns, to do what a prudent operator using reasonable diligence would do, having in mind the best interests of the lessor, lessee, and the state in producing and removing hydrocarbons, including, but not limited to, 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, when these methods or processes employed have been approved by the supervisor, except that nothing contained in this section imposes a legal duty upon the lessee or contractor, or the lessee's or contractor's successors or assigns, to conduct these operations.

(c) The supervisor may require an operator to implement a monitoring program, designed to detect releases to the soil and water, including both groundwater and surface water, for aboveground oil production tanks and facilities.

(d) To best meet oil and gas needs in this state, the supervisor shall administer this division so as to encourage the wise development of oil and gas resources. (Emphasis added)

Next is Public Resources Code Section 3012 which makes it clear that the authority of DOGGR to regulate down-hole oil and gas production techniques under Section 3106 applies to lands and wells within an incorporated city even if the city tries to regulate such activities itself.

3012. The provisions of this division *apply to any land or well situated within the boundaries of an incorporated city* in which the drilling of oil wells is now or may hereafter be prohibited, until all wells therein have been abandoned as provided in this chapter.[2] (Emphasis added)

How do we conclude that section 3012 shows that the legislature intended section 3106 to control even where cities try to regulate down-hole operations? Consider this: if an incorporated city were to enact an ordinance prohibiting new oil well drilling projects within the city limits and also prohibiting any existing wells from utilizing well stimulation techniques approved by the DOGGR there is no doubt that the ordinance would *expressly contradict* section 3012 which expressly says section 3106 controls all wells still producing within the city. Accordingly the city's power to enact such an ordinance would have expressly been preempted by Public Resources Code

[2] "This division" in the code section refers to Division 3 of the Public Resources Code encompassing sections 3000 through 3865.

section 3106. It follows that if the city did not go to the extreme of prohibiting all future oil well drilling projects within the city, but nevertheless purported to prohibit well stimulation techniques even when approved and permitted by the DOGGR, the same result would obtain. If the legislature intended DOGGR to continue to regulate down-hole activities under section 3106 where a city prohibited future oil and gas well projects then, *by implication,* it certainly must have intended DOGGR to regulate down-hole activities under section 3106 where the city did not go so far as to prohibit future oil and gas well projects.

Finally, there is Public Resources Code Section 3690 which explains that some regulatory authority over oil and gas operations remains with cities and counties and has not been preempted. Section 3690 declares that enactment of the unitization chapter of the Public Resources Code shall not be deemed to have preempted the right of cities and counties to regulate such oil and gas production activities as "zoning, fire prevention, public safety, nuisance, appearance, noise, fencing, hours of operation, abandonment and inspection."

> 3690. This chapter shall not be deemed a preemption by the state of any existing right of cities and counties to enact and enforce laws and regulations regulating the conduct and location of oil production activities, including, but not limited to, *zoning, fire prevention, public safety, nuisance, appearance, noise, fencing, hours of operation, abandonment, and inspection.*[3](Emphasis added)

Although specifically aimed at unitization, this section is consistent with case law generally. For instance *Consolidated Rock Products Co. v Los Angeles (1962) 57 C 2d 515* holds that removal of sand and gravel may be prohibited in an area zoned for agricultural and residential uses. Similarly *Friel v Los Angeles (1959) 172 C.A. 2d 142* holds that oil well drilling was properly prohibited in a residential district in an unincorporated area.

However PRC Section 3690 seems not to apply to down-hole activities regulated by DOGGR. There are at least three reasons for this conclusion. First the only cases we have been able to find that permit local regulation of oil and gas operations all involve regulation of surface activities. Second, regulation of down-hole activities of oil and gas operations requires substantial technical knowledge and experience which most cities simply do not have. Third, the examples of permitted regulation contained in PRC Section 3690 all involve regulation of surface activities. That brings into play a well known rule of statutory construction. This is the rule of *ejusdem generis.* Under the rule, where specific words follow general words in a writing or where specific words precede general words, the general words are construed to embrace only things similar in nature to those enumerated by the specific words. In *Harris v Capital Growth Investors (1991) 52 Cal 3rd 1142m 1158* the California Supreme Court explained the rule as follows:

> "Among the maxims of jurisprudence in the Civil Code is the following: "Particular expressions qualify those which are general." (§ 3534 [enacted 1872].) The principle is an expression of the doctrine of *ejusdem generis* (or Lord Tenterden's rule), which seeks to

[3] "This chapter" refers to Chapter 3.5 of Division 3 covering Unit Operations which encompasses sections 3630 through 3690.

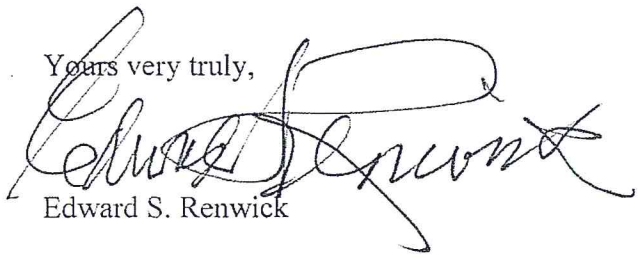
ascertain common characteristics among things of the same kind, class, or nature when they are cataloged in legislative enactments.... Ejusdem generis is illustrative of the more general legal maxim *nocitur a sociis*--"it is known from its associates."

Our conclusion is that under section 3690 local government is allowed to regulate the conduct and location of oil production activities such as zoning, fire prevention, public safety, nuisance, appearance, noise, fencing, hours of operation, abandonment, and inspection. In other words, local governments are allowed to regulate surface activities. However it is also our opinion that section 3690 does not purport to give local governments the power to regulate the conduct of down-hole oil and gas operations.

We now apply the foregoing rules of law to the proposed Los Angeles City and County of Santa Barbara ordinances. On Friday February 28, 2014, the Los Angeles City Council directed the City Attorney to draft an ordinance banning "all activity associated with well stimulation, including, but not limited to, hydraulic fracturing, gravel packing, and acidizing, or any combination thereof, and the use of waste disposal injection wells." In the County of Santa Barbara an anti oil group has apparently obtained the necessary signatures to place on the November 2014 ballot an initiative measure amending the Santa Barbara County Comprehensive Plan and the Santa Barbara County Code to ban "high-intensity petroleum operations" while continuing to permit "low-intensity petroleum operations." High-Intensity Petroleum Operations means (1) Well Stimulation Treatments and/or (2) Secondary and enhanced Recovery Operations" This expressly includes, but is not limited to, hydraulic fracturing, acid well stimulation treatments, waterflood injection, steam flood injection, and cyclic steam injection. Moreover the initiative bans any land uses which support "high-intensity petroleum operations." However the ban does not apply to land uses supporting off shore production activities.

We know that PRC Section 3106 specifically gives the Supervisor of the Division of Oil, Gas and Geothermal Resources the authority to permit oil and gas operators to produce oil and gas by utilizing various down hole procedures "*including, but not limited to, 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.*" The conclusion is inescapable that the proposed Los Angeles City ordinance and the proposed Santa Barbara County ordinance both purport to prohibit those same down-hole activities which section 3106 permits. They both therefore directly contradict PRC Section 3106. Therefore, in our opinion, the proposed ordinances are both beyond the legislative power given to cities and counties by Article XI Sections 5 and 7 of the California Constitution.

Yours very truly,



Edward S. Renwick

ESR:so