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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF MONTEREY

CHEVRON U.S.A. INC., et al.,

Petitioners and Plaintiffs,

v.

COUNTY OF MONTEREY, et al.,

Respondents and Defendants.

AND CONSOLIDATED ACTIONS

CASE NO. 16-CV-3978 (Consolidated for purposes of Phase 1 with Case Nos. 16-CV-3980, 17-CV-0790, 17-CV-0871, 17-CV-0935, and 17-CV-1012)

CHEVRON PLAINTIFFS' REPLY IN SUPPORT OF OPENING BRIEF IN SUPPORT OF PHASE 1 PROCEEDINGS

Phase 1 Trial: November 13, 2017
Time: 9:00 a.m.
Dept: 14
Judge: Hon. Thomas W. Wills

Action Filed: December 14, 2016

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I. INTRODUCTION

Measure Z is preempted by state and federal law, and the County's effort to "water down" the impacts of the initiative cannot save it from a prompt demise. In their Opposition papers, the County and Intervenors put forth fundamentally distinct interpretations of Measure Z, thereby evidencing the distinct agendas of the County, attempting to limit its liability, versus the Intervenors, who want to shut down oil production altogether. They do so by betraying the plain language of Measure Z to divine self-serving interpretations of an initiative whose operative provisions are allegedly "clear and precise." (Intervenors' Brief ("IB") at 5:10.) The County, in particular, strains credulity by suggesting Measure Z "would permit replacement wells," in blatant disregard of the initiative's plain language. (County's Brief ("CB") at 10:4; AR 373.) And it is equally clear that Intervenors are scrambling to explain away inconsistencies identified in the Opening Brief regarding the plain language of Measure Z; for example, whether (1) well maintenance operations are prohibited as well stimulation, (2) steam injection is prohibited as underground injection, and (3) sidetracking is prohibited as new drilling. But Intervenors are not bound by their interpretation in later proceedings. And the County cannot simply interpret Measure Z how it sees fit to limit liability, especially when strangers to this litigation could bring a subsequent writ action to enforce the plain terms of Measure Z.

Further, the County's misinterpretation of Measure Z more certainly dooms the initiative to preemption. Under the County's interpretation, Measure Z would interfere even more directly in operations preempted by the state, by inserting exceptions for treated injectate fluids and for replacement wells. But no matter how Measure Z is interpreted, it prohibits or phases out well stimulation treatments ("WST"), underground injection for storage and disposal, and drilling new wells, which are all activities fully regulated by superior authorities to the exclusion of County interference. The County and Intervenors attempt to overcome the preemptive force of federal and state law by portraying Measure Z as a traditional land use initiative. But Measure Z is an apparent attempt to do indirectly what the County may not do directly: Regulate the manner in which subsurface oil operations are conducted. Finally, Measure Z constitutes an unconstitutional taking of all economic value in oil and gas interests within Monterey County.

II. ARGUMENT

A. The County and Intervenors Have Improperly Interpreted Measure Z

Any interpretation of Measure Z is governed by "the same principles that govern statutory construction." (*People v. Rizo* (2000) 22 Cal.4th 681, 685.) The starting point of any interpretative analysis is the text of Measure Z itself. (*Ibid.*) That is because the plain language of the initiative is "typically the best and most reliable indicator of purpose." (*Cal. Cannabis Coal. v. City of Upland* (2017) 3 Cal.5th 924, 933.) The words of the initiative must be given "their ordinary meaning, while taking account of related provisions and the structure of the relevant statutory . . . scheme." (*Ibid.*)

Unless an ambiguity exists, the purpose of Measure Z must be derived from its plain terms; "the court may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language." (*Lesher Commc'ns, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 543.) "[B]allot materials can help resolve ambiguities in an initiative measure, . . . but they cannot vary its plain import," especially to manufacture ambiguity that raises vagueness concerns.[1] (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 602; see also *Protect Our Benefits v. City and Cnty. of S.F.* (2015) 235 Cal.App.4th 619, 633 [holding that the court must "look to [the] language [of the initiative] as the best indication of the voters' intent"].) While this Court is empowered to adopt an interpretation that saves Measure Z from annulment, the initiative must be "reasonably susceptible to multiple constructions" in the first place. (*Rizo*, *supra*, 22 Cal.4th at p. 685.)

As the Intervenors put it, the operative terms of Measure Z are expressed in "clear and simple language." (IB at 20:14.) By its plain terms, Measure Z prohibits the injection of produced water—whether treated or not—for storage, which has been defined under federal law as retention "for subsequent use, processing, or disposal." (See, e.g., 40 C.F.R. § 191.02, subd. (k).) However, the County and Intervenors argue that steam injection is not prohibited as it "***will be produced again***" (CB at 9:11–13, emphasis added; see also IB at 22:21–22), which directly conflicts with the standard definition of "storage." The Opposition briefs conflate "storage" and "disposal" to allow for continued

[1] The conflicting interpretations put forth by County and Intervenors create the very constitutional vagueness issues that Plaintiffs were concerned about in their Opening Brief. By resorting to ballot materials and other evidence beyond the plain language of Measure Z, this conflict is only deepened. To the extent that this Court looks beyond the plain language of Measure Z, the initiative is void for vagueness. (*FCC v. Fox Television Stations, Inc.* (2012) 567 U.S. 239, 253.)

injection for enhanced oil recovery, which runs afoul of the basic principle that Measure Z should not be interpreted to render critical language "surplusage." (*Rizo*, *supra*, 22 Cal.4th at p. 687.)

Additionally, the County and Intervenors both claim that Measure Z does not apply to "treated wastewater," thereby exempting injection of all "produced water" that has been "treated." (CB at 7:16–9:1; IB at 22:21–23:12.) But Measure Z does not define "treated wastewater," let alone provide guidance on how "treated" the "wastewater" must be to inject. (Suppl. Johnson Decl., Ex. 1 [Burzlaff Dep. Tr.] at 128:21–129:12, 130:1–131:8 [testifying production process "treats" produced water but that deponent could not "recall any discussion of treatment processes in Measure Z"].) And regulators and operators alike understand that "produced water" is "produced water," even when it is "highly treated." (RJN, Ex. 18 at p. 1.) Reading the word "treatment" into Measure Z would lead to "absurd result[s]" contrary to the intent of the voters. (See *Rizo*, *supra*, 22 Cal.4th at p. 687.) Under federal law, "[t]reatment means any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste." (40 C.F.R. § 260.10; see also Cal. Code Regs., tit. 22, § 66260.10.) Under that definition, all produced water at San Ardo qualifies as "treated wastewater," because the production process at San Ardo necessarily requires the removal of oil from produced water, thereby treating and cleaning the produced water. (Tubbs Decl., ¶¶ 40–41; see also Suppl. Johnson Decl., Ex. 1 [Burzlaff Dep. Tr.] at 128:21–129:12.)

The final provision of Measure Z prohibits "[t]he drilling of new wells." (AR 156.)[2] By its plain terms, the initiative prohibits "sidetrack[ing]," where a new bottom hole is completed by drilling out the side of the existing well. (Tubbs Decl., ¶ 51.) Contrary to the plain language, the County and Intervenors argue that sidetracking is still allowed (CB at 10:5–8; IB at 23:21), even though drilling sidetracked wells is functionally the same mechanical process as drilling other new wells, and thus implicates the same purported environmental and land use concerns driving Measure Z. (*Ibid.*; AR 153–154.) The County further argues that Measure Z leaves room for "replacement wells" (CB at 10:1–15), which is belied by the plain terms of Measure Z, not to mention the deposition testimony of their supporting declarant. (Suppl. Johnson Decl., Ex. 1 [Burzlaff Dep. Tr.] at 103:12–104:24.) Even if the

[2] Plaintiffs have also submitted a more legible copy of Measure Z as Exhibit 7 to the Supplemental Request for Judicial Notice, filed concurrently.

proponents intended to "permit[] existing operations to continue," there is no indication anywhere in the initiative such permission included replacement wells. (CB at 10:11–12.) The County's interpretation injects ambiguity into Measure Z in a transparent attempt to limit the County's own liability.[3]

B. Measure Z Is Preempted under State and Federal Law.

While local governments have inherent police power over land use decisions, "local legislation that conflicts with state [or federal] law is void." (*City of Riverside v. Inland Empire Patients Health and Wellness Ctr., Inc*. (2013) 56 Cal.4th 729, 743.) "A conflict exists if the local legislation duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication." (*Ibid.*, citations omitted.) Under both state and federal principles, "field preemption" can be implied when local action "enters an area fully occupied by general law . . . [so] as to indicate that it has become exclusively a matter of state concern. . . . [or] 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." (*Sherwin-Williams Co. v. City of L.A.* (1993) 4 Cal.4th 893, 897-98 [state field preemption]; see also *Hughes v. Talen Energy Mktg., LLC* (2016) 136 S. Ct. 1288, 1290, 1297 [finding federal preemption where Congress "comprehensively" addressed an "entire field" and where state law "stands as an obstacle" to congressional purposes], citation omitted.)

1. Measure Z Is Not a Proper Exercise of County Land Use Authority.

The Opposition papers cite a bevy of cases to argue that Measure Z is a traditional exercise of the County's zoning authority. In these cases, courts merely held that local governments can restrict delineated areas, such as residential zones, from oil and gas development. (See, e.g., *Marblehead Land Co. v. City of L.A.* (9th Cir. 1931) 47 F.2d 528, 532 [holding that the use of residential property for oil production "would be entirely out of harmony with the development of the neighborhood"]; see also *Friel v. Cnty. of L.A.* (1959) 172 Cal.App.2d 142, 150-154 [upholding ordinance that zoned certain areas for "residential use and prohibit[ed] drilling for oil" as "the character of the area restricted to residential

[3] Intervenors also challenge Plaintiffs' standing to challenge Measure Z's prohibition of WST. (IB at 34:18–19.) Intervenors specifically waived any objection on standing for the Phase 1 proceedings. (Suppl. RJN, Ex. 2 [6/7/17 Tr.] at 32:16-21.) In any event, Measure Z does not adopt DOGGR's regulations explaining when maintenance is considered WST; without these regulations, operators cannot know whether or not ongoing acid maintenance will be prohibited under Measure Z. (Tubbs Decl., ¶ 53.) Because Measure Z does not say whether it prohibits these maintenance activities, Plaintiffs have standing to challenge the overbroad WST prohibition included within Measure Z.

usage is truly and exclusively residential"].) Similarly, the Court has previously held the state has preempted "the mode and manner in which the city may execute oil leases" on City-owned tidelands, but "there has been no preemption of the field of determining" if those tidelands should be developed for oil or gas in the first place. (*Higgins v. City of Santa Monica* (1964) 62 Cal.2d 24, 32; see also *Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach* (2001) 86 Cal.App.4th 534, 555 [upholding city decision to reinstate ban on oil production on city-owned tidelands before any development took place].) Whether residential areas or tidelands granted by the state, local zoning authority extends, at most, to determining whether oil production may occur within delineated areas.[4]

The California Supreme Court clearly distinguished between land use authority that properly regulates "where" certain operations may occur, and an impermissible ordinance that regulates "how" operations may occur. (*Big Creek Lumber Co. v. Cnty. of Santa Cruz* (2006) 38 Cal.4th 1139, 1152–53.) In *Big Creek Lumber*, the Court held that a local land use ordinance that "restricted timber harvesting to specified zone districts" was not preempted by comprehensive state law that "preempts local regulations of the ***conduct*** of timber operations." (*Id.* at p. 1158, emphasis added.) As the Court put it, "an ordinance that avoids speaking to ***how*** timber operations may be conducted and addresses only ***where*** they may take place falls short of being a clear attempt to regulate the conduct thereof." (*Id.* at pp. 1152–53, quotations omitted.) Likewise, Measure Z does not regulate where subsurface activities may occur, but how subsurface operations may be conducted.

2. State Law Preempts Local Regulation of Subsurface Operations.

In 1976, the Attorney General reviewed the landscape of regulations and case law concerning oil and gas development to determine the preemptive effect of state law. Upon concluding this review, the Attorney General elucidated a distinction between permissible land use authority, on the one hand, and preempted local regulation that interferes with the statewide interest in oil and gas production, on the other. According to the Attorney General, "where state regulation approves of or specifies plans of

[4] In *Beverly Oil Co. v. City of L.A.* (1953) 40 Cal.2d 552, the Court noted that localities may "prohibit[] the production of oil in designated areas" when reasonable. (*Id*. at p. 558.) However, the Court only held those restrictions were reasonable because they would allow "plaintiff's wells [to] recover oil which could be recovered by surrounding owners if it were not for the prohibitions of the ordinance." (*Id.* at pp. 559–60.) The situation here is far different, as Measure Z eliminates specific subsurface operations in a manner that will destroy all economic value for the mineral rights.

operation, methods, materials, procedures, or equipment to be used by the well operator or where activities are to be carried out under the direction of [the State], there is no room for local regulation." (See RJN, Ex. 32 [59 Ops.Cal.Atty.Gen. 461], 462.) The Attorney General explained "that for the most part such activities are confined to down-hole or subsurface operations." (*Ibid.*)

The Attorney General recognized the expanding nature of the state's oil and gas laws and regulations, which "[i]n recent years . . . have assumed added importance." (*Id.* at p. 469.) In particular, the Public Resources Code reflects the "growing concern over the limited nature of energy sources," balanced with the "additional purpose" to protect "life, health, property and natural resources." (*Ibid.*) Since 1976, that dynamic has increased exponentially. Most of the comprehensive statutory schemes bearing upon the prohibitions in Measure Z were adopted after 1976, including the WST statutes and regulations adopted with California's Senate Bill 4 (2013) ("SB 4"), the institution of the Underground Injection Control ("UIC") program after the State was granted primacy by the U.S. Environmental Protection Agency ("U.S. EPA") under the Safe Drinking Water Act ("SDWA"), as well as numerous regulations and statutes governing the drilling and operation of new wells. (See Ellison Decl., ¶¶ 7–21.)

The countywide prohibition instituted by Measure Z on vital subsurface operations blatantly undermines the state's own significant interest in the "wise development of oil and gas resources." (Pub. Resources Code, § 3106, subd. (d).) And the "comprehensive nature" of state and federal law authorizing and regulating subsurface operations evinces a clear intent to preempt complete bans on that conduct like Measure Z. (*O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1071.) This preemptive intent is especially pronounced for oil production operations, which are extremely valuable but also limited to "where the resources are found." (*Lockard v. City of L.A.* (1949) 33 Cal.2d 453, 467–68 [distinguishing between land use authority that prevents business operations and "regulations that . . . merely restrict its location"].) State and federal authorities have expressed their supreme interest in the "uniform regulation" of subsurface activities, and thus the County may not enter that field. (See RJN, Ex. 32 [59 Ops.Cal.Atty.Gen. 461], 477.) By immediately prohibiting or phasing-out WST, the underground injection of "wastewater" for storage or disposal, and the drilling of new wells—activities that all occur underground—Measure Z impermissibly enters the regulatory field of "down-hole or subsurface operations," which has been fully occupied by state and federal law authorizing those

operations. (See *id.* at p. 462.)

a. Subsurface Operations Are Exclusively a Matter of Statewide Concern.

Pursuant to its statutory mandates under state and federal law, the Department of Conservation, Division of Oil, Gas and Geothermal Resources ("DOGGR"), has established "the most rigorous regulations in the country for oil and gas exploration, development and production." (See RJN, Ex. 26 [SB 4 EIR] at C.10-24.) These regulations allow DOGGR to balance competing concerns with energy production and environmental protection, which "has greatly minimized, and in many cases prevented, the types of environmental impacts that have occurred in other states." (*Ibid.*) As such, the regulation of "down-hole or subsurface operations" during oil and gas production has been a field fully occupied by superior law since at least 1976—before SB 4 or the UIC program even existed. (See *id.*, Ex. 32 [59 Ops.Cal.Atty.Gen. 461], 462.) More recently, DOGGR reevaluated the landscape of statewide oil and gas regulations and concluded it "has exclusive legal jurisdiction over, and thus 'occupies the field' regarding, 'subsurface regulation.'" (RJN, Ex. 26 [SB 4 EIR] at C.2-44.) And here, every subsurface activity prohibited by Measure Z is comprehensively regulated to the exclusion of any local interference.

First, DOGGR is exclusively authorized to regulate subsurface WST operations under SB 4, (Pub. Resources Code, §§ 3160–3161), and has adopted the strongest WST regulations in the country. (RJN, Ex. 26 [SB 4 EIR] at C.2-67.) Unsurprisingly then, DOGGR concluded "the very specific requirements of SB 4 itself are so detailed that they ***simply leave no room*** for local governments to add further downhole requirements." (RJN, Ex. 26 [SB 4 EIR] at C.2-45, emphasis added.) ***Second***, DOGGR was granted primacy by the U.S. EPA under the federal SDWA to administer the state UIC program to regulate underground injection throughout California. (40 C.F.R. § 147.250.) Once granted primacy, the SDWA dictates that DOGGR alone "shall have primary enforcement responsibility for ***underground water sources***[.]"[5] (42 U.S.C. § 300h-1, subd. (b)(3), emphasis added.) ***Finally***,

[5] To that end, DOGGR enforces comprehensive statewide regulations that require permits for every underground injection project, including disposal. (Cal. Code Regs., tit. 14, §§ 1724.6, 1724.9, 1724.10.) In fact, DOGGR has evaluated the aquifers underlying the San Ardo field for potential endangerment issues, and has submitted an aquifer exemption application to U.S. EPA for expansion of the San Ardo aquifer exemption based on evidence that injection here will not affect any water that could be used for beneficial use. (Suppl. RJN, Exs. 3 & 4.) By extensively regulating underground injection, rather than prohibiting the activity outright, the SDWA evidences congressional intent to

[Footnote continued on next page]

DOGGR has exclusive authority to regulate the drilling of new wells for oil and gas production in California. The Legislature has explicitly stated its intention to "meet oil and gas needs in this state" by obligating DOGGR to administer the governing statutes "so as to encourage the wise development of oil and gas resources." (Pub. Resources Code, § 3106, subd. (d).) On that basis, the Attorney General concluded that "there will . . . be a conflict with state regulation when a local entity, attempting to regulate for a local purpose, ***directly or indirectly*** attempts to exercise control over subsurface activities." (RJN, Ex. 32 [59 Ops.Cal.Atty.Gen. 461], 478, emphasis added.)

Given the extraordinary breadth of statewide subsurface regulations, there can be little doubt that state and federal law have fully occupied the regulatory field concerning those subsurface operations. The "comprehensive nature" of these regulations—which define subsurface activities, authorize and regulate their operation, and set penalties for violations—"is so thorough and detailed as to manifest the Legislature's intent to preclude local regulation." (*O'Connell*, *supra*, 41 Cal.4th at p. 1071.)

b. Measure Z Regulates Subsurface Activities.

Measure Z is not simply an exercise of land use authority, but an indirect regulation of the "manner" in which subsurface operations are conducted. (See *Big Creek Lumber*, *supra*, 38 Cal.4th at p. 1157.) Measure Z does not "limit[] the locations within the county" where oil production is permitted; instead the initiative "impermissibly regulate[s] the conduct of such operations" by prohibiting certain subsurface activities necessary for oil and gas production. (*City of Riverside*, *supra*, 56 Cal.4th at p. 761, fn. 12, quotations omitted.) Measure Z contains no consideration of surrounding land uses, or whether the extensively-developed San Ardo oil field stands in the path of inevitable residential development. Instead, it uniformly prohibits all land uses in support of WST, injection, and drilling wells. Measure Z cannot avoid preemption by deceptively phrasing these prohibitions as mere surface uses; the County "cannot under the guise of doing one thing, accomplish a wholly disparate end." (*Desert Turf Club v. Bd. of Sup'rs of Riverside Cnty.* (1956) 141 Cal.App.2d 446, 452–453; see also *Monterey Oil Co. v. City Court of City of Seal Beach* (1953) 120 Cal.App.2d 41, 43 [holding that

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balance environmental concerns with the value of energy production. (*W. Neb. Res. Council v. U.S. EPA* (8th Cir. 1991) 943 F.2d 867, 870.)

"it is apparent" that restrictions on surface buildings were intended to prevent drilling operations, which was preempted by state law].)

In attempting to narrow the scope of Measure Z, the County and Intervenors have only intensified the extent to which they are interfering with the manner in which operators must conduct their subsurface operations. Even assuming *arguendo* that the various (and inconsistent) interpretations of the County and Intervenors are correct, application of Measure Z will still require the County to focus entirely on the subsurface aspect of oil and gas operations, despite their acknowledgment that the County may only regulate on "above-ground land uses." (CB at 20:16–27; IB at 1:17–19, 29:19–30:4.) If the County and Intervenors are correct, the County would be required to closely regulate whether underground injection is conducted by the operator for enhanced oil recovery or for disposal. (CB 9:6–16; IB at 22:21–26.) The County must consider whether downhole well maintenance operations should be prohibited as WST. (CB at 34:27–35:3.) The County must analyze whether new drilling operations are prohibited under Measure Z as a new well, or permitted as maintenance, reworking or side-tracking on an existing well.[6] (CB 9:18–10:15; IB 23:15–24:2.) Finally, the County purports to determine the appropriate level of treatment needed to avoid the endangerment of aquifers from underground injection. (CB at 26:8–15.) By requiring pre-injection treatment, the County is contradicting the role of the State and federal government in determining that injection has no potential of endangering drinking water sources here. (Suppl. RJN, Exs. 3 & 4.) None of these issues implicate surface impacts. Rather, they intricately concern subsurface operations that are exclusively vested with the state and federal government and are far beyond the technical competence of the County and its staff.

c. The Identified Savings Clauses Have No Bearing Here.

The County and Intervenors point to various "savings" clauses that purportedly leave room for local authorities to regulate oil and gas operations. But none of these savings clauses applies to Measure Z, or contemplates the imposition of a total ban on surface activity necessary for subsurface operations.

First, the plain language of the savings clause in SB 4 says nothing about the authority of local

[6] The County's purported land use objective is completely undermined by its proposal to allow for sidetracking and for replacement wells if existing wells are abandoned. Both of these operations would have the same surface impacts and require the same drilling rigs as any other new well. (Tubbs Decl., ¶ 50.) The County makes no mention of limiting the ability to install new well-sites, grading, or other surface features that could possibly fall under its police power jurisdiction.

governments to ban WST throughout their territory. (Pub. Resources Code, § 3160, subd. (n).) At most, it requires DOGGR to abide by existing statutory requirements, such as CEQA. In response, the County cites legislative history from SB 4, implying that local governments can retain their "ability to enforce its own approval authority." (See Cnty. RJN, Ex. A at 9.) Yet, as discussed above, the County's "approval authority" is restricted to where development may take place, not how oil operations are conducted. (See *Big Creek Lumber*, *supra*, 38 Cal.4th at p. 1152, 1157.)

Second, while the SDWA has a "savings" clause (42 U.S.C., § 300h-2, subd. (d)), it must be considered in the context of California's delegation of primacy over the UIC program. DOGGR then has the "overriding power . . . to occupy the field to the exclusion of its own subdivisions, lest its superiority be circumscribed." (*EQT Production Co. v. Wender* (S.D.W.Va. 2016) 191 F.Supp.3d 583, 601, affd. (4th Cir. 2017) 870 F.3d 322, 329, 333–34 [holding local ban on underground injection disposal runs "afoul of the state's UIC permit program" despite state savings clause "similar" to SDWA].) While this savings clause may apply if California did not have primacy, it has no application to the state UIC program, which is the ultimate preservation of state authority. (*Ibid.*) And state law does not contain any similar savings clause related to underground injection. Even if the SDWA savings clause does apply, it certainly does not permit the County to violate the SDWA "minimum requirements" by "interfer[ing] with or imped[ing]" energy production through a prohibition on underground injection for disposal. (*Ibid.*, citing 42 U.S.C., §§ 300h, subd. (b)(2), 300h-1, subd. (c)(1).)

Third, the Public Resources Code contains provisions that recognize oil and gas production operations are subject to both state and local oversight; a premise implicit in the distinction between preempted subsurface regulations and permissible land use authority. (Pub. Resources Code, § 3206.5 [authorizing County to request idle-well information and that they be plugged or abandoned]; *id.*, § 3320.1, subd. (c) [recognizing local power of eminent domain concerning certain unitized production properties].) But these clauses are silent on the question of whether subsurface operations are exclusively regulated by DOGGR. The Opposition briefs rely upon Section 3690, which is expressly limited to "this chapter," *i.e.*, sections 3630 through 3690, (*id*., § 3690; CB 18:6-8) and Plaintiffs have not relied on "this chapter" whatsoever for any of their preemption claims. Moreover, the title of "this chapter" is "Unit Operations," and it is intended to regulate "the management, development, and

operation of lands as a unit for production of oil and gas" in order to, *inter alia*, "facilitate[] increased concurrent use of surface lands for other beneficial purposes." (Pub. Resources Code, ch. 3.5, § 3630.) Far from authorizing the County to enter the subsurface regulatory field, section 3690 only demonstrates that the state has not fully occupied the regulation of surface uses. But section 3690 raises no question whatsoever about who rules below the surface. Instead, the lack of such a savings clause for the other chapters of the Public Resources Code that are applicable here speaks volumes to the legislators' intent.

None of the savings clauses identified by the County or Intervenors undermines the conclusion that subsurface regulation of oil and gas operations is the exclusive domain of state and federal authorities. If anything, these clauses help clarify the dividing line between permissible surface regulations and preempted subsurface interference. But they do not save Measure Z from preemption.

3. Measure Z Bans Activity Permitted by State Authorities and is Preempted.

Measure Z is further preempted because it requires an exercise of authority that prohibits activities expressly permitted by DOGGR. Even where superior law "permits more stringent local regulation," the County may not exercise its land use authority "to completely ban the activity or otherwise frustrate the statute's purpose." (*Great Western Shows, Inc. v. Cnty. of L.A.* (2002) 27 Cal.4th 853, 868, citing *Blue Circle Cement, Inc. v. Bd. of Cnty. Comrs.* (10th Cir. 1994) 27 F.3d 1499.)

Neither the County nor Intervenors seriously challenge the propriety of this preemption standard. Granted, both parties assert that Measure Z neither "'mandate[s] what law expressly forbids,' nor 'forbid[s] what state law expressly mandates.'" (CB at 16:4–5, quoting *Great Western Shows, Inc.*, *supra*, 27 Cal.4th at p. 866; see also IB at 37:4–16.) But this merely recites the standard governing whether a "direct conflict" exists between Measure Z and superior law. (*Great Western Shows, Inc.*, *supra*, 27 Cal.4th at p. 866.) It has no bearing on the "real question" of "whether the Legislature intended to occupy the field" of subsurface oil and gas regulations. (*Ibid.*) Moreover, "total bans are not viewed in the same manner as added regulations, and justify greater scrutiny." (*Fiscal v. City & Cnty. of S.F.* (2008) 158 Cal.App.4th 895, 915.) Consequently, "[l]ocal law that prohibits an activity that state law intends to promote is preempted, even though it is possible for a private party to comply with both state and local law by refraining from that activity." (*City of Riverside*, *supra*, 56 Cal.4th at 764 (conc. opn. of Liu, J.), citing *Great Western Shows*, *supra*, 27 Cal.4th at pp. 867–868.)

The quintessential example of this type of preemption involves the federal Resource Conservation and Recovery Act ("RCRA"), regulating the disposal of hazardous wastes. (*City of Riverside*, *supra*, 56 Cal.4th at 760, quoting *Blue Circle Cement, Inc.*, *supra*, 27 F.3d at p. 1505.) While RCRA contains a "savings clause" that permits states to adopt "more stringent" requirements, that clause "does not vest in such authorities the power to ban outright important activities that RCRA is designed to promote—including recycling hazardous waste." (*Blue Circle Cement, Inc.*, *supra*, 27 F.3d at p. 1506.) Despite the power to adopt "more stringent" requirements, counties may not thereby exercise their zoning authority "to enact a measure that as a practical matter cannot function other than to subvert federal policies concerning the safe handling of hazardous waste." (*Ibid.*, quoting *ENSCO, Inc. v. Dumas* (8th Cir. 1986) 807 F.2d 743, 745.) "[O]rdinances that amount to an explicit or de facto total ban on an activity that is otherwise encouraged by RCRA will ordinarily be preempted by RCRA." (*Id.* at pp. 1508 –09 ["adopting an objective, rather than subjective, analysis" for preemption].)

Under these principles, there can be no doubt that Measure Z is preempted by comprehensive state and federal oil production laws that imbue DOGGR with "exclusive jurisdiction over . . . 'subsurface regulation.'" (RJN, Ex. 26 [SB 4 EIR] at C.2-44.) As such, the County simply may not use its land use authority to prohibit surface uses essential to subsurface activities permitted federal and state regulators. (See *Blue Circle Cement, Inc.*, *supra*, 27 F.3d at p. 1506.)

4. The Prohibitions on WST and Underground Injection Cannot Be Severed.

Depending on how this Court resolves preemption, it may have to decide whether certain portions of Measure Z can be severed from the remainder or, instead, whether the preemption of certain provisions requires invalidation of the entire initiative. Because Measure Z contains a severability clause, "[t]he test is whether it can be said with confidence that the electorate's attention was sufficiently focused upon the parts to be severed so that it would have separately considered and adopted them in the absence of the invalid portions." (*Gerken v. Fair Political Practices Comm'n* (1993) 6 Cal.4th 707, 714–715.) While Measure Z and the voter-guidance materials disclose that voters were aware the initiative contained three provisions, those same materials also offer a "persuasive reason" to think the voters viewed the provisions differently in ways that are critical to resolution of the severability issue. (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 822.)

It is "by no means clear that the electorate would have approved" Measure Z if the only remaining provisions were the drilling and impoundment prohibitions. (*Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 174.) The arguments by the initiative proponents in the voter-guidance materials do not even use the word "impoundment" (AR 364, 387), and the only specific reference to the new well prohibition actually tries to downplay the impact of that prohibition (AR 364). In contrast, proponents repeatedly emphasized the specific risks posed by "[f]racking, acidizing, and wastewater injection." (AR 364, 387.) Based on proponents' own voter-guidance materials, it simply cannot "be said with confidence" that County voters would have adopted Measure Z in the absence of either the WST or the underground injection prohibition. (*Gerken*, *supra*, 6 Cal.4th at p. 714.)

C. Measure Z Unconstitutionally Takes Operator's Property Rights without Compensation.

Measure Z violates longstanding and basic principles of constitutional law. The County and Intervenors reference cases allowing local governments to regulate the prospective development of unencumbered property. However, Measure Z does more than simply regulate future development. It will cause immediate disruptions in the operations of existing oil fields. (Chevron Brief at 34:3–38:15; *Hansen Bros. Enterprises, Inc. v. Bd. of Supervisors* (1996) 12 Cal.4th 533, 551–552 [distinguishing constitutional impact on prospective uses from "an unreasonable, oppressive, or unwarranted interference with an existing use"]; *Jones v. City of L.A.* (1930) 211 Cal. 304, 320 [holding that the city may not allow for "the destruction of [an existing] property interest without compensation"].)

1. Plaintiffs' Claims Are Ripe and Should Be Adjudicated By the Court.

The County and Intervenors assert that Plaintiffs' facial taking claims are not ripe until Plaintiffs undergo a time-consuming and burdensome exemption process before the County. This is not a situation where property owners should be required to seek a final administrative ruling on their entitlement application to determine if the local agency may allow some form of development on the applicant's property. (See, e.g., *MacDonald, Sommer & Frates v. Yolo Cnty*. (1986) 477 U.S. 340, 352 ["the holdings of both courts below leave open the possibility that some development will be permitted"]; *Sinclair Oil Corp. v. Cnty. of Santa Barbara* (9th Cir. 1996) 96 F.3d 401, 404 [dismissing facial claim where "Sinclair has not submitted to the County a proposal for development"]; *San Mateo Cnty. Coastal Landowners' Assn. v. Cnty. of San Mateo* (1995) 38 Cal.App.4th 523, 549 [dismissing

challenge on ripeness grounds where "[t]he easement requirement would not arise unless and until a property owner submitted an application to divide land in the coastal zone"].)

Here, oil operators and royalty owners have set forth substantial evidence showing that they will undoubtedly lose economic value if Measure Z is implemented. Plaintiffs provided declarations of highly experienced and credentialed petroleum engineers who declared under oath that oil production in Monterey County cannot continue if Measure Z is implemented.[7] (See, e.g., Latham, Wilson, Kemp, Gore Decls.) All of these declarations have either been ignored (by the County) or subject to objections (by Intervenors). Neither party challenges the substantive validity of these statements, nor make any meaningful challenge to their qualifications or credentials.[8] An ordinance must be "declared invalid 'on its face' when its terms will not permit those who administer it to avoid confiscatory or unconstitutional results in 'any' potential application to the complaining parties." (*San Mateo Cnty. Coastal Landowners' Assn.*, *supra*, 38 Cal.App.4th at p. 547, fn. 16, citation omitted.)

Exhaustion of administrative remedies is not required where "the remedy is inadequate." (*L.A. Cnty. Employees Assn. v. Cnty. of L.A.* (1985) 168 Cal.App.3d 683, 686.) An administrative remedy is inadequate where "the administrative procedure is too slow to be effective, or when irreparable harm would result by requiring exhaustion of administrative remedies before seeking judicial relief[.]" (*City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597, 609, citations omitted; see also *Abelleira v. Dist. Ct. of App.* (1941) 17 Cal.2d 280, 296 [remedy was inadequate where "[c]ontinued operation of the business at the rate imposed pending the appeal may in some instances be so unprofitable as to amount to a destruction of the business"]; *L.A. Cnty. Employees Assn., supra*, 168 Cal.App.3d at pp. 686–87; *Soc. Servs. Union v. Cnty. of San Diego* (1984) 158 Cal.App.3d 1126, 1131.)

Here, the implementation of Measure Z would have an immediate and significant financial impact on Plaintiffs. (Latham Decl., ¶¶ 6, 12–26; Tubbs Decl., ¶¶ 50–60.) The administrative exemption process identified in Measure Z provides no avenue for immediate relief from the

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[7] Oil operators and royalty owners will also incur substantial temporary damages if the Court lifts its order staying the effective date of Measure Z, and Plaintiffs are required to seek an administrative determination from the County before their clams can be heard.

[8] The County submitted the declaration of petroleum engineer Alan Burzlaff with its opposition, but Mr. Burzlaff does not dispute that any application of Measure Z will impact ongoing oil operations from continuing within the County. (Suppl. Johnson Decl., Ex. 1 [Burzlaff Dep. Tr.] at 140:22–141:13.)

prohibitions imposed by Measure Z. (Suppl. RJN, Ex. 5 & 6.) In contrast to the cases cited by the County and Intervenors, operators have a legal right to drill new wells under their permits, and they would be irreparably harmed without an immediate legal ruling on the validity and confiscatory nature of Measure Z. (Latham Decl., ¶¶ 6, 12–26.)

2. The County Cannot Avoid Liability by Desperate Attempts to Narrow Measure Z.

While the County and Intervenors try to minimize the economic impact of Measure Z, their interpretations cannot replace its plain language. And, even if their interpretation was ordered by the Court and adopted by the County, it would not avoid the ultimate shutdown of oil operations from Measure Z. Measure Z prohibits the reinjection of produced water for disposal, without a cost-effective alternative means to dispose of the large amounts of produced water that are extracted from the current production wells. (Kemp Decl., Ex. A at pp. 3, 52–55; Tubbs Decl., ¶ 36; Latham Decl., ¶¶ 20–21.)

The County has also proposed that Measure Z allows some unspecified system of replacement wells that do not exceed the existing well count (CB at 9:18–10:15), but this interpretation is not shared by Intervenors or the County's expert, and the County does not explain how it reconciles this interpretation with the language of Measure Z. (Suppl. Johnson Decl., Ex. 1 [Burzlaff Dep. Tr.] at 103:12-104:24.) In any event, this proposal is in direct conflict with DOGGR's policy of encouraging the abandonment of idle wells. (Plaintiffs' RJN, Exs. 11, 12.) Given the large number of wells recently abandoned in direct response to DOGGR's policy, operators do not have an excess number of wells that can be shut-in so that needed wells can be drilled. (Tubbs Decl., ¶¶ 14–16; Plaintiffs' RJN, Ex. 22.) Finally, the County and Intervenors make no attempt to show that it is economically feasible to require treatment of all produced water through a reverse osmosis system. Even so, a reverse osmosis system still generates a brine stream that must be disposed of through reinjection. (Tubbs Decl., ¶ 38–41, 55.)

III. CONCLUSION

For the foregoing reasons, Measure Z is facially and legally invalid and should be struck down.

DATED: October 17, 2017

Respectfully submitted,
GIBSON, DUNN & CRUTCHER LLP

By: _____
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PROOF OF SERVICE

I, Matthew Wickersham, hereby declare as follows:

I am employed in the County of Los Angeles, State of California; I am over the age of eighteen years and am not a party to this action; my business address is located at 333 South Grand Avenue, Los Angeles, California 90071. In said County and State, on October 17, 2017, I served a true and correct copy of the following documents:

CHEVRON PLAINTIFFS' REPLY IN SUPPORT OF OPENING BRIEF IN SUPPORT OF PHASE 1 PROCEEDINGS

on the following persons:

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by the methods indicated:

☑ **BY ELECTRONIC MAIL:** Based on an agreement of the parties to accept electronic service, I caused the documents to be sent to the persons at the electronic service addresses listed above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that the foregoing document(s) were printed on recycled paper.

Executed at Los Angeles, California, on October 17, 2017.

/s/ Matthew Wickersham
Matthew Wickersham