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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF MONTEREY

AERA ENERGY LLC,

Petitioner and Plaintiff,

vs.

COUNTY OF MONTEREY, a municipal corporation; and DOES 1 through 25, inclusive,

Respondents and Defendants.

Lead Case No. 16CV003978
Case No. 16CV003980 (consolidated for purposes of Phase I with 17CV000790, 17CV000871, 17CV000935, and 17CV001012)

PETITIONER AND PLAINTIFF AERA ENERGY LLC'S REPLY BRIEF RE FACIAL INVALIDITY OF MONTEREY COUNTY MEASURE Z

Action Field: December 14, 2016
Hearing Date: November 13, 2017

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I. INTRODUCTION

In their Opposition Briefs, Defendants County of Monterey ("County") and Intervenors Protect Monterey County and Dr. Solario ("Intervenors") (collectively, "Defendants") struggle to perpetuate the fiction that Measure Z is a valid land use ordinance. It is undeniable that, rather than proscribing ***whether*** and ***where*** oil and gas production activities can occur, Measure Z crosses the line into regulating the subsurface methods and operations of oil and gas production—***how*** oil and gas production is to be conducted in Monterey County, a matter preempted by conflicting, superior state and federal law. Intervenors claim that Measure Z was "carefully crafted"—which is true, but only in a limited sense: Seeking to avoid the extraordinarily large compensable taking that would result from a direct prohibition of oil and gas production in the County, Intervenors cunningly crafted a fatally restrictive regulation of subsurface oil and gas production activities using the jargon of land use regulation. It is improper, and allowing Measure Z to stand ultimately would result in the termination of oil and gas production in Monterey County.

Defendants' Opposition Briefs are long on irrelevant straw man arguments supported by hornbook recitations of inapplicable law, and very short on relevant legal analysis addressing the material issues in dispute. Cutting through to the relevant authorities and arguments, this Reply demonstrates that Measure Z is in conflict with and is preempted by superior state and federal law and effects a *per se* taking upon Petitioner Aera Energy LLC ("Aera") and the other Petitioners. For the reasons set forth below, and in the other Phase 1 Briefs and filings, Petitioner Aera respectfully requests that the Court invalidate Measure Z.

II. LEGAL ARGUMENT

A. The Court Should Rule on the Interpretation of Measure Z.

Both the County and Intervenors implicitly acknowledge that, as written, Measure Z goes too far. Consequently, Defendants proffer disparate interpretations of Measure Z in an attempt to narrow its application (although neither reinterpretation would change the ultimate result of the implementation of Measure Z—the San Ardo Field being shut down). As set forth in Chevron's

Reply Brief, Defendants' interpretations are inconsistent with the language of Measure Z.[1]

B. Measure Z is Preempted by State and Federal Law Because It Regulates the Operations, Methods, and Techniques of Oil and Gas Production in the County.

In its Opening Brief, Aera identified numerous, specific, superior statutes and regulations that conflict with the terms of Measure Z. (Aera OB at pp. 11-20.) Rather than address Aera's specific arguments, however, Defendants posit vague generalities about the County's land use authority and rules of preemption in the abstract. None of the fuzzy contentions in Defendants' Oppositions have merit. Measure Z is preempted.

1. Legal Standard for Preemption Analysis.

Pursuant to the California Constitution, counties have broad authority to regulate land uses within their jurisdiction to promote public health, safety, and welfare. Cal. Const., art. XI, § 7. However, no county has the authority to enact regulations, including land use regulations, that conflict with state law. *Id.*; *Sherwin-Williams Co. v. City of Los Angeles*, 4 Cal. 4th 893, 897 (1993); *see also L.I.F:E Cinn, v. City of Lodi*, 213 Cal. App. 3d 1139, 1143 (1989) ("where the legislature has exhibited the intent or purpose to occupy the field to the exclusion of municipal regulation, the city lacks authority to legislate under the preemption doctrine"). Local legislation conflicts with state law where it "duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication." *Sherwin-Williams*, 4 Cal. 4th at 897. Here, the County has grossly exceeded its regulatory authority by enacting a measure that, although disguised as a "land use" regulation, actually purports to regulate the manner and methods of oil and gas production, which both Defendants concede is fully occupied by the state of California. (CO 20:16-27; IO 26:8-23; 29:12-30:18; 35:15-36:1.)

2. Measure Z's "Land Use" Regulations Are Not Actually Land Use Regulations.

Defendants maintain that because California oil and gas law focuses on below-ground or "downhole" activities, Measure Z's above-ground "land use" prohibitions are not preempted.

[1] Defendants' non-binding interpretations of Measure Z would create even more ambiguities in the implementation of Measure Z than are inherent in the existing text of Measure Z. The County's current proposed implementing ordinance does nothing to resolve Measure Z's inherent ambiguities. (Supp. RJN, Ex. 5.)

Defendants' oppositions thus rely almost exclusively on the interpretation of Measure Z as an above-ground, land use ordinance. (*E.g.*, CO 20:11-27; IO 31:11-38:22.) Indeed, Defendants concede as they must that "underground phases of oil and gas production activities are fully occupied by California law," and that "a local government cannot layer conflicting downhole requirements on top of" state requirements. (CO 20:16-27; IO 35:15-36:1.)

Defendants' concession is critical here because, although "carefully crafted" to give the appearance that Measure Z is a "land use" regulation, Measure Z is not actually a land use regulation of any kind—it does not regulate the "what" and "where" of oil operations. Rather, Measure Z is a cleverly disguised, improper regulation of downhole oil and gas production activities that dictates the manner and methods of oil and gas production contrary to applicable state and federal law. *See Big Creek Lumber Co. v. County of Santa Cruz*, 38 Cal. 4th 1139, 1158 (2006) (local regulations of the conduct of state-regulated timber operations preempted, but ordinance only regulating where such operations may take place permitted).

a. Hydraulic Fracturing/WST Ban. Measure Z purports to eliminate "any facility, appurtenance, or above-ground equipment . . . in support of well stimulation treatments." (Phase 1 Administrative Record ["AR"] 127.) Neither the text of Measure Z, nor Defendants' Briefs identify any above-ground facilities or equipment that are unique to well stimulation treatments, all of which occur underground. That is because there are none. (Supp. Sasaki Decl. ¶ 9.) In fact, the equipment employed in well stimulation treatments is the same equipment in use for oil and gas production in Monterey County, specifically including equipment currently used in steam flooding and well cleaning activities. The language of Measure Z is a blatant attempt to cloak in the language of land use regulation, impermissible county regulation of subsurface oil and gas production activities that conflict with the State's statutes and regulations.

b. No new wells. Measure Z does not affect the location, spacing, or appearance of new wells. Nor does it address typical land use concerns like traffic, noise, or noxious odor prevention. Indeed, the County's interpretation of the provision as allowing new wells so long as an equal number of old wells are abandoned is even less tethered to traditional notions of land use regulation than an outright ban on the drilling of new wells. Prohibiting new

wells is about regulating oil production, not land use.

c. Wastewater Reinjection. Finally, Measure Z purports to prohibit "any facility, appurtenance, or above-ground equipment, whether temporary or permanent, mobile or fixed, accessory or principal, in support of oil and gas wastewater injection . . . ." (AR 128-129.) Much like the WST ban, Measure Z does not identify any purported "land uses" in support of wastewater reinjection that are additional to or different from land uses in support of oil and gas extraction, steam flooding, and wastewater treatment—there are none. (Supp. Sasaki Decl. ¶10.) Calling this prohibition "land use" is a transparent ruse; the actual effect of Measure Z is to regulate the methods and operations of oil and gas production in the County.

L.I.F.E. Committee v. City of Lodi, 213 Cal. App. 3d 1139 (1989), is instructive here. In *L.I.F.E. Committee*, the voters in the City of Lodi passed a "land use" measure that established a "Green Belt, approximately one mile wide contiguous to the boundaries of and surrounding the City of Lodi and occupying the area between the City limits and the outer boundary of the City's sphere of influence." *Id.* at 1141. The measure went on to provide that, prior to any annexation of land within the Green Belt, there must be a citywide vote approving an amendment to the general plan with respect to the land to be annexed. *Id.* at 1146.

Thus, the measure appeared on its face to be an exercise of the City's land use regulatory powers. The court, however, did not limit its analysis solely to the carefully drafted words on the face of the measure. Instead, the court looked beyond the pretext on the page and to the actual impacts of the measure, holding that the citywide vote requirement was not a land use regulation and was preempted by state annexation law. *Id.* at 1148.

Here, the Court is faced with a similar analysis requiring it to look beyond the pretextual nature of Measure Z. Measure Z purports to be a set of land use regulations. Yet, upon examination, the "land use" regulations do not actually regulate land uses. In fact, Measure Z impermissibly regulates the methods and operations of oil and gas production.

3. Defendants Manufacture a Non-Existent and Counterfactual Intent to Reserve Oil and Gas Regulation to Local Authorities.

Defendants next argue that Measure Z is not preempted based on a series of California

authorities purportedly preserving the broad power of counties to regulate the location of oil and gas activities. According to Defendants, California has expressed an intent not to preempt local regulation of and prohibition on oil and gas production activities through (1) Public Resources Code section 3690 (CO 18:5-19:5; IO 28:23-29:11; 34:2-4); (2) "a century of legal authority" (IO 26:26-31:8); and (3) the so-called "presumption against preemption" (IO 25:3-26:16). The cited authorities do not establish any intent by California to permit local entities to regulate the manner and methods employed to extract oil and gas. Indeed, substantial authority demonstrates just the opposite to be true. *See, e.g.*, 59 Ops. Cal. Atty. Gen. 471, 461-462, 468-469, 478 (1976).

a. Public Resources Code section 3690. Defendants claim that, in Public Resources Code section 3690, the California legislature "expressly preserved a county's regulatory power over the conduct and location of oil and gas operations." (IO 34:1-4; CO 18:1-19:5.) Section 3690, however, applies solely to the chapter of the Public Resources Code that governs unit operations: "***This chapter*** shall not be deemed a preemption by the state of any existing right of cities and counties . . ." (emphasis added).[2] Not only is it the case that Measure Z and the cited chapter governing unitization of oil fields are not in conflict, they have nothing to do with one another. Section 3690 is irrelevant.

b. "Century of Legal Authority." Intervenors claims that "a century of legal authority... evidences a clear legislative intent not to preempt local zoning restrictions or prohibitions on oil and gas production activities." (IO 26:26-31:8.) Notably, no case that Intervenors cite in support of this proposition addresses preemption or the intersection between state law and local zoning powers. Only one of the cases upon which Intervenors rely even discusses the connection between local ordinances and state law—and it does so in the context of the Contract Clause. *See Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach*, 86 Cal. App. 4th 534 (2001). Further, as the Attorney General noted, the cases relied upon by Intervenors for their argument (including *Friel v. County of Los Angeles*, 172 Cal. App. 2d 142 (1959), *Pacific Palisades Assoc. v. City of Huntington Beach*, 196 Cal. 211 (1925), and *Marblehead Land*

[2] The Attorney General also emphasized the limited application of section 3690: "[S]ection 3690 applies only to 'any existing rights' and only to the provisions of 'this chapter,' i.e., chapter 3.5." 59 Ops. Cal. Atty. Gen. at 473.

Co. v. City of Los Angeles, 47 F.2d 528 (1931)) arose out of a local authority's attempt to restrict or prohibit—***not regulate***—oil and gas activities. 59 Ops. Cal. Atty. Gen. at 468. And finally, as discussed above, although Measure Z was "carefully crafted" to appear to be a set of land use restrictions, in reality Measure Z has nothing to do with land use or zoning.

At bottom, these cases establish that local authorities may at times regulate above ground land uses related to oil and gas production—for example, by regulating the zoning designations in which oil wells can be drilled. The cases do not establish any legislative intent for local authority to override conflicting state law. Nor do the cases demonstrate California's "intent" to allow counties to regulate the methods and procedures of oil and gas production.

c. "Presumption Against Preemption." Both the County (CO 12:1-13:1) and Intervenors (IO 25:9-18) rely on *Big Creek Lumber Co. v. County of Santa Cruz*, 38 Cal. 4th 1139 (2006), to establish a purported "presumption against preemption"—*i.e.* that "when local government regulates in an area which it ***traditionally*** has exercised control, such as the location of particular land uses, California courts will presume, absent a clear indication of preemptive intent from the Legislature, that such regulation is *not* preempted by state statute." *Id.* at 1149. This fails to recognize that no California county "***traditionally*** has exercised control" over either (1) subsurface oil and gas activities; or (2) *how* oil and gas operations may be conducted. 59 Cal. Opps. Cal. Atty. Gen. at 478.

Further, *Big Creek* goes on to provide that this presumption applies "unless [preemptive] intention is made clearly to appear ***either*** by express declaration *or by necessary implication.*" *Id.* at 1149-1150 (emphasis added) (citations omitted). Here, California's extensive and comprehensive regulation of subsurface oil and gas activities necessarily preempts those local regulations that intrude on the regulation of the methods and operations of oil and gas production.

4. Measure Z is Not a Direct Ban on Oil and Gas Activities—And, Thus, Defendants' Reliance on the County's Purported Ability to Ban Oil and Gas Production in Certain Areas is Misplaced.

Lastly, Defendants spend significant time arguing that localities have the authority to completely ban oil and gas production activities. (IO 26:24-31:8; CO 14:5-15:17.) For example, the County cites to *Higgins v. Santa Monica*, 62 Cal. 2d 24, 32 (1964), which the County alleges

"squarely answers the question before this Court about whether Measure Z is preempted." (CO 15:4-14.) *Higgins* holds that, at least as of the time of the decision, a city was permitted to prohibit entirely oil and gas operations in tidelands within the city's boundaries, but the city could not regulate the manner and methods of operations. *Higgins*, 62 Cal. 2d at 32. This argument has no place in the Measure Z analysis because Measure Z does not institute a direct ban on oil and gas activities in any particular area or zoning designation. Rather, Measure Z improperly purports to regulate the methods and operations of oil and gas activities in the County.[3]

5. Each of the Three Prongs of Measure Z is Preempted.

Defendants confine the majority of their analysis to vague, surface-level and conclusory arguments. In its Opening Brief, however, Aera identified numerous conflicts between each of the prongs of Measure Z and applicable state and federal law.

a. The WST Ban is Preempted by State Law. Defendants argue that Measure Z's WST ban is not preempted by state law because Measure Z does not regulate the below-ground or "downhole" activities that are the central focus of state laws, including SB 4 and its implementing regulations. (CO 15:21-16:2; IO 35:1-36:1.) Defendants' argument is misplaced.

Defendants conveniently ignore that in developing the regulations to implement SB 4, DOGGR expressly considered and ***refused to adopt*** a statewide hydraulic fracturing ban after concluding that such a ban was not an "environmentally superior alternative" because it would require California to import oil and gas at a level that would significantly increase greenhouse gas emissions. (JRJN, Ex. 26 at ES-23.)

Instead of addressing the statutes and regulations that directly conflict with the WST ban, Defendants argue that there is no basis to find that SB 4 ever preempts a local regulation because: (1) the Public Resources Code contemplates working with local agencies to collect information about wells (CO 19:6-17); (2) Senator Fran Pavley stated that SB 4 is "not intended to preempt . .

[3] This regulation of the methods and operations of oil and gas production will cause the termination of all oil and gas operations in the County, but that is only because the regulations are so restrictive that they leave no space for operations to continue. Indeed, eliminating oil and gas operations in the County was the clear intent of the drafters of Measure Z, but it could not so state on its face or it would be an obvious compensable taking. In other words, in attempting to avoid liability for a taking—which Intervenors knew the County could not afford and voters would not approve—Intervenors "carefully crafted" Measure Z in a way that not only fails to avoid takings liability, but also is preempted because it regulates the methods and operations of oil production in the County.

. local government's authority over land use" (CO 18:23-26; IO 36:7-17); and (3) SB 4 does not include an express preemption provision (CO 18:5-9). Each of these arguments fails.

First, that the Public Resources Code calls for the collection of information from local governments does not rise to the level of mandated coordination with local governments that resulted in a finding of preemption in the case upon which the County relies, *Waste Res. Technologies v. San Francisco Dept. of Pub. Health*, 23 Cal. App. 4th 299, 307 (1994). There, the court found a local regulation was not preempted by a state law that explicitly looked to local governments to ***implement and enforce the state law***, contained "numerous provisions" directing the state to consult and coordinate with local agencies, and specifically required the designation of a "local enforcement agency" to police the law. *Id.* at 306. In short, allowing local entities to collect information is not on par with relying on local entities to implement and enforce state law.

Second, Senator Pavley's statements about her beliefs regarding SB 4 have no bearing on whether SB 4, as implemented, preempts Measure Z's WST ban. Measure Z's well stimulation provision is not a traditional land use ordinance; but rather a thinly veiled improper regulation of downhole oil and gas activity. And furthermore, Senator Pavley's statement is inadmissible and irrelevant to the meaning of SB 4. (*See* Plaintiffs' Objections to Evidence at 2:11-4:18.)

Third, Intervenors' suggestion that SB 4 cannot impliedly preempt Measure Z because SB 4 does not contain an express preemption provision is meritless. Neither the language of SB 4 (including, section 3160(n)), nor DOGGR and Senator Pavley's statements as to preemption allow for regulations that conflict with the requirements of SB 4 (which Measure Z does). Intervenors rely on *People v. Garcia*, 39 Cal. 4th 1070, 1088 (2006), to argue that SB 4's failure to expressly preempt local regulation of fracking after extensive court holdings allowing local regulation of surface oil and gas activities, indicates the legislature's intent to leave such regulation to local authorities. (IO 36:2-17.) That reliance is misplaced. *Garcia* involved a criminal statute that was amended after the court interpreted that same statute.[4] It did not concern,

[4] In *Garcia*, the People challenged the court to reconsider its previous holding that a welfare applicant exonerated of fraud charges during an administrative hearing could not be criminally prosecuted for welfare fraud under collateral estoppel. 39 Cal.4th at 1070. The court rejected the People's request to overturn its finding on the basis that the welfare statute was changed to permit, rather than require, administrative proceedings seeking restitution of benefits before a criminal prosecution. *Id.* at 1085. The court reasoned that in amending the welfare code, the State was

as here, a state law enacted to regulate one aspect of an industry (well stimulation treatments) after courts allowed local entities to regulate a different aspect of that industry (above-ground oil and gas land uses).

Further, as the Attorney General concluded, California's regulation and permitting of plans of operation, methods, materials, procedures, and equipment to be used in oil and gas production leaves "no room for local regulation"—and that was before the State further expanded its regulation of the methods and operations of oil production with SB 4. 59 Ops. Cal. Atty. Gen. at 461-462. That Measure Z does not ***directly*** purport to exercise control over subsurface activities is irrelevant: "in all probability there will in our view 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." 59 Ops. Cal. Atty. Gen. at 478 (emphasis added).

Lastly, in a haphazard footnote, Intervenors claim that "hydraulic fracturing has many above ground impacts," including visual intrusions, impacts to air quality, "health issues," "noise audible to surrounding land uses," vibrations, and "increased traffic." (IO 35:25-28.) But Measure Z's hydraulic fracturing prohibition does not address any of these alleged impacts and neither Intervenors nor the County attempt to show how the WST ban would reduce alleged above ground impacts in comparison to non-WST oil and gas production.[5]

b. The Wastewater Reinjection and Impoundment Ban is Preempted. Measure Z's wastewater reinjection and impoundment provisions prohibit the exact activities that DOGGR and the Water Boards, acting under delegated authority from the EPA, allow. They are therefore preempted by state and federal law.

Defendants contend that the Safe Drinking Water Act ("SDWA") does not preempt Measure Z's wastewater impoundment and injection ban because the SDWA (1) contains a

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presumed to be fully cognizant of the court's previous interpretation of that statute – had the state wanted to abrogate the court's prior holding, it could have done so. *Id.* at 1088.

[5] Intervenors assert that Plaintiffs have no standing to obtain relief based upon Measure Z's prohibition of land uses in support of well stimulation treatments because no producer uses, or intends to use, hydraulic fracturing at the San Ardo Field. (IO 34: 7-19.) A plaintiff has standing to bring a facial challenge if "beneficially interested in the controversy." *Zubarau v. City of Palmdale*, 192 Cal. App. 4th 289, 299-300 (2011) (internal citations omitted). Here, Plaintiffs have property interests in the oil and gas at San Ardo Field, and are therefore "beneficially interested" in the methods permitted to extract that oil and gas. More importantly, both Defendants stipulated on the record that standing would not be raised during Phase 1 of this action. (Supp. RJN, Ex. 2 [June 7, 2017 Hearing, 29:6-32:21].)

savings clause preserving the authority of states and political subdivisions to adopt and enforce regulations concerning underground injection (IO 38:24-39:11; CO 23:11-24:4); and (2) allows for supplementary local regulation that interferes with underground injection where "essential to assure that underground sources of drinking water will not be endangered by that injection." (IO 40:16-41:22; CO 26:8-14.)

Defendants' reading of the SDWA's savings clause blatantly ignores the rest of the Act. The SDWA specifically provides that a state UIC program may not prohibit "the underground injection of wastewater or other fluids which are brought to the surface in connection with oil or natural gas production." 42 U.S.C. §§ 300h(b)(2), 300h-1(c)(1). And as set forth in *EQT Prod. Co. v. Wender*, 191 F. Supp. 3d 583 (2016), "[a]lthough the SDWA savings clause permits local law to remain effective despite the existence of a UIC program, surely the prohibition [against banning injection of wastewater and other fluids brought to the surface with oil or gas production] prevents such local law from altogether preventing UIC activity." *Id.* at 601.[6]

Defendants further attempt to sidestep the SDWA's clear prohibition by arguing that the County may enact regulations that interfere with or impede underground injection if "essential" to protect underground sources of drinking water. Defendants rely on *Bath Petroleum Storage, Inc. v. E.I.L. Petroleum*, 309 F. Supp. 2d 357 (N.D. N.Y. 2004), in which the state of New York was allowed to require permits in addition to those required under the state-administered UIC program. Despite Defendants' best efforts, *Bath* simply does not stand for a county's right to prohibit underground wastewater reinjection. *Bath* did not allow—much less consider—an outright ban on injecting produced water into UIC reinjection wells.

Furthermore, Defendants' contention that Measure Z is "essential" to protect underground sources of drinking water is factually baseless, and Defendants do not submit any evidence to the contrary. Reinjected produced water in Monterey County is returned to salty, oil-bearing aquifers that are not suitable now, and are not reasonably expected to serve in the future, as a source of

[6] Defendants' attempt to render *EQT* inapposite fails. That California counties have broad authority to regulate the location of oil and gas operations, including underground injection, does not defeat the express language of the SDWA. And even so, Measure Z exceeds the County's land use authority by regulating the manner and methods of underground reinjection and impoundment, not merely the location.

drinking water. (JRJN, Ex. 79 at ES-2; Sasaki Decl. ¶ 20, Suppl. Johnson Decl., Ex 1 [Burzlaff Depo. at 56:5-58:15.) Indeed, Defendants' theory of the "essential" protection clause would completely swallow the SDWA's prohibition on reinjection bans: There is no more appropriate place to reinject produced water than into salty, oil-bearing aquifers that do not, and will not in the future, serve as a source of drinking water.

c. The Prohibition on New Wells is Preempted by State Law. As an initial matter, Aera identified numerous statutes and regulations that directly conflict with Measure Z's ban on new wells. (*See* Aera Opening Brief pp. 18-20.) Defendants' do not address a single specific statutory or regulatory provision. Their silence on those provisions speaks volumes. Measure Z's prohibition on new wells is a regulation of the manner and method by which oil and gas may be produced in the County. By banning new wells (or requiring new wells to be offset by abandonment of existing wells, as the County argues), Measure Z dictates not where oil and gas may be produced in the County, but instead *how* oil and gas may be produced within the County by, for example, forcing oil and gas producers to rework existing wells "through re-drilling or horizontal drilling" where they would otherwise drill new wells. (IO 23:13-24:4.) The prohibition on the drilling of new wells is, therefore, preempted by state law.

6. Measure Z is Not Severable.

Measure Z presents, and was promoted to the public as, a single unified, non-divisible ordinance to "ban fracking." As such, if the Court finds any one of Measure Z's three prongs preempted, the entire ordinance must fail. *See Ex parte Blaney*, 30 Cal. 2d 643, 655 (1947) ("if the statue is not severable, then the void part taints the remainder and whole becomes a nullity.")

Defendants argue that Measure Z is severable because voters were informed about each of the three prongs and because each prong contributes to the Measure's overriding purpose. (CO 30:5-31:2; IO 44:20-27.) These arguments fail because the test for volitional severability is not whether voters were "informed" of each provision, but "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 absence of the invalid portions." *Gerken v. Fair Political Practices Com.*, 6 Cal. 4th 707, 714-715 (1993) (internal citations omitted). There

is no evidence in the record that would allow the Court to find "with confidence" that the voters were sufficiently and separately focused on the three prongs of Measure Z such that any one of the prongs would have been adopted alone. Measure Z is therefore not volitionally severable.

C. The Mere Enactment of Measure Z Would Effect a Facial Taking.

1. Regardless of its Interpretation, Measure Z Strips Aera and the other Producers of All Economically Beneficial Use of Its Property Interests in the San Ardo Field.

Mere enactment of Measure Z, whether as written or with the County's interpretive gloss, effects a facial taking because it strips Aera of all economically beneficial use of its property interests. Aera's property interests in the San Ardo field derive value solely from the right to extract and produce oil and gas resources, and Aera does not have the right, under its oil and gas leases, to use the San Ardo Field other purposes. (Anderson Decl., Exs. A-G.) To exercise their rights in the San Ardo Field, oil and gas producers must be able to drill new wells and to reinject produced water for steam flooding, storage, and disposal. Thus, because Measure Z, on its face, prohibits both the drilling of new wells and the injection and impoundment of wastewater, it deprives all oil and gas interest holders of the economically beneficial use of their property.

a. San Ardo Operators Must Be Able to Inject or Impound Wastewater to Store and Dispose of Produced Water. If oil and gas producers are not permitted to inject or impound produced water for use in steam flooding and for storage and disposal, all oil and gas operations at San Ardo field will cease. (Kemp Decl., Ex. A at 49; Sasaki Decl. ¶ 47.) As set forth in Aera's Opening Brief, given the geological composition of the San Ardo Field, steam flooding is the only viable means of extracting oil and gas in the County. (*See* Aera OB 25:6-27:10.) By prohibiting the injection and impoundment of produced water for steam flooding purposes, Measure Z precludes all San Ardo operators from producing the oil and gas reserves from which their property interests derive.

Further, because it is impossible to produce oil without also producing associated water (*see* Aera OB 25:6-27:10), all oil and gas producers in the San Ardo Field must be able to dispose of that produced water—through injection or impoundment for purposes of storage and/or disposal. In the past nine years, water production from the San Ardo Field has exceeded 300,000

barrels per day. (Kemp Decl., Ex. A at 49; JRJN, Ex. 79 at ES-2.) Of that total, approximately 44 percent is used for steam flooding. But the remaining 56 percent must be disposed of. (Sasaki Decl. ¶¶ 36-38; JRJN, Ex. 79 at 6.) If producers cannot inject the remaining produced water, no producer can continue to operate. (Kemp Decl., Ex. A at 47-49; Sasaki Decl. ¶ 47.)

Even if the Court accepts Defendants' interpretation of Measure Z with respect to steam flooding and treated wastewater disposal, Measure Z still effects a facial taking. First, not all water reinjected for use in steam flooding will be brought to the surface with the oil and gas reserves. Inevitably, some portion of the injected water will remain stored and/or disposed of underground. (Supp. Sasaki Decl. ¶ 8.) Thus, Defendants strained interpretation that Measure Z permits steam flooding appears to be based on a misunderstanding of the oil and gas production process. Second, Defendants assert that Measure Z would allow for disposal of water after reverse osmosis treatment. But the reverse osmosis process only purifies about 75 percent of the water run through the process. (Kemp Decl., Ex. A at 49; Tubbs Decl. ¶¶ 38-41.) The remaining 25 percent becomes a "brine stream" that contains high concentrations of dissolved salts, and must be reinjected underground for disposal. (Kemp Decl., Ex. A at 5, 49; Tubbs Decl. ¶¶ 38-41.) If the remaining brine stream cannot be disposed of underground, oil and gas production at the San Ardo Field cannot continue. (Tubbs Decl. ¶ 41.)

b. San Ardo Operators Must Be Able To Drill New Wells. On its face, Measure Z prohibits drilling *any* new wells from which to extract oil and gas. As set forth in Aera's Opening Brief, that prohibition would immediately impact the production, operations, and economics of the San Ardo Field, and would force a premature end to the field's life—long before even a fraction of the estimated 850 million remaining barrels of economically recoverable oil and gas reserves can be produced. (*See* Aera OB 24:5-25:5.) Tellingly, Defendants do not address whether a complete prohibition of new wells would strip Aera of all economically beneficial use of its property interests in the San Ardo Field.[7]

c. Section 6 Does Not Save Measure Z. Defendants assert that section 6 of

[7] The County's counter-textual interpretation of the no new wells provision does not change the ultimate analysis: because operators cannot dispose of their wastewater, oil production in the County necessarily will cease.

Measure Z prevents a facial taking.[8] Defendants are mistaken, for two reasons:

First, section 6 only provides the possibility of administrative relief ***after*** Measure Z has been applied and Aera's property has been taken. As discussed at length above, upon becoming effective, Measure Z would require operators to, *inter alia*, stop injecting wastewater for storage and disposal. Only after operators file an exemption application and the Board of Supervisors issues a determination, may operators resume their production efforts. This is the exact opposite of the administrative procedures that were at issue in the two cases cited by Defendants, *Home Builders Ass'n of N. California v. City of Napa*, 90 Cal. App. 4th 188 (2001); *San Mateo County Coastal Landowners' Ass'n v. County of San Mateo*, 38 Cal. App. 4th 523 (1995). For example, the ordinance challenged in *Home Builders* imposed, as a condition to obtaining a permit for future development, the requirement that 10% of all new construction in the city be "affordable." *Home Builders*, 90 Cal. App. 4th at 192. It did not impact existing development. Likewise, the *San Mateo* ordinance conditioned approval of permit applications upon applicants granting the county open space or agricultural easements. *San Mateo*, 38 Cal. App. 4th at 545. In contrast, Measure Z directly impacts the ***existing*** operations at San Ardo Field by requiring operators to change the way that they produce oil ***before*** their application for an exemption is even considered. And even if operators are granted an exemption under Section 6, they are required to suspend their operations until the Board of Supervisors issues a determination. At present, it is entirely unclear how long the exemption process will take, but even applicants that eventually do obtain an exemption will be deprived of the economically beneficial use of their property while the application is pending, and any suspension of operations may render restarting oil production in San Ardo not economically viable, making that deprivation permanent. (Tubbs Decl. ¶ 57.)

Second, section 6 improperly restricts the availability of administrative relief by requiring that an operator demonstrate a taking by "substantial evidence." There is no such heightened evidentiary requirement under either the California or Federal Constitution. *Pennsylvania Coal*

[8] Section 6 provides, as relevant here: "In the event a property owner contends that the application of this Initiative effects an unconstitutional taking . . . the Board of Supervisors may grant . . . an exception to the application of any provision this Initiative if the Board of Supervisors finds, based on substantial evidence, that both (1) the application of that provision of this Initiative would constitute an unconstitutional taking of property, and (2) the exception will allow additional or continued land uses only to the minimum extent necessary to avoid such a taking." (AR 137.)

Co. v. Mahon, 260 U.S. 1003, 1014 (1992) (finding city ordinance constituted an as-applied taking of plaintiffs' property right in the extraction of oil without applying a heightened evidentiary standard). The County cannot trample Aera's constitutional rights and then require Aera to meet a heightened burden to vindicate its rights.

d. Aera's Facial Takings Claim is Ripe for Review. Finally, Aera's facial takings claim is ripe for review prior to exhaustion of the County's administrative process. "The ripeness doctrine, requiring a final decision regarding the application of the regulation to the specific property, only applies to legal attacks on the regulation 'as-applied' to a specific property. It does not apply when a property owner challenges the 'facial' validity of the land use regulation." *San Mateo*, 38 Cal. App. 4th at 547, fn. 16.

Intervenors urge that "because 'a court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes,' *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986), this Court should find that Petitioners cannot go forward at this time on their takings claims.'" (IO 53:11-18.) This argument ignores clear precedent (which Intervenors cite for a different proposition) that limits the ripeness doctrine to as-applied takings. The argument has no merit applied to Aera's facial claim.

2. Measure Z's "Amortization" Provision Cannot Remedy the County's Facial Taking of Aera's Property Interests in the San Ardo Field.

Defendants argue that the concept of amortization can be applied to oil and gas production because it has been utilized to regulate land uses other than billboards, including cement mixing plants, wrecking yards, adult bookstores, and nudist camps. (CO 39:3-21; IO 56:3-11.) There is a key difference between oil and gas production operations, however, and the types of businesses to which the amortization concept has been applied: oil and gas production requires ongoing capital infusions to merely maintain a steady rate of production, whereas most business require capital up front and then predominantly only operating expenses as the business continues. The California Supreme Court noted this very nature of extractive business, finding that "[i]f [they] may not expand, [they] cannot continue." *Hansen Bros. Enterprises, Inc. v. Board of Supervisors*, 12 Cal. 4th 533, 559 (1996). In other words, standing still—continuing to fund only operating expenses

while avoiding further capital expenditures—simply does not allow an oil field to maintain even current rates of production. (Kemp Decl., Ex. A at 16.) Therefore, in this context, amortization has no purchase.

III. CONCLUSION

Plaintiff and Petitioner Aera Energy respectfully requests that the Court declare that Measure Z is preempted by superior federal and state law, and therefore Measure Z is void. Alternatively, Aera requests that the Court declare that Measure Z effects a facial taking of Aera's property rights in Monterey County, without just compensation, in violation of the United States and California Constitutions.

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