ELECTRONICALLY FILED BY
Superior Court of California,
County of Monterey
On 12/28/2017
By Deputy: Valenzuela, Diana

**SUPERIOR COURT OF CALIFORNIA**
**COUNTY OF MONTEREY**

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| **CHEVRON U.S.A., INC, et al.**<br>**Plaintiffs/Petitioners**<br><br>**vs.**<br><br>**COUNTY OF MONTEREY**<br>**Defendant/Respondent** | **Case No.: 16CV003978**<br><br>**INTENDED DECISION** |
| **Protect Monterey County; Dr. Laura Solorio, M.D.,**<br>**Intervenors** | |

This matter came on for court trial on November 13, 14, and 15, 2017. All sides were represented through their respective attorneys. The matter was argued and taken under submission.

This intended decision resolves factual and legal disputes, and shall suffice as a statement of decision as to all matters contained herein. (Cal. Rules of Court, rule 3.1590(c)(1).)

## *Factual Background*

This action involves challenges to a Monterey County ordinance, known as "Measure Z," a County initiative approved by the electorate in the November 2016 election. The measure, which relates to oil and gas operations exclusively, prohibits on all lands within the County's

unincorporated area 1) well stimulation treatments — measures by which oil-producing companies render underground formations more permeable to facilitate the extraction of oil (including but not limited to hydraulic fracturing, aka "fracking"), effective immediately; 2) underground wastewater injection and impoundment of wastewater, with a five-year phase out period; and 3) drilling any new wells for the recovery of, or to aid in the recovery of, oil or gas, effective immediately. It also provides for two possible extensions of the five-year underground injection and impoundment phase-out period, for a total possible extension of 15 years.

To understand the meaning and effect of Measure Z, as well as its potential interplay with existing state and federal regulations, evidence on the background and nature of oil operations in Monterey County was not only appropriate but also necessary.

There is no fracking currently taking place in Monterey County. Because of the sandy nature of oil bearing strata in Monterey County oil fields, fracking is not necessary to extract oil. There are only two or three reported instances of fracking ever occurring in Monterey County, all of which occurred approximately a decade ago.

The oil producing fields in Monterey County are principally located in the southern Monterey County areas of San Ardo and Lynch Canyon,[1] arid, sparsely populated regions well inland from the coastline. Oil drilling and production has been carried on in San Ardo for nearly 70 years and in Lynch Canyon for nearly 55 years. The oil deposits are highly viscous (i.e., thick), and exist at levels in the range of 1,800-2,200 feet or more underground. There are two oil-bearing formations in San Ardo: the Lombardi Sands Formation which currently produces oil, and the Aurignac Sands Formation, which lies at a level below the Lombardi and is sufficiently depleted of its oil reserves that it is now used to dispose of water extracted from the Lombardi. The oil-producing formation in Lynch Canyon is the Lanigan sand, a porous, highly permeable sand that occurs at approximately 1,700 feet underground.

There exists naturally in these formations, accompanying the oil deposits, a huge volume of water laden with salt and hydrocarbons (95% water volume for every 5% of oil, by

[1] Petitioner Trio Petroleum LLC operates primarily at the Hangman Hollow Oil Field, just west of Lynch Canyon. Other Petitioners own mineral rights in oil and gas leases in areas such as the Monroe Swell Oil Field, which is northwest of the San Ardo Field and produces from similar formations (Sunset Exploration, Inc.); Hames Valley (Bradley Minerals, Inc.); and the Paris Valley and McCool Ranch oil fields (California Resources Corporation).

one expert's estimation). Because of the highly viscous nature of the oil deposits, the oil must be heated by injecting steam underground in order to make it more fluid so that it can be pumped out. In San Ardo, as oily water is pumped out of the ground, it is placed into storage tanks where the oil and water settle out and separate. The extracted water is then dealt with in one of three different ways. It is either 1) purified, in part (and the purified water placed back into the ground to recharge the water table and maintain wetlands); 2) treated and injected into the ground as steam at the Lombardi formation level to heat the viscous oil deposits; or 3) reinjected — with the oil removed but otherwise untreated and in its natural state — along with the saline brine extracted in the reverse osmosis purification process, into the Aurignac Formation. As the pumped out water is subjected to these processes, it must be stored temporarily.[2]

All of the water used for steam injection comes from the underground, pumped-out water (after some treatment). The process of removing oil and naturally occurring water necessarily results in less volume to occupy the space previously occupied by the extracted oil/water and, consequently in colder, naturally occurring water encroaching into that space. This in turn requires extraction of the encroaching cold oil/water and further steam injection to maintain the temperature (and lower viscosity) of the oil so that it can be removed. As the oil/water is extracted, the perimeter of the area that needs to be heated expands — necessitating further steam injection and new wells at the increasing periphery of the area from where the recoverable oil lies.

Oil cannot be extracted without the continuous drilling of new steam injection wells. Unless steam is continuously added, the underground steamed area (known as a "steam chest") cools and the oil is no longer extractable. Oil production would then decline relatively quickly and come to a complete halt in five years or less.

[2] Oil producers such as Eagle Petroleum, LLC (Eagle), which operates out of the Lynch Canyon, also inject steam and produced water into underground formations. Eagle injects steam into the Lanigan Formation and produced water into either the Lanigan Formation or the Santa Margarita Formation.

### *Procedural Background*

Measure Z's effective date was initially set to be December 16, 2016. However, on December 14, 2016, Petitioners Chevron, U.S.A., et al., and other associated Petitioners[3] (Chevron), and Aera Energy LLC (Aera), filed petitions for writ of mandate alleging that Measure Z 1) was preempted by state and federal law; 2) effected a facial taking of their property; and 3) violated their due process rights. On that same date, the court approved separate stipulations between Chevron and the County and Aera and the County to stay implementation of Measure Z indefinitely. Separate suits by 1) the California Resources Corporation (CRC); 2) National Association of Royalty Owners-California, Inc., plus 61 individual and corporate entities (NARO); 3) Trio Petroleum LLC, Bradley Minerals, Inc., Monroe Swell Prospect, J.V., and Sunset Exploration, Inc. (Trio); and 4) Eagle Petroleum, LLC (Eagle) followed.[4] Those parties made similar arguments, but also advanced claims that Measure Z created inconsistencies within the County General Plan, and that Measure Z violated the "single-subject" rule.

On March 17, 2017, the court granted a petition for intervention from Protect Monterey County (PMC), the advocacy group responsible for drafting Measure Z and the bulk of the campaign in its favor, and from Dr. Laura Solorio, a founding member of the group and signatory of the Measure (collectively, Intervenors). On April 18, 2017, the court ordered that the case be split into several phases. "Phase I" was "limited to challenges to the validity of the ordinance on its face. And that includes interpretation." (RT 3:14-17.) On June 7, 2017, the court consolidated all six cases for purposes of "Phase I" trial only. On June 14, 2017, the court designated the Chevron case (case number 16CV003978) as the lead case, and ordered that all pleadings related to the trial and briefing of "Phase I" be filed in that case.[5]

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[3] Besides Chevron, other Petitioners in 16CV003978 include Key Energy Services, LLC, Ensign United States Drilling (California) Inc., Maureen Wruck, Gazelle Transportation, LLC, Peter Orradre, Martin Orradre, James Orradre, Thomas Orradre, John Orradre, Stephen Maurice Boyum, and the San Ardo Union Elementary School District.

[4] Unless otherwise noted, the Plaintiffs and Petitioners in all six cases are referred to collectively herein as "Petitioners."

[5] The other case numbers consolidated include 16CV003980 (Aera); 17CV000790 (CRC); 17CV000871 (NARO); 17CV001012 (Trio); and 17CV000935 (Eagle).

*Standing*

Intervenors' positions regarding standing — which bear directly upon the relevance of certain evidence submitted by Petitioners (and to which Intervenors object) — have ranged from non-opposition to vacillation to equivocation to opposition.

At the case management conference held on June 7, 2017, the County stated, "as [standing] relates to the mineral rights owners . . ., we would need to see documents" (RT 29:17-19), and added that it "would prefer to defer any fight, if it's necessary, over standing, to a later phase (RT 29:21-25) . . . . [F]or purposes of Phase I . . ., without prejudicing our rights to later argue standing, we will not raise it" (RT 30:20-22). The court next inquired of Intervenors as to their position, and Intervenors' counsel stated, "[s]o I just want to be clear about the standing issue. Clearly, if they show us documents that we have mineral rights and therefore we have some kind of financial interest to come into court, we're not going to have an objection to that. But we should distinguish the standing issue from the broader issue of pursuit of exclusive remedies; therefore, standing to sue at this point. So we're happy to defer that issue as well because there are exclusive remedy provisions in the measure we have talked about, the vested rights procedure before the County." (RT 31:4-16.)

In support of their opening briefs, Petitioners submitted declarations reciting the nature of their respective ownership interests and attaching a large number of exhibits such as deeds and conveyances of mineral rights. Intervenors, after having stated at the case management conference that they demanded proof of the Petitioners' interests and arguing that Petitioners lacked standing, then objected repeatedly to Petitioners' proofs of ownership and lease interests on the ground that they were "irrelevant to this stage of the proceedings." Additionally, in their merits brief, Intervenors argued, ". . . Petitioners have no standing to obtain relief from the Court on this issue [of the preemption of the Measure's provisions regarding well stimulation treatments and fracking]." (Intervenors' Opposition Brief (Phase I Facial Claims) at p. 34:18-19 and fn. 27.)

Next, at a trial management conference held on November 6, 2017, one week before the Phase I trial commenced, the Court asked Intervenors to clarify their position regarding standing — pointing out that if there was a challenge to one or more Petitioners' standing to raise the

Phase I claims, it should be resolved at this stage of the proceedings, not left for debate later on. (RT 5:21-6:21.) The morning of trial, Petitioners and the County filed a joint statement in which they concurred that Petitioners had standing to pursue the claims briefed in the Phase I trial. That same morning, Intervenors filed a supplemental trial management conference statement in which they announced that they "do not concede that [Petitioners] has [*sic*] submitted evidence sufficient to establish their standing either during Phase 1 proceedings or in any subsequent phases."

Intervenors then submitted a brief mid-trial which stated that not only did they challenge Petitioners' standing to challenge the well stimulation treatment portion of the Measure, but also objected to their standing to contest *any* portion of Measure Z: "As to Petitioners' challenges to LU-1.22 [the underground injection and impoundment prohibitions] and LU-1.23 [the no new wells prohibitions], Petitioners have not submitted supporting evidence to demonstrate standing as to each and every one of the named parties, and thus Intervenors do not concede their standing for any purpose." (Intervenors' Brief Re Plaintiffs' Standing to Challenge Measure Z LU-1.21, at p. 3:9-11.) Intervenors thus further placed in issue each Petitioner's practice of, and need to utilize, 1) underground injection and storage; and 2) new well drilling to aid in the recovery of oil and gas.

Whether this is deliberate obfuscation or genuine confusion on the part of Intervenors, it renders highly relevant numerous declarations and exhibits submitted by Petitioners that go to the issue of standing.

***Administrative Record***

The court admitted the administrative record into evidence.

***Additional Evidence Presented***

In addition to the administrative record, the parties offered evidence in support of their briefing, requests for judicial notice, and stipulated facts. The parties raised myriad objections.

Before addressing the parties' objections, particularly those on relevance grounds, the court notes that the scope of the Phase I facial challenges trial was not limited to the issue of

facial takings challenges.[6] It also included standing (as discussed *ante*, Intervenors raised this issue), preemption, due process procedural and vagueness challenges, a single-subject rule challenge, and general plan consistency challenges.

The court rules on the parties' objections as follows:

**1.0 Intervenors' objections to evidence submitted by Chevron**

**1.1 Declaration of Burton Ellison (Ellison Dec.)**

The following objections are overruled: 1, 3, 5 (as to the first sentence), 6 (as to lack of foundation), 7, 8 (an agency's interpretation of its own regulations is accorded deference), 9-10, 11 (as to the first sentence only), 12-24, and 25 (overruled as to the first sentence).

The following objections are sustained: 2, 4, 5 (as to the second sentence only as argumentative), 6 (as a legal opinion), 11 (as to the last sentence on the grounds that the declarant's opinion of the true purpose of Measure Z is irrelevant), 25 (as to the last sentence), 26-27, and 28 (as to the words "to the detriment of the citizens of California").

**1.2 Declaration of Dallas Tubbs (Tubbs Dec.)**

The following objections are overruled: 1-21, 22 (except as to the words "this prohibition would also prevent Chevron from engaging . . .," since it would interpret the ordinance); 23-27, and 29-33.

The following objections are sustained: 22 (only as to the words "this prohibition would also prevent Chevron from engaging . . .," which amounts to an interpretation of the ordinance), 28 (as to the words "Measure Z would have substantial impacts on the ability to continue capital investment within the current field . . ." as irrelevant to this stage of the proceeding), 34 (as to the words "the impending shutdown of the field precludes the necessary capital investment needed to operate an oil field of this size" as irrelevant to this stage of the proceeding).

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[6] Contrary to Intervenors' claims, facial regulatory takings claims *do* permit the presentation of some evidence. (See *Keystone Bituminous Coal Assn. v. DeBenedictis* (1987) 480 U.S. 470, 495-496; *NJD, Ltd. v. City of San Dimas* (2003) 110 Cal.App.4th 1428, 1448 ["we are not holding that no evidence may be received in a facial regulatory takings case"].) Evidence is necessary to determine whether a statute "deprive[s] an owner of '*all* economically beneficial use' of her property. [Citation.]" (*Lingle v. Chevron U.S.A. Inc.* (2005) 544 U.S. 528, 538, italics in original.)

### 1.3 Declaration of James Latham (Latham Dec.)

The following objections are overruled: 1-2, 3 (except as to the words " . . . thus condemning all such resources," an improper legal opinion), 4-8, 10 (except as to the second sentence concerning the purported economic damage Measure Z's implementation could cause, irrelevant to this stage of the proceedings), 11, 12 (on the ground stated), 13, 16-17, 18 (as to the words "[g]iven the large volume of produced water that is extracted as part of Chevron's operations, any disposal method other than reinjection would be completely unworkable"; sustained as to the balance), and 19.

The following objections are sustained: 2, 3 (as to the words "thus condemning all such resources" as an improper legal opinion), 9 (improper legal opinion), 10 (irrelevant to the extent it references damage to the local and regional economies; otherwise relevant), 14 (improper legal argument and opinion), 15 (same), 18 (except for the words "[g]iven the large volume of produced water that is extracted as part of Chevron's operations, any disposal method other than reinjection would be completely unworkable"; the balance is a legal opinion), 20 (not relevant for purposes of this stage of the proceedings), 21 (same), 22 (same), 23 (same), and 26 (same).

There are no objections numbered 24 or 25 to this declaration.

### 1.4 Declaration of John Orradre

All three objections are overruled.

### 1.5 Declaration of Catherine Reimer

The following objections are overruled: 1-8, and 14.

Objection number 9 is sustained.

There are no objections numbered 10-13 to this declaration.

### 1.6 Declaration of Nathaniel Johnson

The only objection is overruled.

### 1.7 Declaration of Myron Backhaus

This declaration essentially was offered to authenticate six different bottled samples of water collected from different phases of the oil recovery, injection, storage, and disposal process at the San Ardo field. These bottles were used as demonstrative evidence during Chevron's presentation of the case, but were of limited probative value. Intervenors' objections on the

grounds that evidence is beyond the scope of what is allowed at the Phase I proceeding is overruled. The evidence was submitted late, however, and its only probative value is to underscore what is already in the evidence presented by Petitioners. Sustained on these grounds.

**2.0 Objections to Petitioner CRC's evidence submitted in its opening brief**

**2.1 Declaration of Kimberly Bridges (Bridges Dec.)**

The following objections by Intervenors are overruled: 1, 2 (to the extent the words "[t]oday, CRC is California's largest oil and natural gas producer on a gross-operated basis" are subject to the objection), 3, 4, 5, and 8-30.

The following objections are sustained for purposes of Phase I of these proceedings: 2 (except for the words "[t]oday, CRC is California's largest oil and natural gas producer on a gross-operated basis"), and 6-7.

**2.2 Declaration of Justin McMahon (McMahon Dec.)**

The following objections of Intervenors are overruled: 1, 2 (except as to the sentence "[t]his would give CRC a peak oil rate of ~2,800 barrels per day"), and 3-6.

The following objection is sustained: 2 (only as to the words "[t]his would give CRC a peak oil rate of ~2,800 barrels per day").

**2.3 Declaration of Richard Miller (Miller Dec.)**

All objections are overruled.

**2.4 Declaration of Adam Smith**

The following objections are overruled: 1, 2, and 4-10.

The following objection is sustained: 3.

**2.5 Declaration of Heather Welles (Welles Dec.)**

All objections are overruled.

**2.6 Supplemental Declaration of Heather Welles**

The objections on the grounds stated are sustained; this proceeding occurred after the filing deadline for Petitioners' reply briefs.

**3.0 Intervenors' objections to the evidence submitted by Petitioner Aera**

All objections are overruled.

**4.0 Intervenors' objections to Evidence submitted by Petitioner Eagle**

**4.1 Declaration of Mary Jane Wilson. (Wilson Dec.)**

The following objections are overruled: 1, 6 (although it is cumulative and of little additional probative value in light of other evidence presented by the parties), 7, 23-24, 25 (relevant to lack of standing), 26, 28-30, 32-34, 35 (as to the paragraph beginning "nor does it let the reader know . . ."), 38 (the secondary evidence rule is the only ground stated for objection), and 39.

The remaining objections are sustained; much of the material is objectionable because it is argumentative, not relevant, cumulative, or not the proper subject of expert opinion.

**4.2 Declaration of Samuel Allen Monroe.**

Intervenors' objection to paragraph 23 is sustained. All other objections are overruled.

**5.0 Intervenors' objections to evidence submitted by Petitioner NARO**

**5.1 Declaration of Wayman T. Gore, Jr. (Gore Dec.)**

Objection 8 is sustained. All other objections are overruled.

**5.2 Declaration of Steven Bohlen**

The following objections are overruled: 1, 2, 4, 9-13, and 20 (only as to the words "Oil and Gas operators are required by law to report spills, even small spills of a gallon or two of hazardous substances. Once reported, the operator is required to remediate the spill immediately and to demonstrate remediation to an inspector"), 22, 32, 33, 40, and 42. The remaining objections are sustained.

**5.3 Supplemental Declaration of Wayman T. Gore, Jr.**

All objections are overruled.

**6.0 Objections to the Petitioners' Joint Request for Judicial Notice (JRJN)**

Intervenors' objections are largely blanket; Intervenors fail to pinpoint specific objections to particular items in an orderly fashion. While Intervenors voice many generalizations regarding what is and is not properly the subject of judicial notice, these generalizations are not helpful. Moreover, many of the documents proffered are the official acts of governmental agencies, while some are statements made on behalf of the County and thus qualify as admissions of a party

opponent, both of which overcome Intervenors' hearsay objections. Yet others are in themselves documents constituting acts having legal significance without regard to their truth.

With the foregoing in mind, the court sustains objections to the following items for which Petitioners request judicial notice: 1, 2 (only to the extent of emails contained therein; the report by Supervising Appraiser McFarlane of the Monterey County Assessor's Office and the Fiscal Impact statement of the County Assessor are allowed), 3 (not relevant), 6, 16, 21-22, 36 (not relevant), 37-55, 66 (no date; relevance not shown), and 67-68.

The remaining objections are overruled.

**7.0 Petitioners' objections to the County's and Intervenors' Requests for Judicial Notice**

Both objections are sustained.

**8.0 The County's objections to Petitioners' use of the deposition of the County's expert declarant Alan Burzlaff**

The court was clear that no discovery was to take place, yet Petitioners ignored this direction and took Mr. Burzlaff's deposition. For both this reason, and because Mr. Burzlaff's interpretation of Measure Z is not relevant, all objections are sustained.

***Discussion***

Petitioners challenge Measure Z on several grounds. Petitioners argue that 1) Measure Z violates the California Constitution's single-subject rule; 2) Measure Z is preempted, in whole or in part, by state and/or federal law; 3) Measure Z effects a facial regulatory taking of Petitioners' property; 4) Measure Z creates internal inconsistencies in Monterey County's General Plan; and 5) Measure Z violates Petitioners' substantive and procedural due process rights.

**1. The Single-Subject Rule**

Petitioner CRC argues that Measure Z violates the California Constitution's single-subject rule. CRC contends that Measure Z's main purpose was to ban fracking and that Policies LU-1.22 and LU-1.23, the Measure's additional two prohibitions on 1) wastewater injection and impoundment; and 2) new wells, respectively, are not "reasonably germane" to that purpose. CRC further contends that Intervenors purposely used fracking — a technique not currently employed in Monterey County — as a political hook to deceive voters into approving the remainder of Measure Z, which it asserts would end oil and gas production in the County.

### 1.1 Legal Background

The California Constitution provides, "[a]n initiative measure embracing more than one subject may not be submitted to the electors or have any effect." (Cal. Const. art. II, § 8(d).) This "single-subject rule" — itself, adopted by initiative — "is a constitutional safeguard adopted to protect against multifaceted measures of undue scope." (*Brosnahan v. Brown* (1982) 32 Cal.3d 236, 253.) The rule was intended "to attempt to avoid confusion of either voters or petition signers and to prevent the subversion of the electorate's will. [Citation.]" (*Senate of State of Cal. v. Jones* (1999) 21 Cal.4th 1142, 1156 ["*Jones*"].)

The single-subject rule is liberally construed to sustain initiatives that "fairly disclose a reasonable and common sense relationship among their various components in furtherance of a common purpose." (*Brosnahan, supra*, 32 Cal.3d at p. 253.) "An initiative measure does not violate the single-subject requirement if, despite its varied collateral effects, *all of its parts are reasonably germane* to each other, and to the general purpose or object of the initiative." (*Legislature v. Eu* (1991) 54 Cal.3d 492, 512, italics in original, internal citations omitted.) Notwithstanding this language, it is not *necessary* that a measure's several provisions be "reasonably germane" *to each other*. (*Californians For An Open Primary v. McPherson* (2006) 38 Cal.4th 735, 764, fn. 29.) In fact, the test requires only that the separate provisions of an initiative "be reasonably germane *to a common theme, purpose, or subject*." (*Ibid.*, italics added.) Nor is it necessary for an initiative proponent to show "that each one of a measure's several provisions was capable of gaining voter approval independently of the other provisions." (*Brosnahan, supra,* 32 Cal.3d at p. 253.) Nevertheless, the single-subject rule "obviously forbids joining disparate provisions which appear germane only to topics of excessive generality such as 'government' or 'public welfare.'" (*Ibid.*)

Measure Z passes the reasonably germane test. The three provisions prohibit land uses in support of well stimulation treatments (such as fracking) and wastewater injection and impoundment, together with barring the drilling of new oil and gas wells. All three prohibitions pertain to specific production techniques the oil and gas industry uses in production operations. The common theme among these measures is stated by the official title of the initiative, the "Protect Our Water: Ban Fracking and Limit Risky Oil Operations Initiative." (AR 152.)

Measure Z's 15 findings detail the significant environmental, "health, safety, welfare, and quality of life" impacts these practices assertedly have in the County. (AR 152-154.) Measure Z's provisions are reasonably germane to a common theme then, because they address potential environmental, safety, and social impacts of oil and gas production.

By contrast, the cases CRC cite involve provisions linked only by "excessive generality." (*Brosnahan, supra,* 32 Cal.3d at p. 253.) For example, in *California Trial Lawyers Assn. v. Eu* (1988) 200 Cal.App.3d 351, 355, 358, the proposed 120-page, 67-section ballot initiative stated it was intended to control insurance costs, and in particular, "the constantly increasing premiums charged to California purchasers of liability insurance." Section 8, "located inconspicuously" in the middle of the measure, provided insurance companies with protection from future campaign contribution regulations that could be aimed at insurers. (*Id.* at p. 356.) In defending the challenge, the insurers claimed that, because the initiative at issue "deals generally with the regulation of insurance industry practices and [the campaign contribution provision] relates to a specific aspect of those practices, the latter section ipso facto satisfies the 'reasonably germane' test." (*Id.* at pp. 359-360.) The court rejected this defense on two grounds:

"First, the express purpose of the initiative is to control the cost of insurance, not generally to regulate the practices of the insurance industry. Second, we cannot accept the implied premise of Association's analysis, i.e., that any two provisions, no matter how functionally unrelated, nevertheless comply with the constitution's single-subject requirement so long as they have in common an effect on any aspect of the business of insurance. Contemporary society is structured in such a way that the need for and provision of insurance against hazards and losses pervades virtually every aspect of life. [The insurers'] approach would permit the joining of enactments so disparate as to render the constitutional single-subject limitation nugatory." (*Id.* at p. 360.)

Similarly, in *Chemical Specialties Manufacturers Assn., Inc. v. Deukmejian* (1991) 227 Cal.App.3d 663, 670-671, the Court of Appeal sustained a single-subject challenge to an initiative entitled the "Public's Right to Know Act" because the Act covered an overly broad subject. Specifically, the measure contained sections requiring public disclosure of information in a number of unrelated areas such as nursing homes, seniors' health insurance, household toxic

products, and statewide initiative or referendum campaigns. (*Id.* at p. 666.) The measure's supporters claimed that its provisions were all reasonably germane to the subject of "public disclosure i.e. truth-in-advertising." (*Id.* at p. 670.) The Court found this to be a "subject of excessive generality," explaining, "the object of providing the public with accurate information in advertising is so broad that a virtually unlimited array of provisions could be considered germane thereto and joined in this proposition, essentially obliterating the constitutional requirement." (*Id.* at p. 671.)

Measure Z raises none of these concerns. All three policies in effect prohibit specific production techniques in a single industry. Additionally, all three policies further the common goal of protecting the public from the purportedly harmful effects of these practices on the environment, public safety, and quality of life. Hence, Measure Z does not violate the single-subject rule. (See *Brosnahan, supra,* 32 Cal.3d at p. 253.)

**1.2 Voter Deception**

Alternatively, CRC argues that even if the reasonably germane test is satisfied, Measure Z violates the single-subject rule because voters were misled by its proponents' campaign as to the true purpose of the initiative. CRC maintains that these proponents used the controversial topic of fracking, a practice the parties concede is not currently used in Monterey County (see Stipulated Facts, ¶ 29), as a "political hook" for their real agenda: destroying the oil and gas industry by effectively banning certain production techniques. CRC insists that highly technical knowledge — which the average voter lacks — is required to understand the true impact of Measure Z upon the oil and gas industry. (See, e.g., Tubbs Dec., ¶¶ 32-60.)

CRC is correct that the single-subject rule was enacted, in part, to prevent voter deception. (*Jones, supra,* 21 Cal.4th at p. 1156.) And it is true that Measure Z goes much further than the simplistic "anti-fracking" campaign label suggests. But however distasteful oversimplification and political puffery may be, CRC has failed to identify authority for its contention that a proponent's use of misleading campaign material and/or proponent-submitted ballot materials stands as an independent ground for invalidating an initiative under the single-subject rule. Instead, CRC justifies its argument with isolated excerpts from the California

Supreme Court's decision in *Jones*, and by reference to a concurring opinion in *Manduley v. Superior Court* (2002) 27 Cal.4th 537.

### 1.2.1 *Jones*

*Jones* involved a challenge to Proposition 24, the "Let the Voters Decide Act of 2000." (*Jones*, *supra*, 21 Cal.4th at p. 1147.) Proposition 24 revised provisions of the law related to state legislator compensation. (*Id.* at pp. 1147-1148.) The Proposition also transferred the power to reapportion state legislative, congressional, and Board of Equalization districts from the Legislature to the California Supreme Court. (*Id.* at pp. 1148-1149.) The Court held that addressing these two issues in concert violated the single-subject rule. The Court reasoned that the reapportionment proposal involved "a most fundamental and far-reaching change in the law" that "clearly represent[ed] a separate 'subject' within the meaning of the single-subject rule upon which a clear expression of the voters' intent is essential." (*Id.* at pp. 1167-1168.) It therefore concluded that authorizing this provision together with the provisions regarding state officer compensation "would inevitably create voter confusion and obscure the electorate's intent with regard to each of the separate subjects included within the initiative, undermining the basic objectives sought to be achieved by the single-subject rule." (*Id.* at p. 1168.)

CRC claims that *Jones* also stands for the proposition that the Court "can even hypothesize a further claim that there will be instances where [the Court] might just strike the statute down just on the fact that it was brought in such a misleading and deceptive way." In support of this claim, CRC cites to footnote 12 of *Jones*. (*Id.* at p. 1163, fn. 12.) In fact, the *Jones* Court never reached this issue. Footnote 12 provides:

"As noted, in a separate argument petitioners assert that the misleading nature of the initiative petition with regard to this significant point is itself a sufficient basis upon which to disqualify the measure from the ballot. In light of our conclusion that the measure violates the single-subject rule, *we need not determine whether the misleading nature of the initiative petition in itself would support an order restraining election officials from placing the measure on the ballot.*" (*Id.* at p. 1163, fn. 12, italics added; see also *id.* at pp. 1152-1153 [because the court held that the initiative violated the single-subject rule, the court "need not reach the question[]

whether . . . its allegedly misleading aspects are sufficient, in themselves, to warrant an order withholding the measure from the ballot"].)

Although it did not reach the voter deception argument, the Court nevertheless summarized the petitioner's arguments in its introduction. (*Id.* at pp. 1150-1153); CRC cites to this *summary* to support its claim. For example, CRC quotes *Jones* at page 1151 for the proposition that, in applying the single-subject test, the court must take "special care to ensure that voters are not manipulated by one part of the new law 'that the proponent views as politically popular . . . .'" This language is convenient for CRC, since it insists that Intervenors used fracking as a "hook for other, unrelated provisions." But the language CRC quotes simply describes one of the *Jones petitioner's contentions*.

Further, in arguing that campaign behavior may be a factor in the single-subject inquiry, CRC places great emphasis on the Court's citation to a newspaper article, describing it as "one of the key pieces of evidence" upon which the Court relies. (*Id.* at p. 1151, fn. 5.) However, the Court's sole reference to the article is in a footnote in the section of the Court's opinion summarizing the petitioner's contentions, in which the court notes merely that the article in question was an attachment to the underlying petition. (*Ibid.*) Nothing in *Jones* supports CRC's claim that the Court relied on the newspaper article in reaching its decision.

CRC also notes *Jones*' "holding" that "a provision governing legislative salaries was unrelated to the purported purpose of addressing 'legislative self-interest,'" because, as the Court stated, "[a]lthough the text of Proposition 24 obscures this point, in reality . . . members of the Legislature do *not* control their own salaries (and thus cannot 'raise their own pay,' as the initiative implies)." (*Id.* at p. 1163, italics in original.) CRC relies on this statement in analogizing Measure Z to *Jones*, claiming that just as Proposition 24 falsely represented the Legislature's power to control their own salaries, a politically controversial issue, Intervenors misled voters by focusing their campaign nearly entirely on fracking, an equally politically charged issue, even though fracking is not presently employed in Monterey County. (Stipulated Facts, ¶ 29.)

CRC's carve-out of a single sentence of the Supreme Court's opinion is misleading; *Jones* did not hold as CRC contends. Rather, in the relevant passage, the Court primarily

addressed an alternative argument advanced by proponent's counsel as to the *subject* of Proposition 24, not a false premise *within* Proposition 24.

Proposition 24's proponent initially asserted that "voter approval" was the "single subject" to which the initiative pertained. (*Id.* at pp. 1161-1162.) The Court rejected this subject as far too broad to satisfy the rule. (*Id.* at p. 1162.) In the alternative, the proponent suggested the initiative's provisions were reasonably germane to "the objective of dealing with the problem of 'legislative self-interest.'" (*Id.* at p. 1163.) The proponent pointed out that one purpose of the measure was to "'combat the self-interest of individual legislators,'" and hence, the measure declared, "'Legislators should not be entitled to raise their own pay or draw their own districts without obtaining approval of the voters.'" (*Ibid.*) The Court rejected this argument, explaining,

"We need not determine in this case whether an initiative matter that includes provisions dealing with a number of subject matter areas as diverse as legislator salaries and reapportionment would satisfy the single-subject requirement if each of the separate areas addressed by the provision poses a potential conflict of interest between the personal interests of legislators and the public interest. Even if we were to assume that the theme or objective of remedying 'legislative self-interest' is not excessively broad and would permit the combination of such otherwise unrelated proposals, the initiative before us cannot properly be defended on this basis. Although the text of Proposition 24 obscures this point, in reality, under existing law, members of the Legislature do *not* control their own salaries (and thus cannot "raise their own pay," as the initiative implies)." (*Id.* at p. 1163, italics in original.)

The Court consequently *deemed it unnecessary* to consider this *alternative* theory argued by counsel because it was predicated on a falsehood. The Court did *not*, as CRC states, hold that the single-subject rule was violated *because* of the falsehood.

In sum, *Jones* does not support CRC's voter deception argument.

#### 1.2.2 *Manduley*

The closest CRC gets to providing support for its deception argument is in its citation to *Manduley v. Superior Court* (2002) 27 Cal.4th 537. There, in a concurring opinion, Justice Moreno addressed the deception issue, stating, "at the very least, an initiative should not pass muster under the single-subject rule unless its provisions are reasonably encompassed within the

title and summary of the initiative." (*Id.* at p. 587.) Justice Moreno likened to this to the inquiry "whether a party was unfairly surprised by a provision in a contract of adhesion, rendering that provision unconscionable. [Citation.]" (*Ibid.*) Justice Moreno also noted that "the subject encompassed by the title and summary should be reasonably specific, not a broad, generic subject such as crime or public disclosure. [Citation.]" (*Id.* at p. 588.)

However persuasive the opinion of a California Supreme Court Justice may be, it is not, on its own, controlling precedent. (See *People v. Stewart* (1985) 171 Cal.App.3d 59, 65 [to qualify as precedent, a "majority of the court" must agree on a point of law].) Nevertheless, even if this court were to apply Justice Moreno's test, Measure Z would still "pass muster." (*Manduley, supra*, 27 Cal.4th at p. 587.) Measure Z's official title is the "Protect Our Water: Ban Fracking and Limit Risky Oil Operations Initiative." (AR 152.) The title provides notice that the initiative will, at minimum, address fracking and the effect of oil operations on the County's water. Additionally, Measure Z expressly explains that its purpose is to protect the County's "water, agricultural lands, air quality, scenic vistas, and quality of life by prohibiting the use of any land within the County's unincorporated area for well stimulation treatments, including, for example, hydraulic fracturing treatments (also known as 'fracking') and acid well stimulation treatments. The Initiative also prohibits and phases out land uses in support of oil and gas wastewater (which the Initiative defines) disposal using injection wells or disposal ponds in the County's unincorporated area. The Initiative also prohibits drilling new oil and gas wells in the County's unincorporated area." (*Ibid.*)

Accordingly, the title and summary of Measure Z "reasonably encompass" its provisions. (*Manduley, supra*, 27 Cal.4th at p. 587.) Moreover, the title and summary are "reasonably specific" as to the subject of the initiative: limiting the risk of harm to the public interest purportedly posed by certain of the oil and gas industry's production techniques. (*Id.* at p. 588.)

In sum, Measure Z does not violate the single-subject rule.

**2. Preemption**

Petitioners argue that state and federal law preempt Measure Z.

**2.1 State Oil and Gas Law**

Oil and gas operations in California are governed by Division 3 of the Public Resources Code (Pub. Resources Code, § 3000, et seq.) and its implementing regulations (Cal. Code Regs., tit. 14, § 1712, et seq.). Division 3 addresses oil and gas exploration and extraction in detail, including notices of intent to drill and abandon (§§ 3203, 3229); bonding (§§ 3204-3207); abandonment of wells (§ 3208); recordkeeping (§§ 3210-3216); blowout prevention (§ 3219); use of well casing to prevent water pollution (§ 3220); protection of water supplies (§§ 3222, 3228); repairs (§ 3225); regulation of production facilities (§ 3270); waste of gas (§§ 3300-3314); subsidence (§ 3315-3347); well spacing (§§ 3600-3609); unit operations (§§ 3635-3690); and regulation of oil sumps (§§ 3780-3787).

The State of California Department of Conservation's Division of Oil, Gas, and Geothermal Resources (DOGGR) is the state agency appointed to administer oil and gas activities. (See Pub. Resources Code, § 3100, et seq.) DOGGR has a dual mandate to promote the development of the state's oil and gas resources, and to supervise such operations "to prevent, as far as possible, damage to life, health, property, and natural resources," including the water supply. (Pub. Resources Code, § 3106.) DOGGR regulations are extensive. (See, e.g. Cal. Code Regs., tit. 14, §§ 1722-1722.9, 1723, 1723.7, 1724, 1724.1, 1775.) These regulations are intended to be "statewide in application for onshore drilling, production and injection operations." (*Id.*, § 1712.)

Effective January 1, 2014, DOGGR's obligation to regulate the oil and gas industry's use of well stimulation treatments (WSTs), including hydraulic fracturing, was codified by SB 4. (Pub. Resources Code, § 3150, et seq.) SB 4 charged DOGGR with creating permanent regulations specific to WSTs. (Pub. Resources Code, § 3160, subd. (b)(1)(A).) DOGGR's regulations, which created a state permitting system for WSTs, went into effect in July 2015. (Cal. Code Regs., tit. 14, §§ 1761, 1780-1789.)

Further, in California, the U.S. EPA has delegated to DOGGR the authority to permit and regulate "Class II" injection wells under the Underground Injection Control (UIC) program. (40 C.F.R. § 147.250.) The UIC program falls under the federal Safe Drinking Water Act (42 U.S.C. § 300f, et seq.), the purpose of which is to protect "underground sources of drinking water" (40

C.F.R. § 144.1). The Class II injection category includes wells used to enhance oil recovery through the injection of fluids, including steam and water. (*Id.*, § 144.6(B).) All UIC projects are subject to DOGGR approval. (Cal. Code Regs., tit. 14, § 1724.10.) DOGGR strictly regulates UIC projects, enforces testing and equipment requirements, and requires both monthly reporting of injection activity and chemical analysis of injection fluids. (*Id*, §§ 1724.9, 1724.10.)

**2.2 Preemption Law**

Under state law, Petitioners bear the burden of proving preemption. (*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1149.) Voter-approved initiatives, such as Measure Z, are "subject to the same constitutional limitations and rules of construction as are other statutes." (*Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 675.)

"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.'" (*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897-898.) However, "[l]ocal legislation in conflict with general law is void. Conflicts exist if the ordinance duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication." (*Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 747, internal citations omitted.)

"Local legislation is duplicative of general law when it is coextensive therewith. [¶] Similarly, local legislation is contradictory to general law when it is inimical thereto. [¶] 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, 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." (*Sherwin-Williams*, *supra*, 4 Cal.4th at p. 898, internal citations omitted.)

Likewise, the federal Supremacy Clause empowers Congress to preempt state and local law. (*California Grocers Assn. v. City of Los Angeles* (2011) 52 Cal.4th 177, 193, citing U.S. Const., art. VI, cl. 2.) "There are four species of federal preemption: express, conflict, obstacle, and field." (*Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal.4th 929, 935.) Express preemption occurs when Congress "define[s] explicitly the extent to which its enactments pre-empt state law." (*English v. General Electric Co.* (1990) 496 U.S. 72, 78.) "[C]onflict preemption will be found when simultaneous compliance with both state and federal directives is impossible." (*Viva!, supra*, 41 Cal.4th at p. 936.) Preemption also occurs when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Crosby v. Nat. Foreign Trade Council* (2000) 530 U.S. 363, 373, citation omitted.) Courts will infer field preemption "when it is clear . . . that Congress intended, by legislating comprehensively, to occupy an entire field of regulation." (*Capital Cities Cable, Inc. v. Crisp* (1984) 467 U.S. 691, 699.) "[F]or the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws. [Citation.]" (*Hillsborough County, Fla. v. Automated Medical Laboratories, Inc.* (1985) 471 U.S. 707, 713.)

Courts are "reluctant to infer legislative intent to preempt a field covered by municipal regulation when there is a significant local interest to be served that may differ from one locality to another." (*Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 707.) "The inherent local police power includes broad authority to determine, for purposes of the public health, safety, and welfare, the appropriate uses of land within a local jurisdiction's borders, and preemption by state law is not lightly presumed." (*City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.* (2013) 56 Cal.4th 729, 738.) Thus, "when local government regulates in an area over 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." (*Big Creek, supra*, 38 Cal.4th at 1149.)

### 2.3 Well Stimulation Treatments

Measure Z's Policy LU-1.21 prohibits "[t]he development, construction, installation, or use of any facility, appurtenance, or above-ground equipment, whether temporary or permanent, mobile or fixed, accessory or principal, in support of well stimulation treatments . . . within the County's unincorporated area." (AR 155.)

"Well stimulation treatments" are defined as "any treatment of a well designed to enhance oil and gas production or recovery by increasing the permeability of the formation. Well stimulation treatments include, but are not limited to, hydraulic fracturing treatments and acid well stimulation treatments. Well stimulation treatments do not include steam flooding, water flooding, or cyclic steaming and do not include routine well cleanout work, routine well maintenance, routine removal of formation damage due to drilling, bottom hole pressure surveys, or routine activities that do not affect the integrity of the well or the formation." (AR 155.)

Policy LU-1.21 defines the term "hydraulic fracturing treatment" as a WST "that, in whole or in part, includes the pressurized injection of hydraulic fracturing fluid or fluids into an underground geologic formation in order to fracture or with the intent to fracture the formation, thereby causing or enhancing the production of oil or gas from a well." (AR 155.) Further, Policy LU-1.21 defines "acid well stimulation treatment" as a WST "that uses, in whole or in part, the application of one or more acids to the well or underground geologic formation." (*Ibid.*)

Petitioners argue that state law preempts Policy LU-1.21.

#### 2.3.1 Standing

Intervenors contend that Petitioners lack standing to challenge the WST prohibition because they have conceded they neither use WSTs nor are likely to do so in the future. Petitioners respond that the parties stipulated not to raise standing at this phase of the proceedings. Petitioners further respond that they have standing because they are concerned that Measure Z's definition of "acid well simulation treatment" may include certain well maintenance performed with hydrochloric acid.

Only parties with a real interest in a dispute have standing. (Code Civ. Proc., § 367.) A real party in interest is defined as "the person possessing the right sued upon by reason of the substantive law." (*Powers v. Ashton* (1975) 45 Cal.App.3d 783, 787.) Challenges to standing are

jurisdictional; they "may be raised at any time in the proceeding. [Citations.]" (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 438; *Payne v. United California Bank* (1972) 23 Cal.App.3d 850, 859 ["The question of standing to sue is one of the right to relief and goes to the existence of a cause of action against the defendant"].) Accordingly, the fact that the parties have stipulated not to raise standing in this phase of the proceedings is immaterial.

A party has standing to bring a petition for writ of mandate where "there is not a plain, speedy, and adequate remedy, in the ordinary course of law. It must be issued upon the verified petition of the party beneficially interested." (Code Civ. Proc., § 1086.) The "beneficially interested" requirement "has been generally interpreted to mean one may obtain the writ only if the person has some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large. [Citations.]" (*Carsten v. Psychology Examining Com.* (1980) 27 Cal.3d 793, 796.) "The petitioner's interest in the outcome of the proceedings must be substantial, i.e., a writ will not issue to enforce a technical, abstract or moot right. The petitioner also must show his legal rights are injuriously affected by the action being challenged." (*Braude v. City of Los Angeles* (1990) 226 Cal.App.3d 83, 87, internal citations omitted; see also *Lujan v. Defenders of Wildlife* (1992) 504 U.S. 555, 560 [to have standing, a party "must have suffered an 'injury in fact' — an invasion of a legally protected interest which is (a) concrete and particularized . . . ; and (b) "actual or imminent, not 'conjectural' or 'hypothetical'"].)

Petitioners concede they do not presently use WSTs and are unlikely to do so in the future. (See, e.g, Stipulated Facts, ¶ 29; Wilson Dec., ¶¶ 30, 32 [Eagle]; Miller Dec., ¶ 17 [CRC]; Declaration of Charles G. Kemp (Kemp Dec.), ¶ 3, Ex. A, p. 51 [Aera]; Tubbs Dec., ¶ 42 [Chevron]; Gore Dec., ¶ 10 [NARO].) Petitioners nevertheless argue they have standing to challenge the WST prohibition on several grounds.

First, Petitioners are disquieted that a perceived ambiguity in the definition of "acid well stimulation treatment" could potentially subject them to adverse action under Measure Z. A Chevron declarant explains, "Well cleanout and maintenance operations may involve the use of hydrochloric acid. This type of cleanout is not considered well stimulation so long as the maintenance operations comply with the acid volume thresholds set pursuant to DOGGR's

regulations. However, because Measure Z does not incorporate DOGGR's regulations into its provisions," it is "unclear" how the County will determine whether these cleanouts are permissible or prohibited. (Tubbs Dec., ¶ 53.)

To determine whether the use of acid in oil operations constitutes a WST under SB 4, the Legislature directed DOGGR to "establish special values for acid volume applied protruded foot of any individual stage of the well or for total acid volume of the treatment, or both, based upon a quantitative assessment of the risks posed by acid matrix stimulation treatments that exceed the specified threshold value or values in order to prevent, as far as possible, damage to life, health, property, and natural resources pursuant to Section 3106." (Pub. Resources Code, § 3160, subd. (B)(1)(C).) DOGGR did so. (Cal. Code Regs., tit. 14, § 1761, subd. (a)(1)(A)(ii)-(iii), (a)(3).)

Measure Z declares that its definition of "acid well stimulation treatment" "tracks the state law." (AR 152.) Indeed, Measure Z's definition is *identical* to the definition of that term under state law. (Pub. Resources Code, § 3158.) Moreover, Measure Z exempts "routine well cleanout work" and "routine well maintenance" from its definition of WST. (AR 152.) Consequently, to the extent Petitioners' well cleanout and maintenance operations do not exceed DOGGR thresholds, the court construes Measure Z to except those operations from its definition of WST.

The court's construction is supported by the canon of constitutional doubt. That canon requires that this court "adhere to the precept that a court, when faced with an ambiguous statute that raises serious constitutional questions, should endeavor to construe the statute in a manner which *avoids* any doubt concerning its validity." (*People v. Leiva* (2013) 56 Cal.4th 498, 506-507, italics in original, internal citations omitted.) The canon reflects the judgment that "courts should minimize the occasions on which they confront and perhaps contradict the legislative branch.' [Citation.]" (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1373.)

Petitioners contend that this interpretation of the WST prohibition would not bind other parties and hence, that the purported ambiguity would expose them to the risk of enforcement. However, should the WST prohibition ultimately be enforced against Petitioners, they would then have standing to object to such enforcement in this court.

Petitioners claim Intervenors would then argue such a challenge was time-barred. (See Gov. Code, § 65009, subd. (c)(1) [90-day bar on facial challenges to general plan amendments].) This is possible, but any such claim would be defeated by the doctrine of equitable tolling. That doctrine is "designed to prevent unjust and technical forfeitures of the right to a trial on the merits when the purpose of the statute of limitations—timely notice to the defendant of the plaintiff's claims—has been satisfied." (*Appalachian Ins. Co. v. McDonnell Douglas Corp.* (1989) 214 Cal.App.3d 1, 38.) "Where applicable, the doctrine will suspend or extend a statute of limitations as necessary to ensure fundamental practicality and fairness. Broadly speaking, the doctrine applies when an injured person has several legal remedies and, reasonably and in good faith, pursues one. Thus, it may apply . . . where a first action, embarked upon in good faith, is found to be defective for some reason." (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 99-100, internal citations omitted.) It would be inequitable to bar Petitioners from prosecuting a facial challenge to Policy LU-1.21 when they lacked standing to bring such a challenge within the statutory period.

Petitioners also argue that even if they lack beneficial interest standing they nevertheless have standing under the "public interest exception." That exception provides, "where the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the [petitioner] need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced.' [Citation.]" (*Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 166.) "When the duty is sharp and the public need weighty, the courts will grant a mandamus at the behest of an applicant who shows no greater personal interest than that of a citizen who wants the law enforced. [Citations.] When the public need is less pointed, the courts hold the petitioner to a sharper showing of personal need." (*McDonald v. Stockton Met. Transit Dist.* (1973) 36 Cal.App.3d 436, 440.) Here, Petitioners do not seek to enforce a public right, but rather, seek to preserve a private right to benefit economically from WSTs. (See *Weiss v. City of L.A* (2016) 2 Cal.App.5th 194, 205-206.) And, even if Petitioners otherwise qualified for public interest standing, the application of the doctrine is within the court's discretion. (*Save the Plastic Bag Coalition, supra,* 52 Cal.4th at p. 170, fn. 3 ["we do not

suggest that public interest standing is freely available to business interests lacking a beneficial interest in the litigation. No party, individual or corporate, may proceed with a mandamus petition as a matter of right under the public interest exception"].)

Relatedly, Petitioners contend that the WST prohibition is "of great public interest" and that this fact alone suffices to confer standing. Indeed, courts have occasionally relied on this rationale to find standing. (See, e.g., *California Water & Tel. Co. v. Los Angeles County* (1967) 253 Cal.App.2d 16, 26.) However, this has generally occurred when other factors favoring standing are present. (*Ibid.*) "The fact that an issue raised in an action for declaratory relief is of broad general interest is not grounds for the courts to grant such relief in the absence of a true justiciable controversy. [Citations.]" (*Zetterberg v. State Dept. of Public Health* (1974) 43 Cal.App.3d 657, 662.) Finally, Petitioners imply that they may qualify for taxpayer standing. (See, e.g., *Harman v. San Francisco* (1972) 7 Cal.3d 150, 159.) Petitioners do not explain how this doctrine applies here.

In sum, unless and until Petitioners or another party actually propose or engage in WSTs, the question whether LU-1.21 is preempted is not ripe for adjudication and is therefore best left for another day. (See *Braude*, *supra*, 226 Cal.App.3d at p. 87; *California School Emp. Assn v. Sequoia Union High School Dist.* (1969) 272 Cal.App.2d 98, 104 [a "court will not undertake to decide abstract questions of law at the request of a party who shows no substantial right that can be affected by a decision either way"].)

**2.4 Wastewater Injection and Impoundment**

Policy LU-1.22 provides, "The development, construction, installation, or use of 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 or oil and gas wastewater impoundment is prohibited on all lands within the County's unincorporated area." (AR 155.)

Policy LU-1.22 defines "oil and gas wastewater injection" as "the injection of oil and gas wastewater into a well for underground storage or disposal." Policy LU-1.22 defines "oil and gas wastewater impoundment" as "the storage or disposal of oil and gas wastewater in depressions or basins in the ground, whether manmade or natural, lined or unlined, including percolation ponds

and evaporation ponds." Finally, Policy LU-1.22 defines "oil and gas wastewater" as "wastewater brought to the surface in connection with oil or natural gas production, including flowback fluid and produced water." (AR 155.)

Petitioners argue that state and federal law (and state law enacted in furtherance of federal law) preempt Policy LU-1.22. Specifically, Petitioners assert that 1) Policy LU-1.22 conflicts with state law, and is thus preempted; the SDWA's express language forbids local governments from impairing or impeding state underground injection programs; 2) the EPA has approved DOGGR's regulatory scheme, which conflicts with Measure Z; 3) Policy LU-1.22 stands as an obstacle to the SDWA's purposes; and 4) the SDWA occupies the field of oil and gas wastewater injection.

The County and Intervenors contend that 1) Policy LU-1.22 is a valid exercise of the County's police power; 2) the SDWA authorizes Measure Z's ban on underground injection because it is "essential" to protect County drinking water; 3) the SDWA contains a "savings clause," which refutes Petitioners' suggested inference of field preemption; and 4) Measure Z aligns with, rather than frustrates, the SDWA's policy goals.

### 2.4.1 State Preemption

#### 2.4.1.1 Field Preemption

Petitioners argue that the extensive legal and regulatory scheme described above fully occupies the field of oil and gas regulation in California. Petitioners also argue that the historical trend of increased state regulation of the oil and gas industry evinces the Legislature's intent to occupy the field. (See, e.g., Pub. Resources Code, §§ 3130-3132, 3150-3161; Cal. Code Regs., tit. 14, §§ 1761, 1780-1789.) Petitioners cite a 1976 California Attorney General opinion in support of these claims.[7] In that opinion, the Attorney General stated that State oil and gas law preempts "nearly all local regulations of oil and gas production" because local regulation of such resources "would subject development of the state's fuel resources to [a] checkerboard of regulations' . . . . Such local regulation could obviously interfere with and frustrate the state's conservation and protection regulatory scheme." (59 Ops.Cal.Atty.Gen 461, 469, 477 (1976)

[7] "Opinions of the Attorney General, while not binding, are entitled to great weight." (*California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 17, internal citations omitted.)

[JRJN, Ex. 32], internal citation omitted.) The Attorney General explained, "[w]here the statutory scheme or Supervisor specifies a particular method, material or procedure by a general rule or regulation or gives approval to a plan of action with respect to a particular well or field or approves a transaction at a specified well or field, it is difficult to see how there can be any room for local regulation . . . . [¶] We observe that these statutory and administrative provisions appear to occupy fully the underground phases of oil and gas activities." (*Id.* at p. 478.)

The County and Intervenors essentially concede in briefing that state oil and gas law preempts local law as to "technical, downhole activities." However, they characterize Measure Z as a land use regulation addressing surface, as opposed to subsurface activities. They observe that the Attorney General wrote that, as to regulation concerning "land use, environmental protection, aesthetics, public safety, and fire and noise prevention, local governments may impose regulations more stringent than those imposed by the state so long as they do not conflict with, frustrate the purposes of, or destroy the uniformity of the Supervisor's statewide regulatory conservation and protection program. As we have stated, these latter activities appear to be, for the most part, surface activities." (*Id.* at p. 478.) The County and Intervenors reason that Measure Z does not prohibit wastewater injection and impoundment, but rather, prohibits *surface* equipment and activities "*in support of*" these techniques and hence, that Policy LU-1.22 is a valid exercise of the County's police power. There are several problems with this claim.

First, Measure Z's purported prohibition on certain "land uses" is clearly a pretextual attempt to do indirectly what it cannot do directly. (See 59 Ops.Cal.Atty.Gen at p. 478 ["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"].) Nothing in Measure Z or in Intervenors' brief provides a meaningful distinction between wastewater injection and impoundment on the one hand, and surface equipment and activities in support of wastewater injection and impoundment on the other. And tellingly, Intervenors conceded at argument that Measure Z does not merely regulate surface land uses but instead, "specifically prohibit[s] wastewater injection for storage and disposal."

Second, the County and Intervenors' focus on the distinction between surface and subsurface activities is an oversimplification.[8] At bottom, the relevant issue is not whether the activity regulated takes place on the surface or below the surface, but rather whether Measure Z regulates the *conduct* of oil and gas operations or their permitted *location*. (59 Ops.Cal.Atty.Gen at p. 478; see *Big Creek Lumber*, *supra*, 38 Cal.4th at pp. 1152, 1157.) The County and Intervenors are correct that, in general, the County may exercise its broad police power to regulate land use, even to the extent of prohibiting oil and gas production in specific zones or in the County as a whole. (*Pacific Palisades Assn v. City of Huntington Beach* (1925) 196 Cal. 211, 217; *Beverly Oil Co. v. City of Los Angeles* (1953) 40 Cal.2d 552, 555; *Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach* (2001) 86 Cal.App.4th 534.) However, this does not answer the question whether state law preempts the use of that police power, an issue that none of the cases the County and Intervenors cite addressed. (59 Ops.Cal.Atty.Gen at p. 467 ["[a]s has been said, these cases without exception fail to consider any conflict between local and state authority"].)

Moreover, even if the County and Intervenors' argument were accepted, it would change nothing. Measure Z's prohibition of WSTs is not a ban on the *location* of oil and gas drilling or restrictions on the use to which operators may put land. Rather, Policy LU-1.21 regulates a specific *production technique* used by operators on lands upon which oil and gas development is permitted. Such regulation directly conflicts with DOGGR's mandate.[9] (Pub. Resources Code, § 3106, subd. (b) ["The Supervisor shall . . . 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 recovery of

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[8] At argument, Intervenors, who were represented on this point by a certified law student, appeared to abandon this distinction entirely, contending it to be "artificial" because, inter alia, subsurface activity "is accompanied inherently by surface activities" and by accompanying surface land uses. This claim both directly contradicts Intervenors' briefing and cannot be reconciled with Measure Z's focus on surface uses in support of subsurface activities.

The court further notes that Intervenors' counsel failed to present or file a copy of a signed consent form from their clients authorizing a certified law student to appear on their behalf. (Cal. Rules of Court, Rule 9.42(d)(3)(D).) The court reminds Intervenors' counsel of its obligation to observe this rule in the future.

[9] For this reason, Intervenors' claims that state oil and gas regulation do not preempt "zoning restrictions" or "local land use law" are accurate, but beside the point.

underground hydrocarbons . . ."]; 59 Ops.Cal.Atty.Gen at p. 478 ["The state's "statutory and administrative regulatory scheme . . . exclude[s] local regulation in each instance where the Supervisor or his regulatory program approves or specifies plans of operation, methods, materials, procedures or equipment to be used by the operator . . ."].)

Intervenors respond that the statutory and regulatory scheme with respect to state oil and gas operations is relevant only to the "technical requirements" of operations, not to the question whether those operations may be permitted in the first place. Intervenors contend that local governments retain the police power to proscribe such operations, and that Measure Z is merely an exercise of that power. But Measure Z is a ban on specific production techniques *not* a total ban on oil operations.

In short, California's state oil and gas legal and regulatory scheme fully occupies the area of the manner of oil and gas production. Because Policy LU-1.22 seeks to regulate the manner of oil and gas production by restricting particular production techniques, namely wastewater injection and impoundment, it is "in conflict with general law," and is therefore preempted. (*Morehart*, *supra*, 7 Cal.4th at p. 747.)

**2.4.1.2 Policy LU-1.22 is "contradictory" to general law.**

Policy LU-1.22 is also preempted because it is "contradictory" of general law. (*Sherwin-Williams*, *supra*, 4 Cal.4th at p. 898.) Public Resources Code, section 3106, subdivision (b), provides, "[t]he 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 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 [and] . . . to do what a prudent operator using reasonable diligence would do . . . including, but not limited to, *the injection of air, gas, water, or other fluids into the productive strata* . . . when these methods or processes employed have been approved by the supervisor . . . ." (Italics added.)

By enacting this statute, the Legislature expressly declared the state's policy regarding, inter alia, wastewater injection. Policy LU-1.22, then, is irreconcilable with state policy. (See *Fiscal v. City & County of S.F.* (2008) 158 Cal.App.4th 895, 914-915 [local law was "irreconcilable, clearly repugnant, and so inconsistent" with state law that "the two cannot have concurrent operation"].)

**2.4.1.3 The effect of "savings clauses"**

The County and Intervenors argue that three statutes indicate the Legislature did not intend to preempt the field of oil and gas regulation.

**2.4.1.3.1 Public Resources Code, section 3690**

Both the County and Intervenors contend Public Resources Code, section 3690 undermines Petitioners' preemption argument. Section 3690 is expressly limited to a single chapter of Division 3 dealing with unitized operations.[10] The County and Intervenors acknowledge this, but insist the statute demonstrates the Legislature "expressly intended not to preempt the field." Intervenors argues that this section applies here because it "directly covers operations on unitized fields like those at issue."

These claims are not persuasive. As the Attorney General noted in its opinion on which both the County and Intervenors heavily rely, "[t]his declaration in Public Resources Code section 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 p. 473.) Petitioners' preemption arguments do not rely upon Chapter 3.5. Moreover, the fact that no other chapter of Division 3 contains such a provision indicates that the statute was intentionally limited to Chapter 3.5. (*Gikas v. Zolin* (1993) 6 Cal.4th 841, 852 ["The expression of some things in a statute necessarily means the exclusion of other things not expressed"].)

[10] Section 3690 provides, "*[t]his 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." (Italics added.)

#### 2.4.1.3.2 Public Resources Code, sections 3206.5 and 3320.1, subdivision (c)

Finally, the County argues that Public Resources Code, sections 3206.5 and 3320.1, subdivision (c), blunt Petitioners' preemption argument. Section 3206.5 authorizes cities and counties to request that DOGGR 1) provide information concerning non-producing oil wells; and 2) determine "whether the wells should be plugged and abandoned." Section 3206.5 also authorizes DOGGR to compel operators to provide reasons why non-producing wells should not be plugged and abandoned. Section 3320.1, subdivision (c), preserves local governments' right of eminent domain in order to address land subsistence problems related to oil or gas pools. The County maintains that these provisions evince the Legislature's intent to "include and work with local agencies." But these statutes neither confer authority on local governments to regulate the manner of oil production nor suggest DOGGR's authority to do so is non-exclusive. At best, they recognize only that oil and gas production operations are subject to both state and local oversight, a premise implicit in the discussion *ante*, concerning the distinction between regulating the manner of oil production and the location of that production.

### 2.4.1.4 Federal Preemption

Petitioners also contend that Policy LU-1.22 directly conflicts with the Safe Water Drinking Act (SWDA)'s express terms.

The SDWA directed the EPA to oversee underground injection throughout the United States. (42 U.S.C. § 300h, et seq.) Nevertheless, the SDWA provides that states may obtain "primary enforcement responsibility" to enforce the SDWA's UIC program if they have adopted and implemented adequate standards and enforcement measures. (42 U.S.C. § 300h-1.) In 1982, the EPA granted DOGGR this primary enforcement responsibility for the State of California. (40 C.F.R. § 147.250.)

The SDWA establishes certain minimum requirements and restrictions for state UIC programs. (42 U.S.C. § 300h(b).) As relevant here, a state program "may not prescribe requirements which interfere with or impede" underground injection "unless such requirements are essential to assure that underground sources of drinking water will not be endangered by such injection." (42 U.S.C. § 300h(b)(2).) Petitioners maintain that Measure Z is in direct conflict

with this provision. The County and Intervenors respond that Congress structured the SDWA to establish minimum standards that leave room for more stringent local regulation, such as Measure Z. They further respond that Policy LU-1.22 is a land use policy decision the County made because it determined that the Policy was "essential" to protect County drinking water.

It is true that the SDWA generally does not bar states from enacting supplemental or more stringent restrictions on UIC programs. (See 42 U.S.C. § 300h-1(b)(1)(B)(3); 40 C.F.R. § 145.1(g).) The SDWA expressly provides that it does not "diminish any authority of a State or political subdivision to adopt or enforce any law or regulation respecting underground injection but no such law or regulation shall relieve any person of any requirement otherwise applicable under this subchapter." (42 U.S.C. § 300h-2(d).) "Congress intended that states retain authority respecting underground injection so long as it does not impinge on the UIC program administered by the EPA." (*Bath Petroleum Storage, Inc. v. Sovas* (N.D.N.Y. 2004) 309 F.Supp.2d 357, 367-368.)

As an initial matter, there is a significant difference between stringent regulation and outright proscription; "surely the prohibition above prevents such local law from altogether preventing UIC activity." (*EQT Production Company, supra*, 191 F.Supp.3d at p. 601, affd. on other grounds (4th Cir. 2017) 870 F.3d 322.)[11] Measure Z prohibits underwater injection notwithstanding that DOGGR, in implementing its UIC program, has established regulations requiring DOGGR approval for any injection or disposal project, together with extensive filing, notification, operating, and testing requirements for such projects. (Cal. Code Regs., tit. 14, §§ 1724.06, 1724.10.) Where "the state has undertaken to allow UIC wells, [that] action operates to diminish the counties' powers to prohibit them." (*EQT Production Company, supra*, 191 F.Supp.3d at p. 601.)[12]

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[11] On appeal, the Fourth Circuit resolved the dispute on state preemption grounds and thus, found it unnecessary to reach the federal preemption issue. (*Id.* at p. 332.) Nevertheless, the trial court's opinion on that point was not superseded; it remains persuasive authority. (*Credit Managers Assn of California v. Countrywide Home Loans, Inc.* (2006) 144 Cal.App.4th 590, 598.)

[12] In addition, although the SDWA's "savings clause" explicitly preserves some local authority *under state law*, the County lacks the authority under state law to regulate the manner of oil and gas production. (Pub. Resources Code, § 3106, subd. (b); 59 Ops.Cal.Atty.Gen at p. 478; see *Big Creek Lumber, supra*, 38 Cal.4th at pp. 1152, 1157.)

Intervenors contend that the SDWA's prohibition on regulations "which interfere with or impede" underground injection (42 U.S.C. § 300h(b)(2)) is limited to federally mandated UIC programs. Intervenors maintain that the SDWA's "savings clause" (42 U.S.C. § 300h-2(d)) applies to the entire Act, effectively trumping Title 42 United States Code section 300h(b)(2), as applied to local governments. Consequently, Intervenors assert that the obligation not to "interfere with or impede" underground injection applies to the state but not its subdivisions. This claim suffers from at least two defects.

First, the text of the "savings clause" does not support this reading. Although the statute preserves local authority "respecting underground injection," that authority is qualified by the subsequent phrase providing that a law enacted under that authority "shall [not] relieve any person of any requirement otherwise applicable under this subchapter." (42 U.S.C. § 300h-2(d).) A local law like Measure Z, then, cannot relieve the County[13] of its obligation not to "prescribe requirements which interfere with or impede" underground injection programs. (42 U.S.C. § 300h(b)(2).) Second, Intervenors' argument would lead to states possessing less authority than their own political subdivisions, an absurd result. "[T]he superior, overriding power of the state must enable the state to occupy the field to the exclusion of its own subdivisions, lest its superiority be circumscribed." (*EQT Production Company, supra*, 191 F.Supp.3d 583 at p. 601.)

The County and Intervenors further argue that Measure Z is not preempted because it is "essential" to protect drinking water from endangerment, an express exception to the SDWA's prohibition on regulations that prescribe requirements "which interfere with or impede" underground injection. In support of this argument, the County and Intervenors cite Measure Z's Finding 5, which states that wastewater injection and disposal present "a risk of water pollution and soil contamination." (AR 153.) There are three problems with this claim.

First, the County and Intervenors incorrectly assume that the County is authorized to make this finding. In truth, when as here, the EPA has conferred primacy on a state, the SDWA expressly charges that state with determining whether a regulation is essential to protect drinking water. (42 U.S.C. § 300h(b)(2) [regulations for "*State* underground injection control programs

[13] Although the statute refers to a "person," the subchapter's definition of the term expressly includes a "State [or] municipality . . . ." (42 U.S.C. § 300f(12).)

may not prescribe requirements which interfere with or impede" underwater injection "unless such requirements are essential to assure that underground sources of drinking water will not be endangered by such injection"], italics added.) Had Congress intended political subdivisions to make such determinations, it could have so stated. After all, it expressly referenced political subdivisions in the "savings clause" upon which the County and Intervenors rely. (42 U.S.C. § 300h-2(d); see *EQT Production Company*, *supra*, 191 F.Supp.3d at p. 602 ["wastewater properly injected into UIC wells pursuant to state and federal law does not become pollution simply because the [County] says so"].)

Second, the State has recently indicated that such a finding is the province of DOGGR and the State and Regional Water Boards. In 2015, the Legislature amended the Public Resources Code to add Article 2.5, "Underground Injection Control" (§§ 3130-3132), to its oil and gas conservation chapter. That Article requires DOGGR, prior to proposing an aquifer exemption to the EPA, to "consult with the appropriate regional water quality control board and the state board," provide a public comment period, hold a joint public hearing, and if both DOGGR and the State Water Board "concur that the exemption proposal merits consideration for exemption," submit the proposal to the EPA. (Pub. Resources Code, § 3131.)

Third, the State, through DOGGR and the State Water Board, has already followed this process — at least as to San Ardo — and determined that underground water injection will not endanger the relevant water sources. (JRJN, Exs. 27-29; Petitioners' Supplemental JRJN, Exs. 3-4.) That determination trumps Measure Z's findings. Policy LU-1.22 would directly undermine the authority and contradict the expert opinion of two state agencies charged by the EPA to make the requisite determinations. (40 C.F.R. § 147.250; JRJN, Ex. 73; see also Pub. Resources Code, §§ 3106, 3131.) Therefore, Policy LU-1.22 "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Crosby, supra*, 530 U.S. at p. 377.)

The County and Intervenors contend that this conclusion "stands the SDWA on its head." They note that Congress' "overriding concern" in enacting the law was to assure "the safety of present and potential sources of drinking water" not to encourage underwater injection. (*Phillips Petroleum Co. v. U.S. E.P.A.* (10th Cir. 1986) 803 F.2d 545, 560.) They maintain that Measure Z promotes this purpose.

It is true that the SDWA is primarily concerned with protecting drinking water. However, "[t]he principal legislative history explains that . . . [Congress] contemplated regulation, not prohibition, because of the importance of avoiding needless interference with energy production and other commercial uses." (*W. Neb. Resources Council v. U.S. EPA* (8th Cir. 1991) 943 F.2d 867, 870.) Thus, Congress intended the SDWA's prohibition on interfering with or impeding underground injection "to assure that constraints on energy production activities would be kept as limited in scope as possible while still assuring the safety of present and potential sources of drinking water." (H.R. Rep. No. 93-1185, 93rd Cong., 2d Sess., reprinted in 4 1974 U.S. Code, Cong. & Admin. News 6454, 6480-6484.) As discussed *ante*, the EPA delegated the role of insuring the safety of drinking water to the State not the County. (42 U.S.C. § 300h(b)(2); 40 C.F.R. § 147.250; JRJN, Ex. 73.)

Hence, the SDWA preempts Policy LU-1.22.[14]

**2.5 New Wells**

Policy LU-1.23 provides, "The drilling of new oil and gas wells is prohibited on all lands within the County's unincorporated area. This Policy LU-1.23 does not affect oil and gas wells drilled prior to the Effective Date and which have not been abandoned." Policy LU-1.23 defines "oil and gas wells" as "wells drilled for the purpose of exploring for, recovering, or aiding in the recovery of, oil and gas." (AR 156.)

Petitioners argue that state law preempts Policy LU-1.23 because the Policy is a ban on a production technique rather than a true land use regulation. The County and Intervenors respond that ample decisional authority supports the County's right to ban the drilling of new wells.

Preliminarily, the Court observes that, as with Policy LU-1.22, Policy LU-1.23 directly conflicts with the SDWA. Policy LU-1.23's prohibition on new wells extends to wells drilled "for the purpose of . . . aiding in the recovery of [] oil and gas." By its plain language then, Policy LU-1.23 prohibits the drilling of injection wells necessary for oil operators to inject wastewater, effectively banning wastewater injection. (Tubbs Dec., ¶¶ 38-41.) Consequently, Policy LU-1.23 "interfere[s] with or impede[s]" California's UIC program, and as such, is preempted. (42 U.S.C. § 300h(b)(2).)

[14] In light of this conclusion, the court need not reach Petitioners' federal field preemption argument.

Moreover, Policy LU-1.23 impermissibly prohibits certain production techniques. For example, Petitioners have shown that their operations require them to drill new wells for purposes of injecting steam to maintain the "steam chest," an enhanced oil recovery technique necessary to their profitable operation. (Tubbs Dec., ¶¶ 42-47.) Petitioners also drill new wells to dispose of excess produced water and concentrated brine (a byproduct of Petitioner Chevron's reverse osmosis water treatment plant). (*Id.*, ¶¶ 38-41.) Accordingly, Policy LU-1.23 directly conflicts with DOGGR's mandate. (Pub. Resources Code, § 3106, subd. (b) ["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 [and] . . . to do what a prudent operator using reasonable diligence would do . . . including, but not limited to, the injection of air, gas, water, or other fluids into the productive strata . . . when these methods or processes employed have been approved by the supervisor . . . " ]; 59 Ops.Cal.Atty.Gen at p. 478 [California's "statutory and administrative regulatory scheme . . . exclude[s] local regulation in each instance where the Supervisor or his regulatory program approves or specifies plans of operation, methods, materials, procedures or equipment to be used by the operator . . ."].)

Finally, the County and Intervenors' authorities authorizing prohibitions on the locations upon which new oil wells may be drilled are inapposite. (See, e.g. *Pacific Palisades, supra*, 196 Cal. at p. 217; *Beverly Oil Co., supra*, 40 Cal.2d at p. 555; *Hermosa Beach, supra*, 86 Cal.App.4th at p. 534.) As discussed *ante*, at best these cases stand for the proposition that the County has the authority under the police power to prohibit new wells. They do not, however, address preemption. (See 59 Ops.Cal.Atty.Gen at p. 467; *Hermosa Beach, supra*, 86 Cal.App.4th at pp. 545-546.) The mere fact that the County may legislate in an area under the police power does not divest the State of the superior right to occupy the relevant field and/or adopt contradictory law. (See *EQT Production Company, supra*, 191 F.Supp.3d at p. 601 [where "the state has undertaken to allow UIC wells, [that] action operates to diminish the counties' powers to prohibit them"].)

**2.6 Severability**

The foregoing thus raises the question whether the invalidity of parts of Measure Z causes the entire Measure to fail. Measure Z's Section 9 contains a severability clause.[15] "Although not conclusive, a severability clause normally calls for sustaining the valid part of the enactment, especially when the invalid part is mechanically severable . . . . Such a clause plus the ability to mechanically sever the invalid part while normally allowing severability, does not conclusively dictate it. The final determination depends on whether the remainder . . . is complete in itself and would have been adopted by the legislative body had the latter foreseen the partial invalidity of the statute . . . or constitutes a completely operative expression of the legislative intent . . . [and is not] so connected with the rest of the statute as to be inseparable." (*Santa Barbara Sch. Dist. v. Superior Court* (1975) 13 Cal.3d 315, 331.)

Three criteria must be satisfied to show the valid portions of the law are severable from the invalid portion(s): "the invalid provision must be grammatically, functionally, and volitionally separable." (*Gerken v. Fair Political Practices Com.* (1993) 6 Cal.4th 707, 714.) To be grammatically severable, the "valid and invalid parts" of the initiative must be able to "be separated by paragraph, sentence, clause, phrase, or even single words." (*People's Advocate, Inc. v. Superior Court* (1986) 181 Cal.App.3d 316, 331.) To be functionally severable, "the sections to be severed, though grammatically distinct, must be capable of independent application" and of separate enforcement. (*Id.* at pp. 331-332.)

Finally, to be volitionally severable, "[t]he remaining portions must constitute an independent operative expression of legislative intent, unaided by the invalidated provisions . . . [and cannot] be inextricably connected to them by policy considerations." (*Barlow v. Davis* (1999) 72 Cal.App.4th 1258, 1263.) In the context of an initiative, "[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

[15] "If any section, subsection, paragraph, subparagraph, sentence, clause, phrase, part, or portion of this Initiative is held to be invalid or unconstitutional by a final judgment of a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Initiative. The voters hereby declare that this Initiative, and each section, subsection, paragraph, subparagraph, sentence, clause, phrase, part, or portion thereof would have been adopted or passed even if one or more sections, subsections, paragraphs, subparagraphs, sentences, clauses, phrases, parts, or portions were declared invalid or unconstitutional."

invalid portions." (*Gerken, supra*, 6 Cal.4th at pp. 714-715.) "[I]f a part to be severed reflects a 'substantial' portion of the electorate's purpose, that part can and should be severed and given operative effect." (*Id.* at p. 715, citing *Santa Barbara Sch. Dist., supra*, 13 Cal.3d at pp. 331-332.) When applying this test, courts "look to the initiative measure's text and the ballot materials for guidance . . . ." (*Id.* at p. 717.)

Because this court has found that Policies LU-1.22 and LU-1.23 are preempted, the court must determine whether Policy LU-1.21 survives in their absence. Policy LU-1.21 passes all three severability tests.

Policy LU-1.21 is grammatically separable from the remainder of Measure Z. It is entirely contained in its own section of the initiative. Policy LU-1.21 is functionally severable for much the same reason. The ban on WST is capable of application irrespective of whether the other prohibitions stand.

As to volitional severability, the court can "say with confidence" that the electorate would have separately considered the ban on WST and adopted it "in the absence of the invalid provisions." (*Gerken, supra*, 6 Cal.4th at pp. 714-715.) Measure Z's official title is "Protect Our Water: Ban Fracking and Limit Risky Oil Operations Initiative." (AR 152.) Measure Z declares that its purpose "is to protect Monterey County's water, agricultural lands, air quality, scenic vistas, and quality of life by prohibiting the use of any land within the County's unincorporated area for well stimulation treatments, including, for example, hydraulic fracturing treatments (also known as 'fracking') and acid well stimulation treatments." (*Ibid.*) The measure notes that its proponents drafted the initiative in direct response to the Board of Supervisors' decision not to adopt a WST moratorium. (*Ibid.* [Finding 2].) In fact, 11 of Measure Z's 15 findings refer directly to WSTs. (AR 152-154 [Findings 1-9, 11, and 13].) Additionally, the official materials provided to voters placed great emphasis on WSTs. (AR 364, 387.)

It is true, as Petitioners point out, that proponents often promoted the WST and wastewater provisions injection prohibitions as complementary. (AR 364, 387.) Nevertheless, there can be no doubt that the WST prohibition was a "substantial portion" of Measure Z's purpose. (*Gerken, supra*, 6 Cal.4th at p. 715.) And, given the campaign's focus on the fracking ban, the court believes the electorate would prefer "to achieve at least some substantial portion of

their purpose" rather than see the whole initiative be invalidated. (*Santa Barbara Sch. Dist.*, *supra*, 13 Cal.3d at p. 332.)

Accordingly, Policy LU-1.21 is severable from the remainder of Measure Z.

**3. Takings**

Petitioners also contend that Measure Z will end all oil and gas operations in Monterey County, effecting a facial regulatory taking of their property, and entitling them to just compensation under the United States and California Constitutions. The County and Intervenors disagree. They also argue that Petitioners have failed to exhaust their administrative remedies, namely the procedure prescribed by Section 6(C) of Measure Z.

Because exhaustion of administrative remedies is "a jurisdictional prerequisite to resort to the courts," the court will take up this issue first. (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 293.)

**3.1 Administrative Remedies**

Measure Z's Section 6(C) allows a landowner to apply for an exception to its provisions if he or she "contends that application of this Initiative effects an unconstitutional taking of property . . . ." If a landowner so contends, the County Board of Supervisors "may grant . . . an exception to application of any provision . . . if [it] 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 160.)

The County and Intervenors argue that Petitioners have failed to exhaust this procedure, and hence that their facial takings claims must be denied. The County and Intervenors are incorrect. Petitioners' challenge is facial and thus, a legal issue for which "case-specific factual inquiry is not required." (*Del Oro Hills v. City of Oceanside* (1995) 31 Cal.App.4th 1060, 1076.) Facial challenges are not subject to the exhaustion requirement. (*Ibid.*; *State of California v. Superior Court (Veta Co.)* (1974) 12 Cal.3d 237, 251; see also *City of Santa Barbara v. Adamson* (1980) 27 Cal.3d 123, 135.)

Further, even if this were not the case, the County and Intervenors' argument would still fail. The exhaustion doctrine "has not hardened into inflexible dogma. [Citation.]" (*Ogo*

*Associates v. City of Torrance* (1974) 37 Cal.App.3d 830, 834.) For example, the exhaustion rule does not apply "where an administrative remedy is . . . inadequate . . . ." (*Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 217; *Action Apartment Assn v. Santa Monica Rent Control Bd.* (2001) 94 Cal.App.4th 587, 611.) Section 6(C) is inadequate in several respects.

*Action Apartment* is instructive. There, Santa Monica landlords were required to place tenant security deposits in an interest-bearing account, but were not initially required to pay the interest accrued from those accounts to their tenants. (*Action Apartment*, *supra*, 94 Cal.App.4th at p. 595.) However, a 1999 ordinance required landlords to pay tenants three-percent interest on security deposits held for at least one year. (*Ibid.*) A group of landlords sued, complaining that the ordinance worked a regulatory taking. The Rent Control Board successfully demurred, but the Court of Appeal reversed, finding that the landlords had stated a takings claim. (*Id.* at p. 621.)

On appeal, the Board claimed that the landlords had failed to exhaust their administrative remedies, i.e. the general and/or individual rent adjustment process. (*Id.* at p. 611.) The Court disagreed because, inter alia, it found that these procedures "d[id] not offer an . . . adequate remedy." (*Id.* at pp. 612-615.) Specifically, the Court noted, 1) the challenge to the regulations "present[ed] a dispositive question within judicial, not administrative, competence"; 2) the administrative process was "not likely to resolve the dispute in a manner that makes judicial review unnecessary" because the City's 3,200 landlords would be required to file individual petitions, notwithstanding that the key issue was facial, and therefore identical as to each affected landlord; 3) "[t]he dispute [could] efficiently and inexpensively be resolved in a judicial forum"; and 4) the processing of each individual rent petition imposed "a severe time and financial burden on a landlord [and] require[d] a long administrative process . . . ." (*Id.* at p. 615, internal citations omitted.)

Section 6(C) suffers from many of the same defects. First, although the Board undoubtedly possesses substantial expertise in some areas, the decision whether a taking has occurred is a legal one; "an administrative agency is not competent to decide whether its own action constitutes a taking . . . ." (*Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 16.) Thus,

"[t]he Board's expertise is of no assistance here." (*Action Apartment*, *supra*, 94 Cal.App.4th at p. 615.)

Second, the County would require potentially hundreds of mineral rights owners[16] and oil and gas operators to file individual petitions for exceptions. To the extent the issues raised are facial, such individual processes would be highly inefficient; such disputes could more "efficiently and inexpensively be resolved in a judicial forum." (*Action Apartment*, *supra*, 94 Cal.App.4th at p. 615.) Indeed, this court is engaged in just such an undertaking. Additionally, to the extent as-applied takings claims are at issue, the Board would be required to engage in complex, lengthy factual determinations as to each of the potentially hundreds of affected parties. (See JRJN, Ex. 35; Supplemental JRJN, Ex. 5; AR 373.) Such a procedure would impose "a severe time and financial burden on each rights holder." (*Action Apartment*, *supra*, 94 Cal.App.4th at p. 615.) And, because so many parties would be affected, Section 6(C) "inherently and unnecessarily precludes reasonably prompt action except perhaps for a lucky few." (*Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 172.)

Third, the procedure would almost certainly require judicial review. An applicant would likely appeal both a Board decision to reject an exception in its entirety and one to grant an exception only in part. Similarly, any member of the public might claim public interest standing to challenge a decision to fully or partially grant an exception. (See *Save the Plastic Bag*, *supra*, 52 Cal.4th at p. 166; *Waste Management of Alameda County, Inc. v. County of Alameda* (2000) 79 Cal.App.4th 1223, 1236-1237.) Such challenges appear highly likely in light of Measure Z supporters' public statements respecting the exception process. (See, e.g., JRJN Ex. 36, at pp. 36:5-8, 39:17-18 (July 25, 2017 Board meeting transcript) ["We should have an absolute minimum of exemptions if at all . . . . We did not vote to allow the oil companies to have exemptions to work around the vote"].) Thus, the administrative procedure would do little but impose "a severe time and financial burden on each rights holder." (*Action Apartment*, *supra*, 94 Cal.App.4th at p. 615.) In fact, the burden here would be significantly greater than the one imposed upon the landlords in *Action Apartment* because the lengthy delay in resolving

[16] In 2016 alone, the County issued 281 mineral rights property tax assessments. (Welles Dec., ¶ 2.)

exception applications would likely cause grievous, fatal damage to Petitioners' operations. (Tubbs Dec., ¶¶ 52, 57-60; Kemp Dec., Ex. A, pp. 52-55.)

Further, Section 6(C) violates due process because it runs a serious risk of "arbitrary and discriminatory application." (*Grayned v. City of Rockford* (1972) 408 U.S. 104, 109.) Section 6(C) provides that the Board "may" grant an exception if a taking occurs, and even then, shall do so "only to the minimum extent necessary to avoid such a taking." (AR 160.) The Board thus has discretion to grant or deny exceptions to similarly or identically situated parties. For example, the Board could find that Measure Z effects a taking as to Chevron and Aera, but choose only to except Chevron. The Board also has authority to grant exceptions with different parameters to similarly or identically situated parties. Thus, the Board could choose to except Trio from Measure Z's wastewater impoundment and disposal prohibitions but not as to the new wells prohibition, while granting the opposite exception to Eagle. Finally, the Board could choose to grant exceptions only to larger producers, such as Chevron, or only to smaller mineral rights holders, such as those represented by NARO. And, because the Board is an elected body, it would likely be subjected to significant political pressure in making each of these decisions.

Section 6(C) also violates due process because it fails to provide the Board with an adequate standard to determine both whether a taking has occurred and the scope of any potential exception. (See *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 231 [laws "must provide a standard or guide against which conduct can be uniformly judged by courts and administrative agencies"].) Section 6(C) states that these decisions shall be made "based on substantial evidence" (AR 160), but "substantial evidence" is a standard of review, not a burden of proof (see, e.g. Code Civ. Proc., § 1094.5, subd. (c); *JKH Enterprises, Inc. v. Department of Industrial Relations* (2006) 142 Cal.App.4th 1046, 1062).

Nevertheless, Intervenors claim the application of Section 6(B) in concert with Section 6(C) would "always avoid an impermissible taking." Section 6(B) provides, "[t]he provisions of this Initiative shall not apply to the extent, but only to the extent, that they would violate the constitution or laws of the United States or the State of California." (AR 160.) Intervenors cite *San Mateo County Coastal Landowners' Assn. v. County of San Mateo* (1995) 38 Cal.App.4th

523, as a case in which they claim that a court "recognized the validity" of a provision nearly identical to Section 6(B).

*San Mateo* involved a facial challenge to a land use ordinance authorizing the County to impose open space or other easements as a condition of subdivision map and plan approvals. (38 Cal.App.4th at p. 545.) The ordinance contained language virtually identical to Section 6(B). The court reasoned that a facial challenge was untenable because, inter alia, that language gave the county "the flexibility to avoid potentially unconstitutional application of easement requirements," by declining to impose conditions before a taking could occur. (*Id.* at p. 547.) *San Mateo* is distinguishable. There, a taking would only occur if and when the County imposed one or more easements as a condition of project approval. At that stage, the County could avoid any such taking as to specific property by appropriate design of the easement(s). Here, any taking would occur *upon Measure Z's taking effect*. Section 6(C) could theoretically reduce or eliminate that taking, but only after the fact, and, as discussed *ante*, its procedure is sufficiently convoluted that it risks arbitrary and discriminatory application. Additionally, it is so lengthy that it would impose a significant financial burden on property owners in the interim, possibly up to and including a total loss of all economic value of the relevant property before the administrative process — and the nearly certain ensuing litigation — is complete. (Tubbs Dec., ¶¶ 52, 57-60; Kemp Dec., Ex. A, pp. 52-55.) Section 6(B) does not ameliorate these issues.[17]

In short, Petitioners were not required to exhaust their administrative remedies, both because their claims are facial in nature (*Del Oro Hills, supra*, 31 Cal.App.4th at p. 1076), and because Section 6 constitutes a wholly "inadequate" administrative remedy (*Tiernan, supra*, 33 Cal.3d at p. 217).

**3.2 Whether Measure Z effects a taking**

Petitioners assert that Measure Z's dramatic effect on the economic value of their mineral rights amounts to a taking under the state and federal Constitutions, entitling them to just compensation.

[17] Moreover, Section 6(B) does little more than state the obvious. *No law* applies to the extent it violates the United States Constitution.

### 3.2.1 Takings Law

The takings clause of the Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, requires a governmental entity to pay just compensation when it "takes" private property for public use. California Constitution, article I, section 19 contains a comparable provision.[18]

A taking may be either physical or regulatory. A physical taking occurs when the government physically occupies, takes possession of, or destroys property. (See, e.g., *United States v. Pewee Coal Co.* (1941) 341 U.S. 114, 115.) A regulatory taking occurs when a "regulation goes too far," such that it is effectively the equivalent of a physical taking. (*Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393, 415; *Hensler, supra*, 8 Cal.4th at p. 13 ["[A] 'regulatory taking' . . . results from the application of zoning laws or regulations which limit development of real property"].) Petitioners contend Measure Z effects a regulatory taking. Regulatory takings are divided into facial and as-applied challenges. "In facial takings claims, "[the court] look[s] only to the regulation's general scope and dominant features, rather than to the effect of the application of the regulation in specific circumstances." (*Hodel v. Virginia Surface Min. and Reclamation Assn, Inc.* (1981) 452 U.S. 264, 295.) By contrast, an as-applied challenge requires the court to engage in "essentially ad hoc, factual inquiries" exploring the economic impact of the specific application of a regulation to a particular property. (*Kaiser Aetna v. U. S.* (1979) 444 U.S. 164, 175.) Petitioners argue that Measure Z is an invalid regulatory taking on its face.

In a facial challenge, the court must determine whether "the mere enactment" of a law effects a taking. (*Suitum v. Tahoe Regional Planning Agency* (1997) 520 U.S. 725, 736, fn. 10.) "The test to be applied in considering this facial challenge is fairly straightforward. A statute regulating the uses that can be made of property effects a taking if it "denies an owner economically viable use of his land' . . . . [Citation]." (*Hodel, supra*, 452 U.S. at pp. 295-296.) Such challenges face an "uphill battle" (*Keystone, supra*, 480 U.S. at p. 495) because a

[18] Article I, section 19 also requires compensation for damage to property, and hence "protects a somewhat broader range of property values . . . . [Citations.]" (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 298.) Nevertheless, that distinction is irrelevant to the issues in this case, and in any event, "the takings clause in the California Constitution is "construed congruently with the federal clause.' [Citation.]" (*Lockaway Storage v. County of Alameda* (2013) 216 Cal.App.4th 161, 183.)

challenger must show that the law requires an owner of real property to "sacrifice *all* economically beneficial uses" of his property (*Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1019, italics in original).

Before addressing the merits of the takings challenges, the court notes that, unlike in the preemption context, Petitioners are not all similarly situated. Broadly speaking, Petitioners may be broken into two groups: 1) Petitioners that have exercised their oil rights and have active wells (i.e., Chevron, Aera, Eagle, Trio, and some members of NARO); 2) and those that have not (CRC and the remaining members of NARO). The court will address each situation separately.

### 3.2.2 CRC and some members of NARO

A group of Petitioners, including CRC and some members of NARO, are mineral rights and oil and gas lease owners. A mineral owner has "the exclusive right to drill for and produce oil, gas and other hydrocarbons." (*Cassinos v. Union Oil Co.* (1993) 14 Cal.App.4th 1770, 1782.) Oil and gas lessees possess similar rights. "All other rights" are retained by the surface owner. (*Phillips Petroleum Co. v. County of Lake* (1993) 15 Cal.App.4th 180, 185.) The Takings Clause applies to mineral rights estates. (*Pennsylvania Coal Co., supra*, 260 U.S. at p. 414; *Braly v. Board of Fire Commissioners* (1958) 157 Cal.App.2d 608, 610 [a party's mineral rights are "as much entitled to protection as the property itself"; restrictions on that right may constitute a regulatory taking].)

CRC leases mineral rights in over 44 parcels of land in Monterey County; 40 contain no oil and gas wells. (Bridges Dec., ¶ 9; McMahan Dec., ¶¶ 2-9.) The four remaining parcels contain infrastructure, but each requires new wells to be drilled for production to occur. (McMahan Dec., ¶¶ 2-8.) CRC also owns mineral rights in 23 separate parcels, none of which contain wells. (Bridges Dec., ¶¶ 30-31; McMahan Dec., ¶ 9.) Many members of NARO also own or lease parcels with heretofore unexercised mineral rights.

Accordingly, CRC must drill new wells to extract any economic value from either their mineral rights or their oil and gas leases. (McMahan Dec., ¶¶ 2-8.) Policy LU-1.23 prohibits the drilling of any new wells countywide. Consequently, should it take effect, Measure Z would effect a facial regulatory taking of CRC's and some members of NARO's property. (*Lucas*,

*supra*, 505 U.S. at p. 1019; Miller Dec., ¶¶ 28-29.)[19] However, because the court has found that Policies LU-1.22 and LU-1.23 are preempted,[20] the court need not determine an appropriate remedy for the taking.

### 3.2.3 The remaining Petitioners

The remaining Petitioners are in a different position. All either own active oil and gas operations or receive royalties from those operations. These Petitioners (the remaining Petitioners) claim that the prohibitions on new wells and on wastewater injection and impoundment will ultimately result in a complete elimination of their economic value.

The remaining Petitioners contend that the prohibition on drilling new wells will severely impact operations in at least two ways. First, they maintain that new wells must be drilled to maximize oil recovery through "side-tracking." (Tubbs Dec., ¶ 51.) Side-tracking is the practice of "mill[ing] a hole through the existing well casing and drill[ing] a new bottom hole that is adjacent to the current well. Side-track operations are done specifically to re-establish production from the same portion of the reservoir as the original well. The use of sidetracks is often essential to repair damaged wells and to access additional areas of hydrocarbons that are in close proximity to the current bottom hole of the well." (*Ibid.*)

Second, the remaining Petitioners explain that new wells are essential to "steam flooding" an enhanced oil recovery technique in which producers inject steam into underground formations to heat oil, thereby decreasing its viscosity and facilitating its recovery. (Tubbs Dec., ¶¶ 43-45.) Over time, the remaining Petitioners have used steam flooding to create a "steam chest," a large collection of steam which fills a significant, subsurface portion of the production area. (Tubbs Dec., ¶ 44.) The remaining Petitioners assert that the maintenance of this steam chest is critical to the economically feasible production of oil in the County. (Tubbs Dec., ¶¶ 57-59; Latham Dec., ¶¶ 14-15.) But "the constant encroachment of water from the edges of the steam chest can quickly quench the steam and cause the collapse of the steam chest." (Tubbs Dec., ¶ 47.) The remaining Petitioners explain that, to avoid this result, they "must continuously

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[19] For the same reasons (discussed *ante*), that the proposed exemption process is an inadequate administrative remedy, it also fails to vitiate the taking.

[20] Neither CRC nor NARO assert that the WST prohibition would affect their business.

replace or side-track non-productive wells, add infill horizontal wells, and drill new wells at the perimeter of the steam chest . . . ." (Tubbs Dec., ¶ 47; Latham Dec., ¶¶ 14, 22.) Thus, the remaining Petitioners predict Measure Z's immediate ban on new wells would cause production to "exponentially decline" by 20-25% per year. (*Id.*, ¶¶ 52, 60; Kemp Dec., Ex. A, p. 53.)

The remaining Petitioners also insist that the prohibitions on wastewater injection and impoundment will effectively end their operations after Measure Z's phase-out period is complete. They note that, absent the ability to inject wastewater, there is no viable method to dispose of the over 100 million barrels of water produced yearly. (Kemp Dec., Ex. A, pp. 39, 48, 54; Tubbs Dec., ¶ 48.) Moreover, Petitioner Chevron argues that Policy LU-1.22 would force it to halt the operation of its reverse-osmosis water treatment facility, a critical means for disposing of wastewater. (Tubbs Dec., ¶¶ 35-41.) The facility would be unable to continue because 1) it must impound wastewater prior to treatment; and 2) the reverse-osmosis process generates a concentrated brine stream, which must be injected underground to continue operations. (Tubbs Dec., ¶ 41, 55.) Finally, the remaining Petitioners opine that the wastewater injection prohibition will effectively end steam flooding, which relies on injecting steam produced by wastewater through injection wells. (Kemp Dec., Ex. A, p. 52; Tubbs Dec., ¶ 54.) This too, they assert, would lead to "the complete shutdown of operations." (Tubbs Dec., ¶ 54.)

The court has little doubt that Measure Z would cripple oil production in Monterey County. However, the remaining Petitioners have not met their burden to show "the mere enactment" of Measure Z effects a facial taking of their property. (*Suitum*, *supra*, 520 U.S. at p. 736, fn. 10.) To prove a facial taking has occurred, a property owner must show that the law will result in the "sacrifice [of] *all* economically beneficial uses" of her property. (*Lucas*, *supra*, 505 U.S. at p. 1019, italics in original.) The United States Supreme Court has explained that, under this rule, "a statute that 'wholly eliminated the value' of Lucas' fee simple title clearly qualified as a taking. But our holding was limited to 'the extraordinary circumstance when *no* productive or economically beneficial land use is permitted.' The emphasis on the word 'no' in the text of the opinion was, in effect, reiterated in a footnote explaining that the categorical rule would not apply if the diminution in value were 95% instead of 100%. Anything less than a 'complete elimination of value,' or a 'total loss,' the Court acknowledged, would require the kind of

analysis applied in *Penn Central.*" (*Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* (2002) 535 U.S. 302, 330, internal citations and footnotes omitted.)

Although the implementation of Measure Z might *ultimately* result in the end of oil and gas operations in Monterey County, the Measure's "mere enactment" plainly would not. Policy LU-1.22 provides for a minimum of a five-year phase-out period before its prohibitions are effective. And, although the new well prohibition is immediate, as the remaining Petitioners concede, it would only cause production to "exponentially decline" by 20-25% *per year*. (*Id.*, ¶¶ 52, 60; Kemp Dec., Ex. A, p. 53.) Until oil operations were terminated then, the remaining Petitioners would still be able to derive value from their existing oil wells and ongoing operations.[21]

Nevertheless, this does not mean the remaining Petitioners would be without a remedy. But for this court's finding that Policies LU-1.22 and LU-1.23 are preempted,[22] the remaining Petitioners would have the option of proceeding with an as-applied takings claim "governed by the standards set forth in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 . . . (1978)." (*Lingle*, *supra*, 544 U.S. at p. 538.)

**4. General Plan Consistency**

Petitioner NARO argues that Measure Z creates internal inconsistencies in the County's General Plan.

"The general plan is atop the hierarchy of local government law regulating land use. It has been aptly analogized to 'a constitution for all future developments.' [Citation.]" (*Neighborhood Action Group v. County of Calaveras* (1984) 156 Cal.App.3d 1176, 1183.) "[T]he general plan and elements and parts thereof comprise an integrated, internally consistent and compatible statement of policies for the adopting agency." (Gov. Code, § 65300.5.) This principle "has been uniformly construed as promulgating a judicially reviewable requirement 'that the elements of the general plan comprise an integrated internally consistent and compatible

[21] At argument, Chevron suggested that the costs of winding down operations and shutting-in idle wells would more than make up for any economic value derived from operations in the interim. However, Chevron has not presented sufficient evidence to support this claim.

[22] Petitioners do not assert that the WST prohibition would effect a taking, so the court need not address that issue.

statement of policies.' [Citations.]" (*Concerned Citizens of Calaveras County v. Board of Supervisors* (1985) 166 Cal.App.3d 90, 96–97.)

NARO claims Measure Z creates several inconsistencies within the General Plan. NARO contends that 1) Policies LU-1.21 and LU-1.23 are inconsistent with LU-1.22; 2) LU-1.21 and LU-1.22 are inconsistent; and 3) LU-1.22 is inconsistent with certain Policies under the Public Services Element of the General Plan. All of these contentions are mooted by this court's finding that Measure Z's Policies LU-1.22 and LU-1.23 are preempted.

NARO further contends that an internal inconsistency exists between Measure Z and General Plan Policies ED-1.2, ED-2.1, and ED-4.4. NARO explains that these Policies "mandate promoting sustainable economic growth, enhancing the competitiveness of Monterey County's key industrial clusters and working with stakeholders of key industry clusters to support those clusters." NARO asserts that Measure Z will seriously damage the County's economy, in violation of various aspects of these Policies.

Absent Policies LU-1.22 and LU-1.23, this argument must also fail. NARO's own expert has stated both that WSTs are not currently in use and that "it is highly unlikely" they will be employed in the future. (Gore Dec., ¶10.) Any damage to the economy stemming from Measure Z, then, must be the result of Policies LU-1.22 and LU-1.23. Because these policies are preempted, NARO's claim is meritless.

Moreover, Measure Z includes provisions to ensure its consistency with the General Plan. Section 7(F) directs the County "to amend the Monterey County General Plan . . . and other ordinances and policies affected by this Initiative as soon as possible . . . to ensure consistency between the provisions adopted in this initiative and other sections of the General Plan . . . ." (AR 160.) NARO does not explain why this provision is insufficient to remediate any purported inconsistency. (See *Citizens for Planning Responsibly v. County of San Luis Obispo* (2009) 176 Cal.App.4th 357, 378.)

In short, the court finds that Policy LU-1.21 is consistent with the General Plan.

**5. Petitioners' remaining arguments**

The court's conclusions above render it unnecessary either to reach Petitioners' remaining arguments or to proceed to any subsequent stage of these proceedings

***Disposition***

Measure Z's Policies LU-1.22 and LU-1.23 are preempted in their entirety by superior law. Further, Section 6(C) is an inadequate, unconstitutional administrative remedy.

The court directs Petitioners' counsel to prepare appropriate judgments and writs consistent with this decision, present them to opposing counsel for the County and Intervenors for approval as to form, and return them to this court for signature.

The court's orders and stays in case numbers 16CV003978 and 16CV003980 remain in effect as to all portions of Measure Z with the exception of Policy LU-1.21 as interpreted by the court.

Trial materials are returned to parties submitting the same.

Date: 4/20/17

Thomas W. Wills
Judge of the Superior Court

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**CERTIFICATE OF MAILING**
(Code of Civil Procedure Section 1013a)

I do hereby certify that I am employed in the County of Monterey. I am over the age of eighteen years and not a party to the within stated cause. I placed true and correct copies of the **INTENDED DECISION** for collection and mailing this date following our ordinary business practices. I am readily familiar with the Court's practices for collection and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Services in Salinas, California, in a sealed envelope with postage fully prepaid. The names and addresses of each person to whom notice was mailed is as follows:

Theodore J. Boustous, Jr.
Jeffrey D. Dintzer
Matthew C. Wickersham
333 S Grand Ave 54th Floor
Los Angeles CA 90071

Todd W. Smith
1101 Fifth Street Suite 100
San Rafael CA 94901

Andrew A. Bassak
1 Embarcadero Center 30FL
San Francisco CA 94111

David W. Balch
318 Cayuga St
Salinas CA 93901

Donald C. Oldaker
1430 Truxtun Avenue Suite 900
Bakersfield CA 93301

Jacqueline M., Zischke
PO Box 1115
Salinas CA 93902

Edward S. Renwick
444 S Flower Street Suite 2530
Los Angeles CA 90071

Dimitri Daniel Portnoi
400 S Hope St #1435
Los Angeles CA 90071

Matthew T. Kline
Barton H. Thompson
Heather Welles
1999 Avenue of the Stars Ste 700
Los Angeles CA 90067

Lucas A. Messenger
Bernice Conn
Michael A. Giebelson
2049 Century Park East Suite 3400
Los Angeles CA 90067-3208

Hollin N. Kretzman
1212 Broadway Suite 800
Oakland CA 94612

Deborah A. Sivas
Peter Broderick
559 Nathan Abbott Way
Stanford CA 94305-8610

Charles J. McKee
Robert Shaw
168 W Alisal St 3FL
Salinas CA 93901-2680

Gene Tanaka
Shawn Hagerty
500 Capitol Mall Suite 1700
Sacramento CA 95814

Date: December 28, 2017

Clerk of the Court,

By: D Valenzuela
Diana Valenzuela, Deputy Clerk