


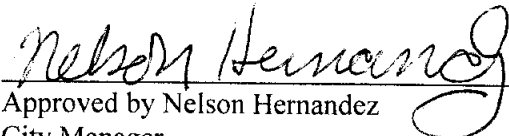


City of Carson Report to Mayor and City Council

May 20, 2014
New Business Discussion

SUBJECT: CONSIDER ADOPTING ORDINANCE NO 14-1540 BANNING HYDRAULIC FRACTURING, COMMONLY KNOWN AS "FRACKING," OR ACIDIZING IN CONJUNCTION WITH THE PRODUCTION OR EXTRACTION OF OIL, GAS OR OTHER HYDROCARBON SUBSTANCES WITHIN THE CITY OF CARSON


Submitted by William W. Wynder
City Attorney


Approved by Nelson Hernandez
City Manager

I. SUMMARY

This item is on the agenda at the direction of Mayor Dear. As the April 29, 2014 adjourned regular council meeting was about to conclude, Councilmember Davis-Holmes inquired about the possibility of agendaizing consideration of an ordinance banning "fracking" and the use of other oil or gas well stimulation technologies within the City of Carson.

Mayor Dear then directed as follows: "As the Mayor of the City of Carson, I would like to have the item agendaized at the first opportunity to ban fracking . . . and other stimulant methods" and he instructed staff and the Office of the City Attorney to bring back an ordinance for consideration and possible action at this meeting.

In response to the Mayor's directive, the Office of the City Attorney has prepared the attached draft ordinance that would prohibit hydraulic fracturing, acidizing (except for use in well cleaning) or any other well stimulation technologies in conjunction with the production or extraction of oil, gas or other hydrocarbon substances within the City of Carson.

The ordinance is in a form ready for consideration and possible action by the City Council at its sound discretion.

II. RECOMMENDATION

CONSIDER and provide DIRECTION.

III. ALTERNATIVES

1. WAIVE further reading and INTRODUCE Ordinance No. 14-1540, "AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF CARSON, CALIFORNIA, ADDING CHAPTER 11 TO ARTICLE 5 OF THE CARSON MUNICIPAL CODE TO PROHIBIT HYDRAULIC FRACTURING OR ACIDIZING IN CONJUNCTION WITH THE PRODUCTION OR EXTRACTION OF OIL, GAS OR OTHER HYDROCARBON SUBSTANCES IN THE CITY."

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2. TAKE such other action as the City Council deems appropriate that is consistent with the requirements of law.
3. RECEIVE and FILE this report and take no action on the same.

IV. BACKGROUND

Well stimulation technologies have garnered increased attention over the past several years due to concerns that these practices may contaminate groundwater supplies and increase seismic events. Currently, there are no state or even federal laws and regulations permanently in place to regulate hydraulic fracturing, acidizing or any other well stimulation technologies in conjunction with the production or extraction of oil, gas or other hydrocarbon substances. Because of this, some local jurisdictions have begun to take steps to regulate these specific technologies.

The State of California has also taken steps to regulate these technologies through two pieces of legislation, SB 4 (enacted and signed into law) and SB 1132 (currently moving through the legislative process). As of the preparation of this staff report it is unclear whether the legislature will enact AB 1132, or whether the Governor would sign the bill into law even if enacted.

As enacted, SB 4 requires the State of California, Department of Conservation, Division of Oil, Gas & Geothermal Resources (“DOGGR”) to study and then adopt state-wide regulations in connection with hydraulic fracturing and other well stimulation technologies. Some experts have advised our office that it may be at least two (2) years, if not longer, before these regulations can be finalized, adopted, and then implemented.

Due to this lack of meaningful regulation, in response to the community concerns raised at the last several City Council meetings surrounding the use of hydraulic fracturing and other well stimulation technologies, and based, in part, on the expert report prepared by Dr. Susan Mearns attached to the 10-Day Report issued on April 15, 2014, and the April 29, 2014 staff report, Mayor Dear has directed the Office of the City Attorney to bring back an ordinance for consideration by the City Council banning “fracking” or other well stimulation technologies.

At the April 29, 2014 City Council hearing, legal counsel for OXY USA, Inc. (OXY) committed, under oath, not to engage in hydraulic fracturing or acidizing in conjunction with the production or extraction of oil, gas or other hydrocarbon substances in connection with its proposed project in Carson. The attached draft ordinance is consistent with OXY’s commitment to the City Council at that meeting.

Based on our review of the case law (which we thoroughly discussed in previous staff reports and which will not be reiterated again in this report), the statutes empowering DOGGR (Cal. Pub. Resources Code sections 3000, et seq.), the case law on State preemption of city land use regulations, and considering the city's police powers to regulate in the interest of public health, safety and general welfare, we are of the considered opinion that existing statutes and regulations **do not** preempt the City from adopting this ordinance.

For example, Section 3690 of the Public Resources Code: State's oil and gas laws expressly provides, in part, the following:

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

(Pub. Resources Code section 3690; *see also* 59 Ops.Cal.Atty Gen. 461 (1976).)

Based on the record as a whole on this issue before the Council (all the staff reports, testimony, expert reports, and all evidence presented to the City Council on March 18, 2014, April 15, 2014 and April 29, 2014) all of which are hereby incorporated and adopted into this staff report and are to be made part of the record for the May 20, 2014 City Council meeting, there are warranted concerns surrounding the safety of unregulated hydraulic fracturing and other well stimulation treatment methods in conjunction with the production or extraction of oil, gas or other hydrocarbon substances which support the City Council's consideration of the attached ordinance.

Furthermore, the mere fact that the state, in the exercise of its police power, has enacted certain regulations **does not** prohibit a municipality, in the exercise of its police power, from imposing its own requirements, **provided** there is no conflict between the state and municipal regulation, the requirements of a municipal ordinance are not unreasonable or discriminatory, and the state has not fully occupied the field. (*California Rifle & Pistol Ass'n, Inc. v. City of West Hollywood* (1998) 66 Cal. App. 4th 1302 [local prohibition on sale of certain handguns not preempted by state firearm regulations].) In fact, the courts have ruled that local governments may enact laws even on matters of statewide concern. (*Bishop v. City of San Jose* (1969) 1 Cal. 3d 56, 62.)

On its face, it is clear that SB 4 has not fully occupied the field of regulation of hydraulic fracturing, acidizing or any other well stimulation technologies. DOGGR is just now commencing the study and drafting of possible regulations

consistent with that statutory direction.

If (and when) such permanent regulations are adopted by the state and *if* (and when) the City's local oil and gas regulations could be viewed to be inconsistent with such regulations, the City could *then* revisit and make proper adjustments to this ordinance to bring in into conformity to such state regulations (*if and when* those are ever adopted).

The attached draft ordinance has been assessed in accordance with the authority and criteria contained in the California Environmental Quality Act (CEQA), the State CEQA Guidelines, and the environmental regulations of the City. The Ordinance represents an action by a regulatory agency for the protection of natural resources; therefore this Ordinance is exempt from the environmental review requirements of CEQA pursuant to Section 15308 of Title 14 of the California Code of Regulations. No exception to Guideline Section 15300.2 applies.

V. FISCAL IMPACT

None.

VI. EXHIBITS

1. Ordinance No. 14-1540. (pgs. 5-8)

Prepared by: Sunny K. Soltani, Assistant City Attorney & Kathy Phalen, Special Counsel

Document 1

TO: Rev05-13-2014

Reviewed by:

City Clerk	City Treasurer
Administrative Services	Public Works
Community Development	Community Services

Action taken by City Council

Date _____ Action _____

ORDINANCE NO. 14-1540

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF CARSON, CALIFORNIA, ADDING CHAPTER 11 TO ARTICLE 5 OF THE CARSON MUNICIPAL CODE TO PROHIBIT HYDRAULIC FRACTURING, ACIDIZING IN CONJUNCTION WITH THE PRODUCTION OR EXTRACTION OF OIL, GAS OR OTHER HYDROCARBON SUBSTANCES IN THE CITY

THE CITY COUNCIL of the CITY OF CARSON, CALIFORNIA, does hereby ORDAIN AS FOLLOWS:

Section 1. Chapter 11 is added to Article 5 of the Carson Municipal Code to read as follows:

**“CHAPTER 11
PROHIBITION OF WELL-STIMULATION METHODS**

Sections:

§ 51101	Findings and Purpose.
§ 51102	Definitions.
§ 51103	Prohibited Conduct.
§ 51104	Takings Claim and Vested Rights.
§ 51105	Enforcement.

51101 Findings and Purpose.

The City Council finds and determines the following:

A. Uncontrolled and unregulated subsurface drilling and extraction of oil and gas could be detrimental to the health, safety and general welfare of the residents of the City of Carson.

B. The regulations set forth in this Chapter and the Code on oil and gas extraction and production are intended to protect the City's residents and buildings from adverse impacts that may result from the use of land for oil drilling and extraction purposes, including, among other impacts, vibration, sinking, or other damages that may result from uncontrolled and unregulated oil drilling and extraction.

51102 Definitions.

As used in this section, the following terms shall have the following meanings, unless the context clearly indicates that a different meaning is intended:

A. "HYDRAULIC FRACTURING": Any well stimulation treatment that, in whole or in part, includes the pressurized injection of hydraulic fracturing fluid or fluids, which may include a mixture of water, chemicals and sand, into an underground geologic formation in order to fracture or with the intent to fracture oil or gas bearing rock formation, thereby causing or enhancing the production of oil, gas or other hydrocarbon substances from a well.

B. "ACIDIZING": Any well stimulation treatment that uses, in whole or in part, the application of one or more acids, at any pressure, to an underground geologic formation with the intent to cause or enhance the production of oil, gas or other hydrocarbon substances from a well. Acidizing may be used in conjunction with hydraulic fracturing or any other well stimulation treatment. Acidizing may include, but is not limited to, processes known as acid fracturing and acid matrix stimulation. Acidizing does not include standard maintenance work or other routine activities that do not affect the integrity of the well or the natural porosity or permeability of an underground geologic formation.

51103 Prohibited Conduct.

Notwithstanding any other provision of this article, it shall be unlawful to use or cause to be used any land within the City for the purpose of conducting or enabling hydraulic fracturing or acidizing in conjunction with the production or extraction of oil, gas or other hydrocarbon substance from any subsurface location within the City.

51104 Takings Claim and Vested Rights.

Notwithstanding the prohibition in Section 51103, to the extent that any person demonstrates to the city engineer, or the city engineer's designee, that (1) acidization or hydraulic fracturing is necessary to recover the person's reasonable investment backed expectation established through investment made before enactment of this Chapter and (2) that acidization will not create a nuisance due to an adverse impact on persons or property within the City, then the city engineer may authorize acidization or hydraulic fracturing pursuant to a permit issued pursuant to procedures adopted by the city engineer.

Any permit issued under this Section shall be conditioned by the city engineer with all measures necessary to ensure the protection of public health, safety and welfare, and may include but not be limited to, groundwater monitoring and testing, regular inspections and reporting by City staff or expert consultants, indemnity agreement from the permittee. The city engineer shall use expert consultants as necessary to determine what conditions are necessary to comply



with this section. The permittee is responsible for all city costs incurred in enforcement of this section.

51105 Violations and Enforcement.

Any violation of this Chapter or a permit issued under Section 51104 is declared to be a public nuisance. The City may enforce this Chapter through all available administrative, criminal and civil actions available in the Code and state or federal law."

Section 2. This Ordinance was assessed in accordance with the authority and criteria contained in the California Environmental Quality Act (CEQA), the State CEQA Guidelines (the Guidelines), and the environmental regulations of the City. The City Council hereby finds and determines that the adoption of this Ordinance is exempt from CEQA pursuant to Section 15308 of the Guidelines for actions taken by regulatory agencies to assure the maintenance, restoration, enhancement, or protection of the environment. The Class 8 exemption is applicable because this Ordinance is intended to further regulate oil and gas production in the City in such a way as to better protect the environment. No exception to the exemption under CEQA Guideline Section 15300.2 applies.

Section 3. Severability. If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this section, or its application to any person or circumstance, is for any reason held to be invalid or unenforceable, such invalidity or unenforceability shall not affect the validity or enforceability of the remaining sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases of this section, or its application to any other person or circumstance. The City Council declares that it would have adopted each section, subsection, subdivision, paragraph, sentence, clause or phrase hereof, irrespective of the fact that any one or more other sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases hereof be declared invalid or unenforceable.

Section 4. The City Clerk shall cause this ordinance to be published at least once in a newspaper of general circulation published and circulated in the City within fifteen (15) days after its passage, in accordance with Section 36933 of the Government Code, shall certify to the adoption of this ordinance.

Section 5. This Ordinance shall be in full force and effect thirty (30) days after its second reading and adoption.

PASSED, APPROVED and ADOPTED at a regular meeting of the City Council on this ____ day of ____, 2014.

Mayor Jim Dear



ATTEST:

City Clerk

APPROVED AS TO FORM:

City Attorney

