CITY OF CARSON

PLANNING COMMISSION STAFF REPORT

CONTINUED PUBLIC HEARING: April 14, 2015

SUBJECT:	Zone Text Amendment No. 19-15
APPLICANT:	City of Carson
REQUEST:	To consider adoption of a Comprehensive Update of the City's Oil and Gas Ordinance Regulating Petroleum Operations and Facilities, and a finding of a Class 8 Categorical Exemption under CEQA Guidelines §15308
PROPERTY INVOLVED:	City-wide

COMMISSION ACTION

_____ Concurred with staff

_____ Did not concur with staff

_____ Other

COMMISSIONERS' VOTE

AYE	NO		AYE	NO	
		Chairman Faletogo			Gordon
		Vice-Chairman Piñon			Saenz
		Brimmer			Schaefer
		Diaz			Verrett
		Goolsby			

Item 11A

I. Introduction

This staff report includes the most up-to-date version of the proposed Oil and Gas Code. A redline version of the code is attached which identifies all changes as compared to the version included in the February 24, 2015 staff report, refer to Exhibit 6. These changes represent a refinement to the oil code as result of comments received during the Planning Commission meeting and the comments received after the staff report was released.

On February 24, 2015, the Planning Commission took public testimony and continued this matter to the April 14, 2015 hearing. This staff report provides a progress report to the Planning Commission on staff's responses to the letters provided to the Planning Commission on February 24th and the meetings held with the Environmental Commission, and with the Planning Commissioners. Staff is also planning to meet with two separate groups including a group of community members and a group representing the oil and gas interest groups. These meetings will be held on April 8, 2015.

The community members include a group of Carson residents who have shown continued interest in the code's progress. The residents have also invited individuals associated with various environmental groups to these meetings. Over time, as more community members have shown interest, staff has extended the invitation to them, as well. The group representing the oil and gas interest groups includes land and/or mineral owners, oil and gas company representatives, and their associated attorneys.

Staff will present the results of these two meetings at the Planning Commission hearing, which may provide additional information to the Planning Commission and could potentially result in further recommended refinements to the Oil and Gas Ordinance update at the night of the hearing As such, staff recommendation is for the Planning Commission to provide additional refinements to the proposed Oil and Gas Code update, if any, and direct staff to prepare an updated resolution and ordinance consistent with the Planning Commission's direction and return for final approval by the Planning Commission at a regular meeting next month. This will require the item to be continued.

II. Background

The City Council held several meetings regarding fracking and other petroleum-related issues on March 18, 2014, April 15, 2014, April 29, 2014, and May 20, 2014, refer to Exhibits 5, 7, and 9 for links to the City Council staff reports and Exhibits 6, 8, and 10 for City Council minutes.

On May 20, 2015, the City Council directed staff to commence a complete and comprehensive review to update the Municipal Code regarding oil and gas operations and to study and address all modern-day drilling issues and applications. The City Council also directed City Staff to address regulation of hydraulic fracturing ("fracking"), acidizing and any other form of well stimulation in

conjunction with the production or extraction of oil, gas or other hydrocarbon substances in the City. In addition, staff was also directed to hold two workshops with the community to receive community input and feedback. The Community Development Department also initiated this text amendment to facilitate this process.

City staff have engaged in several meetings and informational briefings since the last Planning Commission meeting. These meetings are in addition to three large community meetings, multiple small group meetings, various communications with a wide variety of stakeholders, comments received in conjunction with four City Council meetings leading to the initiation of this update, and additional comments received during and after the last Planning Commission hearing on this item.

Environmental Commission: The Planning Commission directed staff to present this matter to the Environmental Commission. Staff noticed and presented this matter to the Environmental Commission at the next regular meeting held on March 4, 2015. The Environmental Commission reviewed the items, did not raise any concerns or take any official action. Subsequently, representatives for Californians for Energy Independence expressed concern that they did not receive special notice of the Environmental Commission meeting in addition to the notice provided under the Brown Act. Staff offered to hold another meeting with the Environmental Commission to allow additional opportunity for comment, which Californians for Energy Independence declined.

Informational Briefings: Staff offered informational-only briefings to Planning Commissioners regarding the proposed Oil and Gas Ordinance and Zone Text Amendment No. 20-15, which proposes to prohibit fracking. Most Planning Commissioners took advantage of these informal briefings at three various times throughout the day on March 30th. None of the meetings included more than four commissioners. No documents were provided to the Planning Commissioners during these informal informational sessions.

Oil and Gas Interest Groups: In addition to the various written and oral comments received from various oil and gas, staff is scheduled to meet with various oil and gas interest groups on April 8, 2015. Staff will present the result of this meeting at the Planning Commission hearing.

Environmental and Community Groups: Just before release of this staff report, a group that has previously met with staff requested an additional meeting. This additional meeting is scheduled for April 8, 2015. Staff will present the result of this meeting at the Planning Commission hearing.

III. Analysis

Refinements to the Proposed Oil and Gas Ordinance

Staff, the City Attorney's office, and MRS have carefully reviewed comments from the Planning Commission, and the public, including representatives of oil and gas interests and environmental groups, and are proposing refinements to the proposed Ordinance to further clarify the intent of the legislation. In general, the proposed refinements:

- Clarify that conventional drilling methods and operations can continue;
- Note that certain heightened requirements for odor, health risk assessments, etc., apply to sites within 1,500 of a prohibited zone(refer to Exhibit 11 for setback examples from other jurisdictions);
- Refine definitions to reduce the likelihood of regulatory conflicts;
- Add requirements for storage tank monitoring, safety measures and emergency response plans; and
- Add additional language to reduce the likelihood of a "taking" that would require the City to pay compensation.

The proposed refinements have been highlighted in a revised Oil and Gas Code update that includes both proposed ordinances to facilitate review, refer to Exhibit 13

Letter and Responses to Comments

The City Attorney's Office has prepared written responses to comments received from legal counsel for entities having interests in oil and gas during and after the Planning Commission meeting on February 24, 2015, refer to Exhibit 1 and 2 for the letters and Exhibit 3 for the responses.

Additional Documents

Additional studies and reports regarding oil and gas impact have also been added to the record for consideration. Due to the volume of documents, these records have been posted and are available on the City's website for review at http://ci.carson.ca.us/department/communitydevelopment/oilcodeupdate.asp. These documents are in addition to those provided at the prior Planning Commission meetings and the four City Council meetings leading to the initiation of the Ordinances.

IV. Environmental Review

Staff performed a preliminary environmental assessment of this project and has determined that it falls within the Class 8 Categorical Exemption set forth in CEQA Guidelines section 15308, which exempts actions by regulatory agencies

for the protection of the environment. This Categorical Exemption is applicable as the proposed Oil and Gas Code Ordinance addresses the maintenance, restoration, enhancement and protection of the environment and the public health, safety, welfare of the citizens of Carson as related to potential impacts from petroleum operations and facilities within the City. The variety of environmental issues addressed include air, water, soil, geology, storm water and wastewater infrastructure, transportation, noise, emergency response, aesthetic issues, and petroleum operations near potentially sensitive receptors. The Ordinance does not provide for the relaxation of standards as compared to the current regulations in the Carson Municipal Code. Instead, the Ordinance strengthens environmental standards related to petroleum operations and facilities, and thereby advances the protection of environmental resources within the City of Carson. Furthermore, none of the exceptions to Categorical Exemptions set forth in the CEQA Guidelines, section 15300.2 apply to this project.

V. Conclusion

The adoption of the proposed Text Amendment will provide a comprehensive update to the City's Municipal Code regulations of petroleum operations and facilities, and will establish additional regulatory authority to address operational and environmental impacts related to oil and gas extraction in the City of Carson.

VI. Recommendation

Staff recommends the Planning Commission to open public hearing, take testimony, close public testimony, discuss, provide additional refinements to the proposed Oil and Gas Code update, if any, and direct staff to prepare an updated resolution and ordinance consistent with the Planning Commission's direction and return for final action by the Planning Commission at the next meeting.

VII. Exhibits

1. Comment letters Received Between February 13, 2015 and February 24, 2015
2. Comment Letter from Manatt, Phelps, Phillips, Dated March 23, 2015
3. Response to Comment Letters from Aleshire and Wynder, Dated April 6, 2015
4. City of Carson Oil and Gas Code Update: FAQ Community Handout
5. March 18, 2014 City Council Staff Report, Drilling Moratorium http://ci.carson.ca.us/MeetingAgendas/AgendaPacket/MG59098/AS59110/AS59118/AI59166/DO59198/DO_59198.pdf
6. March 18, 2014 City Council Minutes
7. April 29, 2014 City Council Staff Report, Drilling Moratorium Extension: http://ci.carson.ca.us/MeetingAgendas/AgendaPacket/MG59374/AS59386/AS59391/AI59400/DO59402/DO_59402.pdf
8. April 29, 2014 City Council Minutes
9. May 20, 2014 City Council Staff Report, Banning Hydraulic Fracturing: http://ci.carson.ca.us/MeetingAgendas/AgendaPacket/MG59593/AS59605/AS59613/AI59651/DO59682/DO_59682.pdf

10. May 20, 2014 City Council Minutes
11. Setback Examples from other Jurisdictions
12. Additional studies, reports, and other written materials can be found at http://ci.carson.ca.us/department/communitydevelopment/oilcodeupdate.asp.
13. City of Carson Oil and Gas Update (with tracked changes) dated April 7, 2015

Prepared, Reviewed and Approved by: Saied Naaseh, Planning Manager

19421 Belshaw Ave.
Carson, CA. 90746
February 13, 2015

Saied Nasseh, Planning Manager
Planning Division
701 East Carson, St.
Carson, CA. 90745

Dear Mr. Nasseh,

L.A. Times recently publised an article concerning the very issue we are pondering now. The gist of the article states, "Drilling reinjection wells near into, or through aquifers well eventually contaminate these aquifers."

Oil companies will say, "We reinject a solution cleaner than your drinking water". Then why are potable water wells near reinjection well areas becoming contaminated?

It is a documented fact that Fracking and reinjection wells cause water contamination, earthquakes, and air pollation.

* Thus updates to the city's Oil and Gas Code should include....

① Prohibition of hydraulic Fracturing.
② Prohibition of highly toxic chemicals to extract oil from regular/standard drill wells.
③ Prohibition of reinjection of the toxic mix, used by standard well drills, back into the ground through reinjection wells.
④ Prohibition of the release of toxic emmisons into the air, at night, in residential areas by refineries.
⑤ Prohibition of high density well drilling in established residential areas.
⑥ Provision of a bond to compensate residents in drill areas who experience hardship of health and property due to proximity to oil well drilling and refineries.

" over "

EXHIBIT NO. 01

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(F) Establishment of a committee to monitor, through Oil company documentation and residential input, if codes are met or violated.

Thank you for considering my code up dates

Yours truly,
Ida B. Boyce

2015 FEB 17 AM 11:13

Saied Naaseh

From: Audrey Wilson <ammwilson@att.net>
Sent: Tuesday, February 17, 2015 9:50 PM
To: Saied Naaseh
Subject: Fracking and Airborne Benzene Concerns

Dear Mr. Naaseh,

I oppose fracking anywhere, especially in Carson, where I live and breathe.

My concerns about fracking are based on my professional knowledge and experience. Before I moved to Carson, I was an environmental engineer with the U.S. Environmental Protection Agency responsible for controlling industrial pollution and conducting research on the health effects of organic compounds. I was also a water resources engineer with the U.S. Army Corps of Engineers responsible for controlling ground water pollution and soils erosion.

I will not take the risk of attending the community meeting to present my concerns in person because doing so risks my exposure to more benzene than I can safely tolerate.

I am already disabled by Toxic Encephalopathy (TE), a degenerative neurological condition, and we believe it was caused by my daily exposure to benzene and other volatile organic chemicals in the cleaning solutions used by others. There is no treatment that will prevent additional neurological damage for those of us with TE, other than to avoid the chemicals that caused it. My medical problem is more common that many realize; it's just that some people who actually have TE get diagnosed with Multiple Sclerosis if they and their doctors don't realize their condition was caused by breathing toxins.

Benzene is an airborne by-product of fracking and the prognosis for those who live near fracking, especially those already suffering from TE, is irreversible brain damage and paralysis. Many others may develop degenerative neurological conditions if they live near fracking. Ever since I moved to Carson, I have used some of the same indoor air pollution control techniques in my home that I recommended to industry years ago and that keeps the air in my home clean enough for me to breathe safely … so far. I'm doing all that can possibly be done to clean the air in my home and my survival will be in jeopardy if I continue living here if fracking comes to Carson.

Don't let Carson be like Baldwin Hills and Oklahoma and have earthquakes and ground water problems caused by fracking. Let Carson be like New York State and ban fracking in Carson <u>permanently</u>.

Very truly yours,
Audrey M. Wilson
1322 E Kramer Drive
Carson 90746
310.604.0410

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Saied Naaseh

To: Saied Naaseh
Subject: FW: Carson Code Review
Attachments: City of Carson Oil Code-R9TWTC.docx

From: Tom Williams [mailto:ctwilliams2012@yahoo.com]
Sent: Thursday, February 19, 2015 10:42 AM
To: Saied Naaseh
Subject: Re: Carson Code Review

LOTS of issues

I leave tomorrow and return on 02/28 from Texas oil and gas conference.
I will not attend the planning commission.

See current status of review in tracked changes.
Based on this vers. i will use a cleanup vers....out of tracked changes and look at the general reorganization of the whole thing - ToC and all headings

All pipelines must be included under a pipeline franchise amendment not here...dividing line should be at the flange on the discharge side of the pumps/compressors, OR site boundaries, OR entering public easements or lands..

All tanks, site piping, gas plant, steaming plant must have IMPERVIOUS secondary containment (HDPE spray-on or sheet lining.

Nothing is mentioned regarding secondary or tertiary containment for tanks, process units/piping, facilities, and site.

No discussion is provided for Well Cellars - with impervious containment - standard for LACity and SCAQMD.

Emergency/Environmental plans are confused....and must be integrated to real-time video and sensor monitoring.

References to Owners is redefined-as the City has no jurisdiction of subsurface property owners (who own everything, not just mineral rights) the city must define and delineate properties - surface/subsurface.

Well ownership must be tied to the well, esp. those abandoned, as the operator must have a lease or ownership of the subsurface before they put in the conductor casing and the operator may no longer be available.

MRS does not know O&G and DOGGR
They don't seem to know the DOGGR permits and applications especially

, and does not understand Pre-emption issues with Gas Plant, Casing testing, Steaming Plant, etc.

The code does not flow well - permits > CUP > DA process is not coordinated
Permits must have a procedure for processing the city's jurisdiction for single isolated wells to be reworked, redrilled, and plugged/abandon - all have notices of intent and permits for DOGGR and require local approvals...

Editorally inconsistent word use - petroleum vs Oil & Gas, facility vs site.....
Just use oil and gas everywhere
Just use site

Can have more later before meeting next week

Dr. Tom Williams, Sr. Techn.Advis., CCSC
323-528-9682
ctwilliams2012@yahoo.com

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Saied Naaseh

From:	Tom Williams <ctwilliams2012@yahoo.com>
Sent:	Monday, February 23, 2015 8:02 AM
To:	Saied Naaseh
Subject:	Fw: Planning Commission and Oil and Gas Ordinance -
Attachments:	City of Carson Oil Code-R9TWTC03.doc
Categories:	Red Category

I won't be at the Tuesday meeting, in TX for Soc.Petrol.Engrs. conference, boring-but not wells !!!

Considerations need to be continued

Needs to be reorganized and cleaned-up technically and editorial changes (see attached)
Readability is key to consistent and continuing enforcement and implementation

Ask DOGGR District 1, SCAQMD, and LARWQCB to review and comment before City final consideration

Definitions are inconsistent and do not reference DOGGR/Glossary=FedOSHA or Schlumberger for typical definitions
Differences between Site and Facility and Facilities - chose one and use thru-out
between Petroleum and Oil and Gas - Is it for petroleum or oil and gas - chose one and use thru-out

Exploration and Drilling must be defined as also including Reworking Redrilling and Plugging

Should avoid word drilling and just talk about the wellhead and surface facilities ONLY
Pipelines vs piping -Outside vs inside site boundaries - reference Pipeline Franchise Code sections

No clear relationships between City Permits, CUPs, and DAs and DOGGRs subsequent/following notices, applications, permits, DOGGR can hold a Notice/Application until the local agency has approved before their considations.

Permits needs to be redone is same style as CUP and DA and show connections between permits and CUP and between CUP and DA

Need separate requirements for
Gas Plant ***Special Permit*** vs OWG separators vs dehydration
Gas for sales-distribution/delivery offsite vs for pipeline to others for for use on site
Steam Plants - **Special permit**
Piping

FRACKING: Any artificial activities and equipment for increasing the permeability of the geological formations (fracture permeability); including acid fracs, frac packs, and fracing and acidization with application pressures/flows of 500psig/500gpm

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Prohibit any temporary industrial activities requiring pumps or pumping systems which develop pressures of more than 200 psig and flows of more than 200 gpm for injection into the ground

Emergency, Health, Safety, and Environmental issues, requirements, plans, etc should be cover in one integrated section
Should be signed off on by Fire Dept., SCAQMD, LARWQCB, etc. before codified

9521.E Refers to "Area of Review" which is a DOGGR term for their Underground Injection Program and permits and has been delegated to DOGGR by EPA. Either delete or change and apply only to surface properties,
Delete any reference to leases which is either a County or DOGGR jurisdictional realm or clarify by adding surface or subsurface.

9530.2 and elsewhere refers to Blowout testing, etc. which is the jurisdiction of DOGGR

9530.4/9501.I Tank bottoms and containment walls must be lined beneath monitoring with impervious membranes/spray coatings.

9530.61 is out of place as NGLs are salable products and NOT chemicals nor wastes

9531.4/others Gas Plant is more than a Oil/Water/Separator and is a processing facility for a directly salable product and must be considered as a "refining facility" as salable product must meet SCGasCo. specifications.
9532 refers to Test Well while DOGGR has NO SUCH Category and is equivalent to DOGGR Exploratory Well, also proprietary well, some times.

9533 pipelines are not appropriate for this section

Oil and gas lines beyond the site boundaries should be covered in the city franchised pipeline code not here
All piping within an O&G site should be above ground

EARTHJUSTICE

ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES
NORTHWEST ROCKY MOUNTAIN WASHINGTON, D.C. INTERNATIONAL

February 23, 2015

Saied Naaseh
Planning Manager
City of Carson
701 East Carson Street
Carson, California 90745
T: (310)952-1770
snaaseh@carson.ca.gov

Re: Proposed Revisions to Regulations Dealing with Oil and Gas Drilling Operations

Dear Mr. Naaseh –

This letter is submitted on behalf of the Carson Coalition, Center for Biological Diversity, Communities for a Better Environment, and Food and Water Watch, and comments on the proposed revisions to the municipal code sections dealing with oil and gas drilling operations in the City of Carson (the "City").

These organizations are all dedicated to protecting the health and well-being of the citizens of Carson, and are particularly concerned about the harmful effects that continued oil and gas drilling operations will have on the community. They believe that the proposed revisions fail to take the necessary measures to protect the community, and now suggest additional revisions to the code to provide additional, needed protections.

The bottom line is that oil and gas development is inherently dangerous and poses a serious risk to our air, water, climate, and health. No amount of regulation will eliminate these risks. And environmental harms do not adhere to zoning boundaries, so restricting oil and gas activity to certain areas of the city is not a substitute for real protections. We encourage you and the Planning Commission to consider a prohibition on these harmful activities, rather than asking the community to continue to bear the risks of exposure. Local governments have the legal authority to use local laws to ban oil and gas activity within their jurisdictions. Carson should use this authority to prohibit all oil and gas activity within the city and move toward a cleaner and healthier future.

1. **The Revisions to Oil and Gas Code Permit Harmful Well-Stimulation Treatments**

While the proposed revisions to the Oil and Gas Code ban hydraulic fracturing, the revisions would allow the use of other harmful well-stimulation treatments like acidizing, and fail in safeguarding citizens from the effects of such treatments.

The Oil and Gas Code requires the City to regulate extraction activities in a manner that protects the public health and environment. The stated purpose of the proposed revisions to the oil and gas code are: "[t]o protect the health, safety, public welfare, physical environment and natural resources of the city by the reasonable regulation of petroleum facilities and operations, including but not limited to: exploration; production; storage; processing; transportation; disposal; plugging, abandonment and re-abandonment of wells; of operations and equipment accessory and incidental thereto and development and redevelopment of oil fields/sites." (Proposed Revisions to Carson Oil and Gas Code, Section 9500.)[1] Furthermore, the code requires to Planning Commission to approve a Conditional Use Permit allowing drilling activity only if it "will not be detrimental to the comfort, convenience, health, safety, and general welfare of the community, and will be compatible with the uses in the surrounding area." (Section 9507.3.)

However, the proposed revisions to the Oil and Gas Code do not fulfill these mandates to protect the public health, since they still would allow well stimulation treatments (other than hydraulic fracturing) to be done, if the permittee demonstrates that: (1) "well stimulation, other than hydraulic fracturing, is necessary to recover the owner/operator's reasonable investment backed expectation established through investment made before the effective date of this ordinance"; and (2) that such well stimulation will not create a nuisance. (Section 9536.)

This exemption for well stimulation treatments is flawed, since the phrase "owner/operator's reasonable investment backed expectation" is vague, and does not conform to the "vested rights" exemptions used in other jurisdictions to preserve operators' property and constitutional rights. Thus, operators in Carson could be allowed by the City to continue operations, even if they have no actual legal entitlement to continue drilling operations using well stimulation treatment. By contrast, in San Benito County, where the "Protect Our Water and Health: Ban Fracking Initiative" ("Measure J") banning "high-intensity petroleum operations" passed in the November 2014 election, the exemption for operators' "vested rights" is described in more narrowly tailored terms.[2] The initiative states that it "includes reasonable provisions to protect property rights and any vested rights," and describes "vested rights" as those that are recognized by "State law." (Measure J, pp. 7-8.) Here, the City of Carson unnecessarily creates ambiguity, and the City of Carson should tie the "vested rights" exemption to entitlements recognized by State law.

In addition, the proposed revisions ban hydraulic fracturing, but would allow operators to continue using other dangerous types of well stimulation treatments such as acid matrix stimulation. These types of well-stimulation treatments cause a number of harmful effects,

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[1] The Proposed Revisions are available at http://ci.carson.ca.us/content/files/pdfs/planning/oilcodeupdate/oil_code_draft_02102015.pdf

[2] *Available at* https://docs.google.com/viewer?a=v&pid=sites&srcid=ZGVmYXVsdGRvbWFpbnxzYW5iZW5pdG9yaXNpbmcyfGd4OjE1NTNlNTIwNTU3YTM3NTU.

ranging from: (1) air pollution from volatile organic compounds, nitrogen oxides, particulate matter, hydrogen sulfide, and other substances released during the process; (2) the contamination of drinking water and soils by chemicals utilized during the process and wastewater produced during the process; and (3) an increased risk of seismic activity and ground disturbance.[3] Exposure to the pollutants released during the oil development process has been linked to numerous harmful health effects including respiratory and neurological problems, cardiovascular damage, endocrine disruption, birth defects, cancer and premature mortality.[4]

Local governments in places like San Benito County have provided for the phasing out of dangerous high-intensity petroleum operations like acid matrix stimulation, and steam- and carbon- flooding. (*See* Measure J, pp. 6-7.) To provide the fullest possible protection from high-intensity petroleum operations for city residents, the City of Carson should not just ban hydraulic fracturing, but should adopt language similar to that used in San Benito County, phasing out the use of other risky well stimulation treatments.

2. **The Revisions Do Not Require Buffers Necessary for Protection of Public Health**

In addition to allowing operators to continue using risky well stimulation treatments, the proposed ordinance allows operations to be conducted in close proximity to schools, residences, businesses, and public rights of way. Therefore, when venting and flaring associated drilling and production operations occur, and in the event of any well site accident, residents will be directly impacted. The City of Carson should widen the buffers required by the ordinance, to limit the risks to residents' health.

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[3] *See* Natural Resources Defense Council, *Drilling in California: Who's at Risk* (October 2014) at pp. 6-8, *available at* http://www.nrdc.org/health/files/california-fracking-risks-report.pdf; Clean Water Action, *In the Pits* (November 2014); *available at* http://cleanwateraction.org/files/publications/In%20the%20Pits%20-%20Oil%20and%20Gas%20Wastewater%20in%20California.pdf; Wei Gan, Cliff Frolich, *Gas Injections May Have Triggered Earthquakes in the Cogdell Oil Field, Texas*, Proceedings of the National Academy of Sciences, Vol. 110 no. 47 (November 19, 2013), *available at* http://www.pnas.org/content/110/47/18786.abstract; NextGeneration, *Distracted by Fracking* (August 8, 2013), *available at* http://thenextgeneration.org/blog/post/monterey-shale-series-distracted-by-fracking, *The Most Dangerous Chemical You've Never Heard Of* (August 15, 2013), *available at* http://thenextgeneration.org/blog/post/monterey-shale-series-the-most-dangerous-chemical; Jueren Xie, *Analysis of Casing Deformations in Thermal Wells* (2008); David Kulakofsky, *Achieving Long-Term Zonal Isolation in Heavy-Oil Steam Injection Wells, a Case History* (20008).

[4] *See Drilling in California* at pp. 6-8; *In the Pits* at Appendix A; Center for Biological Diversity, *Dirty Dozen: The 12 Most Commonly Used Air Toxics in Unconventional Oil Development in the Los Angeles Basin, available at* http://www.biologicaldiversity.org/campaigns/california_fracking/pdfs/LA_Air_Toxics_Report.pdf

The proposed revisions would prohibit "oil and gas facility sites and associated operations" from being located within: (1) Fifteen hundred feet of any "public school, public park, hospital, long-term health care facility"; (2) Fifteen hundred feet of "any residence or residential zone," except "the residence of the owner of the land on which a well might be located and except a residence located on the land which, at the time of the drilling of the well, is under lease to the person drilling the well"; (3) Five hundred feet of any commercially designated zone; (4) Fifty feet of any "dedicated public street, highway, public walkway, or nearest rail of a railway being used as such, unless the new well is located on an exciting drill site and the new well would not present a safety issue or cause conflicts with a right of way." (Section 9521.)

Various studies and reports have called into question whether these types of buffers are sufficient to insulate surrounding communities from the risks of oil and gas drilling. Studies have found that there are substantial exposures to volatile organic compounds among residents living half a mile or less from well sites, when compared to residents greater than half a mile from wells.[5] In evaluating whether 625 foot buffers around drilling sites served as an adequate safety measure, researchers at the West Virginia University School of Public Health found that there were elevated levels of particulate matter and benzene within that zone, at levels which could cause potential health effects.[6] Hydrofluoric acid, a chemical used to corrode rock in acidizing treatments, turns into vapor at room temperature and is highly toxic and can cause severe skin and respiratory system burns.[7] In filings submitted to the Environmental Protection Agency, BP and Marathon reported that accidental hydrofluoric releases from their refining facilities could vaporize and travel for over 20 miles.[8] Studies have shown that proximity to well sites affects fetal development, increasing the prevalence of low birth weight and premature birth, as well as increasing the risk of fetal heart and neural tube defects.[9]

Locating drilling operations close to community residents would add to the environmental and health burdens already being suffered by the community. According to the CalEnviroScreen

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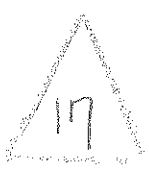
[5] *See* New York State Department of Health, *A Public Health Review of High Volume Hydraulic Fracturing for Shale Gas Development* at 35 (December 2014); *available at,* http://www.health.ny.gov/press/reports/docs/high_volume_hydraulic_fracturing.pdf

[6] Michael McCawley, West Virginia University School of Public Health; *Air, Noise, and Light Monitoring Results for Assessing Environmental Impacts of Horizontal Gas Well Drilling Operations* (May 3, 2013); available at http://wvwri.org/wp-content/uploads/2013/10/A-N-L-Final-Report-FOR-WEB.pdf.

[7] Earthworks, *Acidizing,* http://www.earthworksaction.org/issues/detail/acidizing#.VOPPivnIYgo

[8] The Center for Public Integrity, *Use of Toxic Acid Puts Millions at Risk* (February 24, 2011); *available at* http://www.publicintegrity.org/2011/02/24/2118/use-toxic-acid-puts-millions-risk

[9] Elaine Hill, *The Impact of Oil and Gas Extraction on Infant Health in Colorado* (2013); Lisa McKenzie, *Birth Outcomes and Maternal Residential Proximity to Natural Gas Development in Rural Colorado,* Environmental Health Perspectives (2014).



database[10] prepared by California's Office of Environmental Health Hazard Assessment (OEHHA), the City of Carson ranks in the top 15% of most-polluted communities in the state.[11] Community members in Carson are at greatest risk for exposure to toxic releases from industrial facilities (92 percentile), polluted groundwater (93 percentile), impaired water bodies (95 percentile), fine particulate matter and diesel particulate matter (72 percentile and 79 percentile).[12] In addition, the residents of Carson are mostly from minority groups – the city is 23.8% African American, 25.6% Asian, and 38.6% Hispanic/Latino.[13] The city's per capita income in 2012 was $23,650.[14]

In order to protect city residents, who already suffer disproportionately high environmental and health risks when compared to the rest of the state, the City of Carson should increase the buffers required by the proposed ordinance.

3. **The Revisions Do Not Provide for Adequate Enforcement**

The proposed revisions to the oil and gas code provide some limited methods for enforcement, and in the event an operator violates the provisions of the code: citizens may complain to the City's Petroleum Administrator or bring an action for nuisance, and the City may seek injunctive relief or impose fines against an operator in violation of the code. (Sections 9512-9515.)

The code does not explicitly provide for civil actions brought by citizens against operators, nor does it provide for the imposition of criminal fines or penalties against operators. These omissions make citizens rely on the City to take action against rogue operators, and make it difficult for citizens to seek relief if the City does not act promptly or vigorously to hold operators accountable. In addition, the absence of criminal fines and penalties diminishes the deterrent effect of the code and enables operators to simply build civil fines into their costs of doing business.

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[10] CalEnviroScreen is an Environmental Health interactive screening tool prepared by OEHHA, and compiles information about the pollution burdens faced by communities around the state. *See* Report on Draft California Communities Environmental Health Screening Tool, Version 2.0 (April 2014); *available at* http://oehha.ca.gov/ej/pdf/CES20PublicReview04212014.pdf. CalEnviroScreen looks at factors such as ozone, particulate matter and other air quality risks; pesticides, air toxics, groundwater and other environmental health risks; as well as socioeconomic factors such as education levels, linguistic isolation and poverty. *Id.*at 15.

[11] CalEnviroScreen is available at http://oehha.ca.gov/ej/ces2.html

[12] *Id.*

[13] United States Census Bureau QuickFacts on Carson, California, *available at* http://quickfacts.census.gov/qfd/states/06/0611530.html

[14] *Id.*

In addition, the proposed revisions allow an operator two violations before it is considered "high risk." *All* oil and gas activity is high risk, and it is unacceptable to allow operators two free passes before stricter oversight begins.

The City should include citizen and criminal enforcement provisions into the proposed revisions, to ensure that community residents have the ability to hold operators accountable for violations of the terms of the ordinance and for the harms they impose on the community.

4. Conclusion

As set out above, the oil and gas code should be revised to ensure the enhanced protection of public health and the environment. We therefore respectfully request that the City adopt the revisions proposed in this letter, and incorporate them into the latest version of the oil and gas code.

Sincerely,

On behalf of the Carson Coalition,
Center for Biological Diversity,
Communities for a Better Environment,
and Food and Water Watch

manatt
manatt | phelps | phillips

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February 23, 2015

Client-Matter: 41509-033

BY EMAIL

Members of the City Planning Commission
City of Carson
City Hall
701 East Carson Street
Carson, California 90745

Re: Proposed Zone Text Amendments 19-15 and 20-15 re Petroleum Operations, Hydraulic Fracturing and Acidizing (collectively, the "Amendment")

Ladies and Gentlemen:

I am writing on behalf of our client, The Carson Companies ("TCC"), to provide the City of Carson with information concerning potential legal repercussions of the Amendment's proposed changes to local regulation of petroleum operations, hydraulic fracturing and acidizing. TCC, its affiliates and owners own very substantial mineral rights to lands lying within the City of Carson which would be severely economically impacted if the Amendment were to be adopted. Our clients have reviewed the draft Amendment and are strongly opposed to it.

We believe that the draft Amendment poses very significant legal issues that must be much better understood before this matter is taken up by the City. Important among those issues are whether such an Amendment, if enacted, would result in a taking of property requiring compensation by the City, and in any event be preempted by State law.

Regulations Making it Commercially Impracticable to Exploit Natural Resources, or Enjoy Beneficial Use of the Surface Land, Give Rise to a Claim For Just Compensation

The Amendment being considered by the City purports to address hydraulic fracturing and acidizing, but by its broad and vague language in effect would render impracticable most forms of oil production on land within the City. Any form of regulation that severely limits the use of acidizing, a process in wide use in the oil industry, risks forcing the curtailment of oil exploration and exploitation within the City, resulting in the loss of hundreds of millions of dollars to mineral rights holders over time.

For the reasons set forth below, we believe that those who lose the value of their mineral assets as a result of City action will have a claim against the City for just compensation under

both the federal and state Constitutions. The restrictions contemplated by this Amendment will not only impact companies such as The Carson Companies, but also thousands of individuals and entities, as well as many charitable organizations, that are entitled to royalties from development of these resources.

The state and federal Constitutions prohibit government from taking private property for public use without just compensation. (Cal. Const., art. I, § 19; U.S. Const., 5th Amend.) As long ago as 1922, in the seminal case on regulatory inverse condemnation, a case remarkably similar to that posed by the proposed Amendment, the United States Supreme Court stated that the right to a natural resource necessarily includes the right to extract it, and that a statute making it "commercially impracticable to" extract the resource has essentially "the same effect for constitutional purposes as appropriating or destroying it." *Penna. Coal Co. v. Mahon* (1922) 260 U.S. 393, 414-415 (*Penna. Coal*). The court stated that where "a regulation goes too far it will be recognized as a taking" (*id.* at 415).

The Amendment would give rise to a claim for just compensation by oil well operators and owners as well as holders of mineral rights and royalty interests. The Amendment seeks to ban certain uses of acid associated with oil production, despite acid having been used safely in the Dominguez Hills Oil Field in Carson for many decades. The proposed Ordinace will thereby effectively prevent the exploitation of these mineral resources, very substantially impairing the mineral rights held by hundreds of individuals and charities. Thus under *Penna. Coal*, the proposed Amendment would constitute a taking of those mineral rights and royalty interests.

The long running litigation between the City of Hermosa Beach and MacPherson Oil shows how a regulatory overreach results in repercussions that could financially destroy a municipality. The City of Hermosa Beach adopted an ordinance that effectively prohibited oil production operations within the city limits. Using standard industry valuation techniques, Macpherson Oil was able to show that the financial loss resulting from the actions of Hermosa Beach could be as much as $850,000,000. When a court confirmed that Hermosa could be liable for that amount of compensation, the City was forced to settle the matter. Note that in the MacPherson Oil dispute with Hermosa Beach, the reserves at issue, like those of The Carson Companies, had not yet been developed.

There are undoubtedly City residents that are royalty holders with financial interests in the mineral rights that would be impacted by the proposed Amendment. While their interests range in amount, any action that results in a decrease in current production would financially harm many of the City's own citizens.

The current proposal fails to adequately address the concerns of those who will lose property and production rights, and ignores potentially disastrous claims against the City for just compensation.

While the draft Amendment proposes certain safeguards intended to protect it from Constitutional challenge, the only relief that can be given to make this Amendment constitutional is the awarding of just compensation. The City has no authority to carve out exceptions to an unconstitutional law that only apply to individuals who can risk the substantial time, cost and effort required to vindicate their rights, and the Amendment's proposed standards for granting constitutional relief are so vague as to leave both the proposed Petroleum Administrator and the owners of the mineral rights completely up in the air as to what to do. Obviously, the Petroleum Administrator would have to allow reasonable well enhancement techniques in order to protect the constitutional rights of the mineral owners and the City's economic welfare, but that puts the Petroleum Administrator in a very difficult position.

Similarly, and equally unconsitutionally, the Amendment would attempt to directly and indirectly deprive surface owners of all rights to develop their properties where the properties had been used for oil and gas production. As many of you will know, building over closed oil wells is extremely common, particularly in Cities such as Carson, with a long history of oil and gas production. State regulations on well closures and other safeguards make this an essentially risk-free process, as demonstrated by the lack of problems in Carson and elsewhere where buildings have been built over closed wells. In fact, given that well are closed with materials far denser than the adjoining soils, it is likely that the portions of buildings built over closed wells are less likely to be subject to vapor intrusions than the parts that are built on native soils.

Keep in mind also that the owners of mineral rights and the surface owners are usually different entities. Thus, a surface owner whose property is used by mineral owners for oil and gas production would lose all economic use of his property, without even enjoying the benefits of the oil and gas production. This part of the Amendment thus also fails the test of *Penna. Coal.*

California Law Preempts Local Regulation

State law comprehensively addresses oil and gas operations, including the drilling, construction, and operation of oil and gas wells, and the technical question of whether to inject fluids to improve reservoir productivity (Pub. Resources Code, § 3000 *et seq.*; Tit. 14, Cal. Code Regs., § 1712 *et seq.*). To the extent that issues associated with oil and gas operations have not been fully covered by State law, the Legislature has vested discretion over technical decisions with a State Oil and Gas Supervisor ("Supervisor"), who, in contrast to the City Engineer, does have the training and resources to make such decisions (Pub. Resources Code, §§ 3013, 3222).

Moreover, State law evidences "as a policy of the state" an intent to maximize the productivity of oil and gas operations, while fully addressing potential environmental effects thereof (Pub. Resources Code, § 3106). That provision authorizes the Supervisor of the State Division of Oil, Gas and Geothermal Resources—rather than a City official—to approve well stimulation methods and create a consistent statewide program to "further the elimination of waste by increasing the recovery of underground hydrocarbons." State law has therefore extensively covered the field of oil and gas operations as it relates to downhole oriented matters such as well stimulation, including hydraulic fracturing and acidizing.

By itself, this body of law shows the State's intention to occupy this field. That intent was strengthened by the passage of SB 4 (Pavley) which formalizes the scope of the state's regulation of well stimulation and further confirms that this subject has become exclusively a matter of State concern. Therefore, local regulation on this subject is preempted. (*Morehart v. City of Carson* (1994) 7 Cal.4th 725, 751 [citations omitted]).

Under California law, local government regulations that conflict with State general law are preempted (Cal. Const., Art. XI, § 7). The preemption may be express or by implication (*Candid Enterprises, Inc. v. Grossmont Union High School Dist.* (1985) 39 Cal.3d 878, 885). Express preemption exists where the Legislature has included in a statute a statement of intent to preempt local regulations (52 Ops.Cal.Atty.Gen. 166, 168 (1969)). Implied preemption exists under any of the following circumstances: (1) the subject matter has been so fully and completely covered by the State 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 State general law, but the context clearly indicates that State concerns will not tolerate local regulation of the same subject; or (3) the subject matter has been partially covered by State general law, and the subject is of such a nature that the adverse effects of local regulation outweigh the possible benefits to the local government (*Morehart,* supra, 7 Cal.4th 725 at 751 [citations omitted]). In determining whether the Legislature intended to occupy the entire field to the exclusion of all local regulation, a court will look to the "whole purpose and scope of the legislative scheme," not just the language used in the statute (*Tolman v. Underhill* (1952) 39 Cal.2d 708, 712). A local regulation that is preempted by State law is void and unenforceable (*People ex rel. Deukmejian v. City of Mendocino* (1984) 36 Cal.3d 476, 484). As discussed below, California's quite extensive state regulatory program satisfies all of the three routes to implied preemption.

Because of its strong interest in oil and gas resources and intent to maximize the productivity of oil and gas wells consistent with minimization of environmental impacts, California has adopted statutes and regulations that comprehensively address oil and gas operations. The statutory provisions for oil and gas law are contained within Division 3 ("Oil and Gas") of the Public Resources Code, encompassing sections 3100 through 3865. These statutes address oil and gas operational issues in detail, including notice of intent to drill and

abandon (§§ 3202, 3229); bonding (§§ 3204- 3207); abandonment (§ 3208); recordkeeping (§§ 3210-3216); blowout prevention (§ 3219); casing (§ 3220); protection of water supplies (§§ 3222, 3228); repairs (§ 3225); regulation of production facilities (§ 3270); waste of gas (§§ 3300-3314); subsidence (§ 3315 *et seq.*); spacing of wells (§§ 3600-3609); unit operations (§§ 3635-3690); and regulation of oil sumps (§§ 3780-3787).

Importantly, State law already addresses operational activities that involve the use of well stimulation. For example, unless prohibited in an applicable lease or contract, State law authorizes a lessee or operator, with the approval of the Supervisor, to use reasonable and prudent methods to explore for and remove all hydrocarbons, including "the injection of air, gas, water, or other fluids into the productive strata, the application of pressure heat or other means for the reduction of viscosity of the hydrocarbons, the supplying of additional motive force, or the creating of enlarged or new channels for the underground movement of hydrocarbons into production wells" (Pub. Resources Code, § 3106, subd. (b)). State oil and gas law also contains provisions to address potential effects from hydraulic fracturing, including requirements pertaining to well casings, blowouts, and bore hole integrity (*e.g.*, cementing) (Pub. Resources Code §§ 3208, 3219, 3220, 3270, 3300-3314, 3600-3609). State law includes extensive regulation of possible environmental effects from oil and gas operations, including provisions that would address potential impacts from well stimulation. For example, the Supervisor is directed to prevent, as far as possible, damage to life, health, property and natural resources, and damage to underground and surface waters suitable for irrigation or domestic purposes by the infiltration of, or the addition of, detrimental substances (Pub. Resources Code, § 3106(a)).

As further evidence of California's desire to keep the regulation of oil production at the State level, the California legislature enacted SB 4 (Pavley), a law that establishes a statutory framework for the regulation of hydraulic fracturing and other well stimulation techniques. As set out in recently released regulations, all the requirements of the legislation are to be carried out at the State level including the development of regulations on hydraulic fracturing and other well stimulation techniques, the undertaking of a scientific study overseen by the Secretary of the Natural Resource Agency to ascertain the health and environmental impacts of these activities, and the development of a State permitting program to govern them.

Thus, the State has already fully addressed the issues that the proposed Amendment attempts to address, but with the required resources, expertise and perspective necessary to do it properly.

Conclusion

In summary, under both the federal and state Constitutions, local regulations that have the effect of stopping or impacting oil production at wells currently in service give rise to claims for

compensation from both well owners and royalty holders. **Based on anticipated production levels for our clients' mineral rights, claims for diminution of value against the City could easily be hundreds of millions of dollars—or more.**

State law comprehensively covers the subject of oil and gas operations, including whether to use methods to stimulate reservoir productivity. This comprehensive regulation of oil and gas operations is consistent with the State's strong interest in oil and gas resources, its intent to maximize the recovery of hydrocarbons from oil and gas reservoirs and its mandate to protect our environment. The recent passage of SB 4, which creates a State regulatory framework for hydraulic fracturing and other well stimulation techniques confirms the State's continued desire to regulate issues related to oil and gas production at the State level. Thus, when looking at the "whole purpose and scope of the legislative scheme," it is obvious that the Legislature intended to preempt local regulation on the subject of oil and gas operations[1] (*Tolman v. Underhill* (1952) 39 Cal.2d 708, 712). A local regulation that attempts to impose a ban on the use of hydraulic fracturing or other forms of well stimulation, is preempted by State law and unenforceable, and would most certainly be challenged on such basis.

We appreciate the opportunity to provide our input on this topic and look forward to addressing this issue cooperatively. Should you have any questions regarding the above analysis, please give me a call at (310) 312-4171.

Sincerely,

Tom Muller

cc: City Clerk Donesia L. Gause (cityclerk@carson.ca.us)
City Attorney Sunny Soltani (ssoltani@awattorneys.com)
James D. Flynn, Carson Estate Trust
John W. Hawkinson, Carson Estate Trust

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[1] *The California Office of the Attorney General reached a similar conclusion when considering the issue of State preemption of local regulation of oil and gas operations in the mid-1970s. (59 Ops.Cal.Atty.Gen. 461, 478 (1976) ["Where 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 activity."].)*

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BY EMAIL

February 24, 2015

Honorable Chair Faletogo &
Honorable Planning Commissioners
City of Carson Planning Commission
701 East Carson Street
Carson, CA 90745

Re: Carson Oil Code Update; Planning Commission Meeting February 24, 2015, Agenda Item No. 12-B

Dear Honorable Chair Faletogo and Honorable Commissioners:

We are writing on behalf of our client, Californians for Energy Independence, a statewide coalition of energy producers, business associations, and local government leaders and agencies, among others, formed to educate the public about proven, safe oil extraction technologies, regarding the proposed Carson Oil Code Update.

Having reviewed the current regulations and the proposed regulations, we are confident that the proposed regulations are entirely unnecessary to protect the City's interests and its residents. The City's proposed regulations do nothing more than duplicate existing state and federal oil and gas regulations and, more importantly, create unnecessary litigation risk for the City. We strongly urge this Commission to recommend against their adoption.

While existing oil and gas regulations in Carson have been adopted over time and have not been consolidated, they have served the City well with regard to regulating oil and gas development and protecting the City's residents. The state and its agencies, including the Division of Oil, Gas and Geothermal Resources and the Air Resources Board, have developed and implemented a comprehensive body of regulations that address all of the issues surrounding oil and gas development. The City's proposed regulations, if adopted, would largely be duplicative of state regulations, and would intrude in many respects onto regulatory territory already claimed by the state. The proposed new regulations, therefore, are not only unnecessary, they are largely preempted by state law, and would only serve to discourage development of oil and gas resources in Carson. Oil and gas development could be an important part of Carson's economy, and the City should not pursue new regulations that could hinder the growth of this industry. More importantly, these types of unnecessary and overreaching regulations show Carson as unfriendly to business and would discourage investment in Carson.

Nevertheless, if the City decides to move forward, changes must be made to the current draft of the proposed regulations to make them workable from industry's perspective. As an initial matter, the proposed ban on hydraulic fracturing, acidizing, and well stimulation treatments is preempted by state law and should be stricken. We will submit separate comments on this issue.

In addition, and putting aside the proposed prohibition on hydraulic fracturing, acidizing, and well stimulation treatments, numerous changes to the current draft regulations are required to bring them in line with existing state regulations and to relieve the unnecessary burden imposed on future oil and gas operators. Below is a summary of our concerns and attached are line edits to the proposed regulations showing how they could be addressed.

Overly Burdensome Regulations With No Public Benefit. The proposed regulations should be revised to address unnecessary regulations. Many of the regulations go far beyond the City's purported goals of protection of public health and safety, and would impart little or no benefit to the City or its residents. Instead, many of the regulations seem drafted so as to layer duplicative requirements on an industry so that the City can say it is doing something. These regulations, however, would make it harder to conduct business in Carson and impart no public benefit. Many of these regulations can and should be revised to reduce burdensome and unnecessary requirements on operators. Examples include the requirement that operators maintain a meteorological station at each project site (proposed Sec. 9531.2.E), the requirement that oil well abandonment only be performed by contractors licensed to do business in Carson (proposed Sec. 9510.3.3.D.1), and the requirement that operators submit an annual drilling, re-drilling, and workover plan to the Petroleum Administrator for review (proposed Sec. 9532.C). None of these provisions would result in any meaningful benefits to the City or its residents, but each would significantly increase the costs and burdens of producing oil and gas, not seen in other jurisdictions. These subsections, among many others, should be revised to remove unnecessary and costly burdens that will discourage future oil and gas development.

The Proposed Regulations are Preempted. The proposed regulations should be revised so as to avoid the regulatory authority of state agencies, including the Division of Oil, Gas and Geothermal Resources and the South Coast Air Quality Management District. DOGGR has exclusive jurisdiction over the regulation of all subsurface activities. Thus, for example, the proposed regulations of the subsurface aspects of abandonment of oil and gas wells, pipelines and leak testing, and re-drilling of wells are preempted by DOGGR regulations and should be removed. Likewise, the AQMD imposes extensive regulation of air quality issues and has responsibility for carrying out the state's greenhouse gas emission reduction programs. Again, the proposed regulations need not address these topics, as they are duplicative of AQMD regulations and are therefore preempted.

Avoid Duplication of CEQA. In too many places, the proposed regulations duplicate required environmental review and mitigation monitoring that is already imposed on oil and gas projects under the California Environmental Quality Act (CEQA). Any new drilling project in California must be reviewed under CEQA before it may be approved, and nearly all will be subject to a mitigated negative declaration or environmental impact report. With either level of review, the City studies a wide range of potential environmental impacts and imposes mitigation

measures to reduce those impacts to a level of insignificance. The proposed regulations should not duplicate those efforts, because overlapping evaluation, mitigation, and monitoring requirements are overly burdensome on operators and will discourage future development. Accordingly, the Petroleum Administrator should be able to rely on CEQA review of a project's impacts relating to surface and groundwater quality when approving plans related to those topics, which the Petroleum Administrator cannot do now. In addition, the proposed compliance monitoring section (proposed Sec. 9516) is unnecessary because it is duplicative of the mitigation monitoring and reporting program required for all new oil and gas projects under CEQA.

Petroleum Administrator Powers Are Overbroad and Its Decisions Must be Appealable. The powers of the "Petroleum Administrator" under the proposed regulations should be restrained and the decisions of the Petroleum Administrator should be appealable. Under the proposed regulations, the Petroleum Administrator would be an unelected official appointed by the City Manager who would have vast power over the evaluation, approval, and monitoring of oil and gas projects in the City. The proposed regulations vest too much authority in the Petroleum Administrator in several places, such as the discretion to impose additional conditions on existing, operating projects (proposed Sec. 9509) and to impose any conditions, without guidance, on "high-risk" operations (proposed Sec. 9510.3.5.B.2.iii). The Petroleum Administrator's duties should be more clearly delineated and appropriate guidance must be provided. In addition, we have proposed several new provisions which would make clear that operators have the right to appeal decisions of the Petroleum Administrator.

The attached redline contains numerous other changes to the proposed regulations for clarity and internal consistency. These include deletions of defined terms that are not actually used in the regulations and other changes necessary to have a clear and unambiguous code under which the City and the oil and gas industry can operate.

We appreciate your consideration of our proposed revisions to the proposed regulations. The current proposed draft is a good start, and we look forward to working with the City to improve on this draft moving forward. Please don't hesitate to contact us if you have any questions.

Very truly yours,

Benjamin J. Hanelin
of LATHAM & WATKINS LLP

Attachment

cc: Mr. Saied Naaseh, Planning Manager
Ms. Sunny Sultani, City Attorney
Mr. George J. Mihlsten, Latham & Watkins LLP

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BY EMAIL

February 24, 2015

Honorable Chair Faletogo &
Honorable Planning Commissioners
City of Carson Planning Commission
701 East Carson Street
Carson, CA 90745

Re: Proposed Ordinance to Ban Hydraulic Fracturing, Acidizing, and Well Stimulation; Planning Commission Meeting, February 24, 2015, Agenda Item No. 12-C

Dear Honorable Chair Faletogo and Honorable Commissioners:

We are writing on behalf of our client, Californians for Energy Independence, a statewide coalition of energy producers, business associations, and local government leaders and agencies, among others, formed to educate the public about proven, safe oil extraction technologies, regarding the draft proposal to prohibit hydraulic fracturing, acidizing, and well stimulation treatments within the City of Carson ("Proposed Ban").[1]

We strongly urge the Planning Commission ***not*** to advance the Proposed Ban. The Proposed Ban is not permitted under state law, and adopting the Proposed Ban would subject the City to significant liability.

The City previously considered such a ban and, after much deliberation, the City decided not to enact it. There is no reason to act differently now.

Last year, the City Council adopted a temporary moratorium on ***all*** oil and gas drilling. Rather than extend the 45-day moratorium, the City Council allowed it to expire. The Council appropriately decided not to extend the moratorium because the moratorium was bad public policy and served no real public purpose.

[1] We are providing a companion letter that provides comments and proposed revisions to the entirety of the Oil Code Update.

Oil production has been a part of Carson's economy for over 90 years. The first well was drilled in Carson in 1921, and the Dominguez Field was discovered shortly thereafter in 1923. In the nearly 100 years since then, oil drilling has occurred continuously and safely, producing approximately 274 million barrels of oil from 605 wells in the Dominguez Field.

Oil production activities in Carson have provided good jobs, revenues for the City and the County, and increased economic activity. These are real and tangible benefits for all of the City's residents and the City Council recognized the importance of these benefits when it refused to extend last year's temporary moratorium.

The current proposal to ban ordinary and widely used extraction techniques is no different than the expired temporary ban. Banning particular types of extraction techniques is bad public policy because the regulation will affect more production activities than is intended, state law already regulates these activities, and a ban will only serve to retard much needed investment in Carson's local economy.

As bad as the proposal to ban hydraulic fracturing and other well-stimulation activities is from a public policy and economics perspective, it is similarly improper from legal perspective. The proposal is not only preempted, it exposes the City to substantial liability.

The Proposed Ban is preempted by state law. The state has fully occupied the field relating to the methods of oil and gas production. The state's comprehensive regulatory scheme leaves no room for local regulations that are conflicting or duplicative. In light of the state's occupation of the field, it is clear the City may not single out particular methods of oil and gas production as prohibited.

The Proposed Ban exposes the City to significant liability because the Proposed Ban would affect an unconstitutional taking. Under the Proposed Ban, both existing and future oil and gas projects would be prohibited from utilizing hydraulic fracturing, acidizing, and well stimulation treatments to access petroleum reserves in the City. To the extent that the Proposed Ban would prevent companies, landowners, and holders of mineral rights from extracting those reserves, the City would be liable for damages, which could be many millions of dollars. The "savings clause" in the Proposed Ban, which would empower the Petroleum Administrator to grant limited exceptions to the Proposed Ban to those with "investment-backed expectations" where the use of banned techniques would not pose a nuisance, is an unworkable and ultimately fatally flawed attempt to cure the measure's constitutional defects. In all events, the City will be forced to expend substantial sums defending the ordinance.

The potential for unconstitutional takings is compounded by the proposed Code's vague and imprecise definitions. Although the Proposed Ban is framed as one targeting hydraulic fracturing, acidizing, and well stimulation treatments, it would reach far beyond those techniques to prohibit a much broader range of common oil extraction methods. The Oil Code Update's definitions of the prohibited techniques differ from those used by the state, particularly with regard to the definition of well stimulation treatment. These variant definitions create substantial uncertainty as to the specific types of extraction techniques (e.g., water flooding, cyclic steam

injection) that are intended to be covered by the Proposed Ban's prohibition. The exception written into the Proposed Ban for "normal maintenance work" is similarly insufficient.

Lastly, the City has not complied with the California Environmental Quality Act. Consideration and adoption of the Proposed Ban is subject to review under the California Environmental Quality Act because the Proposed Ban is a discretionary project under CEQA that could potentially result in significant environmental effects. The Planning Division Staff Report states that the Proposed Ban is exempt from CEQA but presents no evidence to support such an assertion. There has been no CEQA clearance provided for the Proposed Ban, and environmental review must take place before the Proposed Ban may be considered for adoption by the City Council.

These issues are discussed in greater detail in Attachment A.

We appreciate your consideration of these issues and respectfully urge your Commission not to move the proposal forward.

Please do not hesitate to contact us should you have any questions or need further information.

Very truly yours,

Benjamin J. Hanelin
of LATHAM & WATKINS LLP

Attachment

cc: Mr. Saied Naaseh, Planning Manager
Ms. Sunny Sultani, City Attorney
Mr. George J. Mihlsten, Latham & Watkins LLP

ATTACHMENT A

I. THE PROPOSED BAN IS PREEMPTED BY STATE LAW

The state has fully occupied the field concerning oil and gas production and extraction activities. Therefore, there is no room for the Proposed Ban.

Where local legislation conflicts with the state's general laws, the local legislation is preempted and is void and unenforceable. (See, e.g., *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897.) A conflict between local and state legislation exists where the local legislation duplicates, contradicts, or enters into an area fully occupied by state law. (*Id.* at 897-98.)

Preemption by state law may either be express or implied. Implied preemption exists where the state has fully occupied the field that a lower body seeks to regulate. Implied preemption can take three forms: (1) the subject matter has been so fully and completely covered by state law as to clearly indicate that it has become exclusively a matter of statewide concern; (2) the subject matter has been partially covered by state law couched in terms that 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 state 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. (See, e.g., *Sherwin-Williams*, supra, 4 Cal.4th at 897-98.)

A review of the relevant and long-standing statutes and authorities makes clear that the Proposed Ban is preempted by state law.

First, the Public Resources Code has long assigned the State Division of Oil, Gas and Geothermal Resources exclusive responsibility for regulating subsurface activities. (See, e.g., Pub. Res. Code, § 3106(a) [State Oil & Gas Supervisor has authority over "the drilling, operation, maintenance, and abandonment of wells"].)

The legislature declared, as a policy of the state to eliminate waste by increasing the recovery of underground hydrocarbons, that an oil and gas lessee or operator has the right to conduct "the injection of air, gas, water, or other fluids into the productive strata, the application of pressure heat or other means for the reduction of viscosity of the hydrocarbons, the supplying of additional motive force, or the creating of enlarged or new channels for the underground movement of hydrocarbons into production wells, when these methods or processes employed have been approved by the [State Oil and Gas Supervisor]."

Subjects regulated under the Public Resources Code include well stimulation, well bonding, abandonment of wells, orphan wells, recordkeeping, blowout prevention, well casing, protection of water supplies, repairs, regulation of production facilities, unreasonable waste of gas, subsidence, spacing of wells, management and development of unit operations, and regulation of oil sumps. (See generally Pub. Res. Code, §§ 3000 – 3865.) Subjects regulated under the California Code of Regulations include CEQA exemptions for oil and gas activities, well testing, well plugging and abandonment, casing and cementing requirements, blowout

prevention, pipeline and tank requirements, and the maintenance and filing of well records. (See Cal. Code Reg. §§ 1681 *et seq.*) Local ordinances that seek to ban or restrict well stimulation techniques conflict with the state's express policy in the Public Resources Code.

Second, Senate Bill 4 (Stats. 2013, ch. 313) ("SB 4") expanded DOGGR's pre-existing comprehensive regulatory program by adding more detailed requirements for well stimulation treatment activities including hydraulic fracturing. Among other things, SB 4 defined terms related to hydraulic fracturing, required specific studies and reports on hydraulic fracturing, mandated additional regulations which DOGGR has already implemented on an interim basis, further delineated regulatory authority over well stimulation treatment activities, required specific permits to utilize hydraulic fracturing, required notice and disclosures, established water quality monitoring requirements, imposed stiffer penalties for noncompliance, and authorized new fees. DOGGR promulgated final regulations pursuant to SB 4 in December 2014 that address reporting and operational requirements for the use of hydraulic fracturing and other well stimulation techniques in greater detail. (See Pub. Res. Code, §§ 3150-3161; see also SB 4 (Pavley, Chapter 313, Statutes 2013).) DOGGR's SB 4 regulations reinforced DOGGR's regulatory authority over all "downhole" activities, demonstrating further that the field is fully covered by the extensive state regulations. DOGGR's final SB 4 regulations will go into effect on July 1, 2015.

Third, the state has fully occupied the field regarding "downhole" regulations of oil extraction. A 1976 opinion from the California Attorney General is unequivocal on this point, finding that "Where 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 activity." (59 Ops.Cal.Atty.Gen. 461, 478 (1976).)

DOGGR regulations are broadly applicable to specific downhole activities and issues, including casing, cementing, blowout prevention, drilling fluids, plugging and abandonment of wells, well spacing, testing of idle wells, underground injection and disposal projects, and many others. It is quite clear that DOGGR's regulations preempt local authority on the subject of "downhole" activities, and, indeed, we are aware of no municipality in California that attempts to regulate "downhole" activities.

Even if the City may determine the location of surface oil and gas facilities, the City cannot regulate the "downhole" business of drilling and operating wells in zones where those uses are permitted. As set forth above, that is wholly within DOGGR's purview. A local government may not use its police power over zoning and land use of the surface of the land to regulate technical, subsurface methods and means. In other words, while the City may be able to determine ***where*** oil wells may be operated, DOGGR has the exclusive power over ***how*** they are operated. (See *Braly v. Board of Fire Commissioners* (1958) 157 Cal.App.2d 608, 616 [municipal regulations on technical aspects of oil production such as the size of the property and distance from public streets required to allow the siting of an oil well imposed an unconstitutional taking of plaintiffs' right to drill on their own land in a jurisdiction that allowed

such drilling].) The City's Proposed Ban would intrude onto regulatory territory claimed in full by the state legislature.

The Oil Code Update includes definitions of acidizing, hydraulic fracturing, and well stimulation treatment that would be added to the Carson Municipal Code. While there are some similarities to the definitions of these techniques used in SB 4, there are also significant differences, particularly with regard to the definition of well stimulation treatment. The Proposed Ban's departure from the definitions in SB 4 creates regulations that are inconsistent with and preempted by state law, and the discrepancies also create a separate legal problem: uncertainty about what types of other extraction techniques (e.g., water flooding, cyclic steam injection) may be covered by the Proposed Ban and what would still be permitted in the appropriate zones.

Thus, in addition to the incurable defect of being preempted by state law, the Proposed Ban also creates confusion as to its applicability to other extraction techniques. The Proposed Ban creates regulations that are inconsistent with state law and must give way to it. The state long ago fully occupied the field of regarding oil and gas regulations. The state further expressed its intent to continue to occupy the field when it enacted SB 4. SB 4 directs DOGGR to develop final regulations that are even more comprehensive than those that existed prior to SB 4's passage. Those regulations are now final and will soon become effective. Any effort by the City to regulate activities such as hydraulic fracturing and other well stimulation treatments covered by SB 4 is preempted.

II. THE PROPOSED BAN WOULD SUBJECT THE CITY TO LIABILITY FOR EFFECTING AN UNCOMPENSATED TAKING

The Proposed Ban would effect a regulatory taking without just compensation, in violation of the U.S. and California Constitutions.

The Takings Clause to the U.S. Constitution and its counterpart in the California Constitution (Art. I, § 19) prohibit the taking of private property absent just compensation. These prohibitions apply equally to physical takings as well as regulatory ones.

A regulatory taking may occur when, as here, a regulation works an economic detriment on property rights of owners and interferes with their "distinct investment-backed expectations," thereby requiring the payment of just compensation. (See, e.g., *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).) Takings may also occur where a government regulation deprives a property owner of all "economically viable use of his land." (*Agins v. Tiburon*, 447 U.S. 255, 260 (1980).) Oil and gas operators and mineral rights holders in the City have hundreds of millions of dollars in investment-backed expectations regarding the extraction of oil and gas from land in the City, and deprivation of the right to use their properties for oil and gas extraction would not leave any other economically viable use of those properties.

A regulatory taking of mineral rights may also be found where a broad prohibition makes it "commercially impracticable to mine..." (*Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 507 (1987) (citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922)).)

While the Supreme Court has held that a regulation depriving a property owner of all economically beneficial use of his property may not constitute a taking if the proscribed use constitutes a public nuisance or "harmful or noxious use[]" of property (see *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1022 (1992)), California courts have required that government demonstrate that such uses pose an "undoubted *menace* to public health, safety, or morals" to sustain the regulation without payment of just compensation. (See *Sunset Amusement Co. v. Board of Police Commissioners* (1972) 7 Cal.3d 64, 80 (citing *Jones v. City of Los Angeles* (1930) 211 Cal. 304, 315)) (emphasis in original.) Given that oil and gas projects in the City are all subject to extensive review and mitigation of environmental impacts under the California Environmental Quality Act and the City has proposed an overhaul of its Oil Code to provide further oversight of such projects, and given the examples of "public nuisance" provided in *Lucas* (i.e., a landfilling operation that floods others' land, a nuclear generating plant sitting astride an earthquake fault (see *Lucas,* 505 U.S. at 1029)), no showing of "an undoubted menace to public health, safety, or morals" can be made for oil and gas extraction uses in the City.

California law recognizes mineral rights as separate, cognizable interests from surface estates (see Civil Code, § 883.110), and California courts have held that mineral rights are cognizable property rights separate from surface estates. (See *In re Walz* (1925) 197 Cal. 263, 268 [a mineral estate is a "fee simple" giving the holder the right to mine such lands, in no way affecting the fee simple title of the owner of the surface of the land]; *Nevada Irrigation Dist. v. Keystone Copper Corp.* (1964) 224 Cal.App.2d 523 [severance of the mineral estate from the surface of the land creates two estates with equal status].) Federal courts have also held that a regulation prohibiting issuance of permits for mining effects a regulatory taking of the separate mineral estate, requiring just compensation. (See *Whitney Benefits, Inc. v. U.S.* (1991) 926 F.2d 1169 [enactment of the Surface Mining Control and Reclamation Act precluded issuance of a permit for coal mining and thereby was a regulatory taking requiring just compensation].)

The Proposed Ban, if adopted, would effect a taking in several ways.

First, it would prohibit the use of hydraulic fracturing, acidizing, or any other well stimulation treatment in the City under the guise of a land use regulation, thereby precluding the use of land in the City for these uses and depriving property owners and royalty owners of investment-backed expectations and economically viable use of land for extraction where recovery of resources using these techniques is the only feasible means of recovery.

Second, the Proposed Ban would go much further than banning hydraulic fracturing, due to the expansive and unclear drafting of the definitions for "acidizing" and "well stimulation treatment" in Section 9503 of the City's proposed Oil Code Update.

The Code Update would define "acidizing" in the first instance as a well stimulation treatment, which could mean, by definition, that all acidizing is prohibited. The exception drafted in the definition of "acidizing" that encompasses "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 foundation" is entirely vague and difficult to adjudicate. How would operators know if a standard, routine application of acid they use to clean out wellbores will pass

muster or be prohibited? Who at the City would decide whether a particular application of acid was exempted?

The definition of "well stimulation treatment" is even more unclear and vague. This definition takes leave of the definition of the exact same term found in SB 4, and introduces a great deal of technical language to define what is and is not a well stimulation treatment. The definition passes responsibility to DOGGR to decide whether a particular technique "does not enhance oil and gas production or recovery by increasing the permeability of the formation" and therefore qualifies as a well stimulation treatment. Requiring a DOGGR determination is an entirely unworkable system in the context of a local operator seeking an exemption from the City to perform routine work on an existing well. The definition also creates a presumption that any treatment that involves placing acid in a well "and that uses a volume of fluid equal to or greater than the Acid Volume Threshold (as defined by DOGGR)" is a well stimulation treatment. Without further guidance from DOGGR, this presumption would be very difficult to overcome, and operators very well may not be able to use any routine well cleanout methods that involve application of acids.

Implementing the ban on "well stimulation treatment" as it is written would, in effect, result in the complete shutdown of all existing oil and gas wells in the City. This is so despite the Proposed Ban's "savings clause," which purports to exempt those with "reasonable investment backed expectation established through investment made before the effective date" of the Proposed Ban from its effects. As explained below, this "savings clause" is illusory and will not protect operators from a taking.

Since the Proposed Ban would deprive current and potential future operators of all economic value of their property, the Initiative would effect a regulatory taking and subject the City to the risk of substantial damages. (See, e.g., *Chandis Securities v. City of Dana Point*, 52 Cal.App.4th 475, 484 (1996) (where a land use initiative constitutes a taking, the local jurisdiction will be required "to pay compensation to plaintiffs").)

III. THE PROPOSED BAN'S PURPORTED "SAVINGS CLAUSE" DOES NOT SHIELD THE CITY FROM LIABILITY

The purported savings clause included in the Proposed Ban does not move the constitutionality needle. The Proposed Ban's savings clause reads:

> "However, to the extent that any permittee demonstrates to the Petroleum Administrator, that (1) well stimulation, other than hydraulic fracturing, is necessary to recover the owner/operator's reasonable investment backed expectation established through investment made before the effective date of this ordinance; and (2) that such well stimulation will not create a nuisance due to an adverse impact on persons or property within the City, then the Petroleum Administrator may authorize such well stimulation treatment pursuant to a permit issued pursuant to this ordinance." (Proposed Oil Code Update, section 9536.)

Any protections offered by this purported savings clause are undermined in at least two ways.

First, any protection is illusory, at best, as the exception is subject to the discretion of the Petroleum Administrator not once but twice. To grant an exemption, the Petroleum Administrator must find (a) that the owner/operator had a "reasonable investment backed expectation" established prior to the ordinance's effective date, and (b) that the proposed treatment would not create a "nuisance." This provision leaves enormous, if not unfettered, discretion in the hands of the Petroleum Administrator – an official not equipped to evaluate a takings claim from a legal standpoint – and offers no guidance or set criteria as to how to evaluate such a claim.

Second, the Proposed Ban does not provide any definition of its key terms: "reasonable investment backed expectation" and "nuisance." Will the Petroleum Administrator follow any set of principles in interpreting these terms? Or will he/she simply rule on exemption claims on a case-by-case basis? In any event, these provisions at most would transform a facial takings challenge into an as-applied one, without alleviating these constitutional concerns.

The U.S. Supreme Court has made clear that public entities are liable for damages caused by regulatory takings, even temporary takings, from the moment the regulation causing the taking goes into effect, and public entities must pay property owners for the value of the property use during the period of deprivation. (See *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 319 (1987) ("The value of a leasehold interest in property for a period of years may be substantial, and the burden on the property owner in extinguishing such an interest for a period of years may be great indeed…Where this burden results from governmental action that amounted to a taking, the Just Compensation Clause of the Fifth Amendment requires that the government pay the landowner for the value of the use of the land during this period. [*Cf. United States v. Causby,* 328 U.S. 256, 261 (1946) ("It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken")].)

While there has been no determination of the full extent of damages in the City that would result from the regulatory taking effected by enactment of the Proposed Ban, those damages could be enormous, and the City would be liable for the costs of defending any and all challenges to the Proposed Ban. If the Proposed Ban goes into effect, the City would be required to compensate producers and mineral rights holders for these losses, with damages accruing the moment the Proposed Ban goes into effect. The purported exemptions contained in the Proposed Ban to protect the interests of owners of "reasonable investment backed expectations" are highly suspect, as explained in this letter, and even immediate implementation of these purported exemptions would not save the City from financial exposure.

IV. THE PROPOSED BAN IS NOT EXEMPT FROM CEQA

The Planning Commission Staff Report concludes that the Proposed Ban is categorically exempt from CEQA as a regulatory action to protect the environment under Section 15308 of the CEQA Guidelines. Section 15308 exempts only "actions taken by regulatory agencies, as authorized by state or local ordinance, to assure the maintenance, restoration, enhancement, or

protection of the environment where the regulatory process involves procedures for protection of the environment." (CEQA Guidelines, § 15308.)

The Staff Report presents no evidence that the Proposed Ban is necessary to protect the environment. In fact, the Staff Report fails to identify the existence of any pending applications for any oil and gas projects involving hydraulic fracturing, acidizing, or well stimulation treatments, and it fails to identify any existing or past application of those techniques within the City. The Staff Report lists a litany of alleged negative impacts of these techniques (Staff Report, pp. 3-4), but provides no evidence that these techniques are causing or contributing to any of those impacts in the City. Instead, the Staff Report simply concludes, without support, that the Proposed Ban "strengthens environmental standards related to the prohibited uses, and thereby advances the protection of environmental resources within the City of Carson." (Id. at p. 4.)

Section 15308's exemption for regulatory acts is narrow and cannot be stretched to include the Proposed Ban. A municipality cannot "circumvent CEQA merely by characterizing its ordinances as environmentally friendly and therefore exempt" under the exemption. (*Save the Plastic Bag Coalition v. County of Marin* (2013) 218 Cal.App.4th 209, 219-220.) Rather, a municipality claiming that a project need not undergo CEQA review because it is a regulatory action intended to protect the environment must first marshal substantial evidence establishing that the project falls within the exempt category of projects. (See *Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 115.)

In *Dunn-Edwards Corp. v. Superior Court* (1992) 9 Cal.App.4th 644 (disapproved on other grounds by *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559), for example, the court rejected an air district's argument that regulations imposing emission standards for volatile organic compounds contained in architectural coatings were categorically exempt under CEQA Guidelines Sections 15307 and 15308 because the regulations were more stringent and "cannot be said to have created an adverse change." (*Id.* at 657.) The court held the agency's conclusion that the regulations would not result in a net increase in emissions was not supported by any evidence on the record and was therefore "predicated on lack of the very information which would be provided by an EIR." (*Id.* at 658.)

Here, there is no evidence, much less substantial evidence, to support a determination that the Proposed Ban falls within the narrow exemption under Section 15308. The Staff Report merely concludes, without further explanation, that the exemption applies. This is not enough. The City cannot simply assert, without any support, that the Proposed Ban is categorically exempt from CEQA under Section 15308. (*Save the Plastic Bag Coalition*, 218 Cal.App.4th at 219-220.) Because the City has no evidence to support its conclusion that the Proposed Ban is exempt from CEQA, the City has not met its burden of establishing that the Proposed Ban falls within Section 15308's exemption for regulatory actions to protect the environment. Therefore, the Proposed Ban must undergo CEQA review.

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March 23, 2015

41509-033

BY EMAIL
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Re: Proposed Carson Restrictions on Oil Production

Dear Ms. Soltani:

At the Carson Planning Commission hearing on February 24, 2015, you advised the Commission that an ordinance effectively banning oil production in the City of Carson would not constitute an unconstitutional taking because the legislation under consideration does not unduly limit the rights of the surface owners.

As I noted in my comments at the hearing, on behalf of certain subsurface mineral rights owners, that position is not correct. Where, as here, the subsurface mineral rights are owned separately from the surface lands, a taking of all that my clients own—the subsurface mineral rights—***would*** constitute a compensable unconstitutional taking. If these rights are overregulated, the City will be liable for a taking of the mineral owners' valuable property rights.

In fact, the classic case in this area is exactly on point. In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), Pennsylvania Coal deeded the surface rights but retained the right to remove subsurface coal from the property in question. The state adopted the Kohler Act, which prohibited coal mining in such a way as to cause subsidence to occupied structures. The Supreme Court found the Kohler Act exceeded the State's police power and overregulated Pennsylvania Coal's property interest by "abolish[ing] what is recognized in Pennsylvania as an estate in land—a very valuable estate." (*Pennsylvania Coal*, 260 U.S. at 414.) The Court wrote:

> "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." (*Pennsylvania Coal*, 260 U.S. at 415-416.)

EXHIBIT NO. 02

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Pennsylvania Coal involved the situation where the property owner's *sole* property interest was in the subsurface.

This critically distinguishes the quite different situation where an owner owns the *entire* fee interest—including both the surface estate and the subsurface mineral estate—and tries to segment its property by focusing only on the latter. In that situation, the law will look to "the property as a whole" in analyzing whether there has been a taking by overregulation—*i.e.*, whether the regulation goes "too far" in depriving the property owner of what it actually owns. For example, in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, Penn Central was the fee owner of a city block on which the Grand Central Terminal, an 8-story building, was located. The City declared the Terminal a landmark, and denied Penn Central's plan to build a 55-story building atop it. Penn Central sued on the theory that the City had taken its air rights above the Terminal. Because Penn Central owned the entire property and other adjoining properties to which the air rights could be transferred, the Supreme Court denied Penn Central's attempt to divide its single parcel into segments; the focus is on the extent of the interference with rights "in the parcel as a whole." (*Penn Central*, 438 U.S. at 130).

Penn Central did not deal with the situation where a property owner owns *less than the fee* and the regulation damages the owner's *entire* property interest. The Supreme Court made this clear in the careful language it used in a subsequent case, *Andrus v. Allard*, 444 U.S. 51 (1979). In *Andrus,* the Court upheld Congress' right to limit the sale of bird artifacts that had been lawfully obtained before passage of the legislation under review. The owner tried to segment its property interests and focus solely on a "taking" of its right to profit from the sale of its property. This was improper under *Penn Central*, as the Supreme Court explained:

> "At least *where an owner possesses a full 'bundle' of property rights,* the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety." (*Andrus*, 444 U.S. at 65-66, emphasis added.)

The Court then added a citation as follows: "Compare *Penn Central* . . . with *Pennsylvania Coal*." (*Andrus*, 444 U.S. at 65-66.) This demonstrates that the Court recognized the distinction between factual scenarios in which an owner was trying to artificially limit its holdings by "segmenting" out but one of its interest (as in *Penn Central*), on the one hand, from the scenario where an owner was alleging that its *entire* property interest was being taken (as in *Pennsylvania Coal*). The Supreme Court has reiterated the conditional statement in *Andrus* on several occasions. *See, e.g. Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 497 (1987); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 327 (2002).

The distinction between *Pennsylvania Coal* and *Penn Central* recognized in the regulatory takings area is the same as that recognized in direct condemnation. The government must pay for the owner's *particular* property interest that it takes, even where the owner owns less than the fee. *See, e.g, United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 633 (1961) ("The guiding principle of just compensation is reimbursement to the owner *for the property interest taken.*") (emphasis added); *People ex rel. Dept. of Public Works v. Lynbar*, 253 Cal. App. 2d 870 (1967) ("[T]he property must be valued as the condemnor finds it, including without limitation thereby, the state of its title. . . .").

State courts applying *Penn Central* have recognized that the nature of the property owner's particular interest is critical to analysis of the regulatory takings issue. For example, in *Western Energy Company v. Genie Land Company*, 227 Mont. 74 (1987), the Supreme Court of Montana was reviewing a claim by a lessee of coal interests that a statute requiring consent of the surface owner to mine was unconstitutional. Reviewing the Supreme Court's decisions in *Pennsylvania Coal, Penn Central,* and *Andrus,* the Court honed in on the "full bundle" issue:

> "At issue in this case is *destruction of Western's entire bundle of rights in the minerals beneath the surface owned by Genie*." (*Western Energy*, 227 Mont. At 81, emphasis added.)

Another similar case is *Machipongo Land and Coal Company, Inc. v. Commonwealth of Pennsylvania*, 569 Pa. 3 (2002). Certain lands were designated as "unsuitable for mining" and the owners of the mineral rights sought compensation for a taking. In analyzing the owners' claims for a *per se* taking of all use under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Court found a distinction between the claims of those owners who owned *only* the mining rights, and those owners who owned *both* the mining rights and the surface rights. The latter (owners of the fee simple) could not, under *Penn Central*, segment their fee simple interest to focus only on the subsurface mining rights. But the fact that the former group owned only the mining interests "would appear to distinguish them" from the fee simple owners. (*Machipongo*, 569 Pa. at 35.) *See also*, *State ex rel. Shelly Materials, Inc. v. Clark County Board of Commissioners*, 115 Ohio St. 3d 337, 344 (Oh. 2007) (mineral estate may be considered the relevant parcel for regulatory takings analysis if it was purchased separately); *Whitney Benefits, Inc. v. United States*, 926 F. 2d 1169, 1172 (Fed. Cir. 1991) (affirming $60.2 million judgment for taking where "the only property here involved is the right to surface mine a particular deposit of coal.").

Thus, where an owner's property interest is limited to the subsurface mineral rights, a regulatory takings claim must assess whether *those* property interests have been taken. As the Supreme Court has recognized, property ownership has various dimensions. It is limited *horizontally* by the amount of acres owned – *e.g.*, by the metes and bounds of the interest. It may be limited

vertically by the particular property interest owned – *e.g.*, air rights or surface rights or subsurface rights. And it may be limited *temporally* by the length of the estate – *e.g.*, a leasehold for a stated period of time. *Tahoe-Sierra*, 535 U.S. at 331-332. When a claimant pursues a regulatory takings claim, the court always considers the dimensions of the owner's holdings. There may be issues as to whether all or just a part of the holdings should be placed in the denominator; but the question is never whether *somebody else's* property should be added to the denominator. In short, a regulatory takings claim is always limited by the *amount* of property that the claimant owns. The vertical dimension is treated in the same manner as the horizontal: where the owner's interest is limited to just part of the vertical dimension, its regulatory takings claim must be assessed based on that ownership interest — not by adding *someone else's* property to the denominator.

Here, the mineral owners own only the subsurface oil and gas rights in the properties in question. If the City destroys or damages that property interest, it will owe compensation to the mineral owners, regardless of whether the surface interests owned by somebody else still retain some economically beneficial use. The City needs to recognize this before it adopts any legislation that would damage the limited property interests owned by the mineral owners.

Sincerely,

Tom Muller

cc: James D. Flynn
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April 6, 2015

VIA ELECTRONIC MAIL

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Re: Carson Oil Code Update: Proposed Zone Text Amendment 20-15 (Hydraulic Fracturing Prohibition)

Dear Mr. Hanelin:

Thank you for your input provided by correspondence on behalf of Californians for Energy Independence in connection with proposed Zone Text Amendment 20-15 (Ordinance). The purpose of this response is to address and provide clarification to the issues you raised.

I. Proposed Ordinance Does Not Prohibit Common Oil Extraction Methods

As a preliminary matter, the proposed Ordinance does not prohibit common oil extraction methods, nor would it result in "a complete shutdown of all existing oil and gas wells in the City." Oil and gas uses – including new operations - can continue to operate a variety of routine matters that have been traditionally associated with extraction of hydrocarbons.[1] Even if Zone Text Amendment 19-15 and the proposed Ordinance are both adopted, legally existing oil and gas uses may continue. If these uses are non-conforming, they would be subject to regulations and ordinances governing non-conforming uses, much in the same manner as other legally nonconforming uses may continue that do not involve petroleum uses.

As there is apparently misunderstanding regarding this issue, we will be recommending modifications to the proposed Ordinances to make this even more explicit.

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[1] These include routine well cleanout work; routine well maintenance; routine treatment for the purpose of removal of formation damage due to drilling; bottom hole pressure surveys; routine activities that do not affect the integrity of the well or the formation; the removal of scale or precipitate from the perforations, casing, or tubing; a gravel pack treatment that does not exceed the formation fracture gradient; or a treatment that involves emplacing acid in a well and that uses a volume of fluid that is less than the Acid Volume Threshold for the operation and is below the formation fracture gradient. Steam flooding, cyclical steaming, certain types of workovers and other traditional operations are also not precluded.

EXHIBIT NO. 03

II. Proposed Ordinance Is Not Preempted By State Law

The proposed Ordinance is not preempted by State law. Under California law, local government regulations that conflict with State general law are preempted.[2] The preemption may be express or by implication.[3]

State law is devoid of any express preemption regarding a city's ability to regulate zoning and land uses with regard to oil and gas. The law is also devoid of any express preemption regarding hydraulic fracturing and related items.

Next, preemption by implication of legislative intent may not be found when the Legislature has expressed its intent to permit local regulations or when the statutory scheme recognizes local regulations.[4] Likewise, 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 that such regulation is not preempted by state statute unless there is a clear indication of preemptive intent from the Legislature.[5] Local entities may make further regulations on phases of the matter not covered by the state legislation in furtherance of the purpose of the state law, provided such local regulations are not in themselves unreasonable. In such cases it is said that there is no conflict.[6] A city has broad discretion in determining what is reasonable in endeavoring to protect public health, safety, morals, and general welfare of the community.[7] The Legislature has specified certain minimum standards for local zoning regulations but has carefully expressed its intent to retain the maximum degree of local control.[8]

State statutes and regulations do not implicitly preempt the City from adopting zoning and land use regulations related to oil and gas drilling. In at least one provision in the State's oil and gas laws the State Legislature stated:

> 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.[9]

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[2] Cal. Const., art. XI, § 7.

[3] *Candid Enterprises, Inc. v. Grossmont Union High School Dist.* (1985) 39 Cal.3d 878, 885 [218 Cal.Rptr. 303].

[4] *Candid Enterprise v. Grossmont Union, supra,* 39 Cal.3d 878, 888 [218 Cal.Rptr. 303].

[5] *Big Creek Lumber Co. v. County. of Santa Cruz* (2006) 38 Cal.4th 1139, 1149 [136 P.3d 821], as modified (Aug. 30, 2006).

[6] *Baron v. City of Los Angeles* (1970) 2 Cal.3d 535, 541 [86 Cal.Rptr. 673].

[7] *Carlin v. City of Palm Springs* (1971) 14 Cal.App.3d 706, 711 [92 Cal.Rptr. 535].

[8] *IT Corp. v. Solano County Bd. of Supervisors* (1991) 1 Cal.4th 81, 89 [2 Cal.Rptr.2d 513], see also Gov. Code, §§ 65800, 65802 and 65850 *et seq.*

[9] Pub. Resources Code, § 3690 (emphasis added).

Note, the statute recognizes a city is restricted to adopting laws and regulations limited to just "where" these oil production activities may occur, but also includes the conduct "how," operations must take place. This includes "how" loud, "how" safe, "how" the use may operate during certain periods of time, "how" oil production activities must be abandoned, etc.[10]

Likewise, California cities and counties have been validly regulating oil and gas operations since the early 1900's.[11] Early regulations included zoning ordinances restricting oil drilling and production to certain zones, etc.[12] They also included limitations, safeguards, and controls on how oil and gas operations could be conducted.[13] As early as 1925, the California Supreme Court held that local governments have "the unquestioned right to regulate the business of operating oil wells within [their] limits, and to prohibit their operation within delineated areas and districts, if reason appears for so doing."[14]

Today, local regulation of oil and gas operations is widespread.[15] Local government routinely zone oil and gas uses.[16] Some have also codified detailed processes for permitting and overseeing such operations and regulate matters such as well spacing and location, grading, piping, fire prevention and control equipment, signage and liability insurance.[17] Jurisdictions have also adopted zoning regulations specific to fracking.[18]

As a final consideration, the Ordinance is being considered concurrently with Zone Text Amendment 19-15, a comprehensive update of the City's Oil and Gas Code. If that Code and this proposed Ordinance are both adopted, the Ordinance would subject to Section 9504, which includes a mechanism to prevent inadvertent preemption as the law evolves. That section provides that in all cases where there is conflict with state laws or regulations, "such state laws or

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[10] *See id.*

[11] See, e.g., *Pac. Palisades Ass'n v. City of Huntington Beach* (1925) 196 Cal. 211. For a general discussion, see also Minner & Broderick, *Local Control of Oil and Gas Operations: Getting a Handle on Fracking and Cyclic Steaming Through Land Use Prohibitions, Moratoria, Discretionary Permits, and Citizen Initiatives* (2014) 23 Envt'l Law News 2.

[12] See, e.g., *Beverly Oil Co. v. City of Los Angeles* (1953) 40 Cal.2d 552, 557-58; *Trans-Oceanic Oil Corp. v. City of Santa Barbara* (1948) 85 Cal.App.2d 776, 780; *Higgins v. City of Santa Monica* (1964) 62 Cal.2d 24, 27.

[13] See, e.g., *Friel v. County of Los Angeles* (1959) 172 Cal.App.2d 142, 145; *Wood v. City Planning Comm'n of San Buenaventura* (1955) 130 Cal.App.2d 356, 361.

[14] *Pac. Palisades Ass'n v. City of Huntington Beach, supra,* 196 Cal. 211, 217.

[15] The following is a sample of counties that regulate or restrict land uses involving oil and gas drilling in some form: Butte County, Colusa County, Glenn County, Humboldt County, Imperial County, Kern County, Kings County, Los Angeles County, Marin County, Merced County, San Diego County, San Joaquin County, San Louis Obispo County, Santa Cruz County, Solano County, Sonoma County, Stanislaus County, Sutter County, Tehama County, Venture County, and Yolo County. Numerous municipalities in California have similar regulations.

[16] See, e.g., County of Glenn County Codes, §§ 15.440.020, 15.450.060 (2014) (oil and gas wells allowed in industrial zone and allowed with conditional use permit in timberland preserve zone).

[17] See, e.g., San Benito County Code of Ordinances, Ch. 19.21 (2014) ("Oil and Gas Wells").

[18] See, e.g., Santa Barbara County Code of Ordinances (County Land Use & Development Code), §§ 35.52.040, 35.52.050 (2014).

regulations shall prevail over any contradictory provisions, or contradictory prohibitions or requirements, made pursuant to this ordinance."

Under these circumstances there is no express or implied preemption posed by the proposed Ordinance.

III. Proposed Ordinance Does Not Give Rise To A Compensable Taking

The proposed Ordinance does not give rise to a compensable taking under either a facial challenge or an as-applied challenge.

A. No facial taking

Facial claims assert that the action took the property even without an inquiry into its circumstances because under any conceivable scenario there was a taking. Facial regulatory takings challenges are disfavored due to the highly factual nature of the court's inquiry in each case.[19] A facial claim does not appear to be asserted by your correspondence, nor does the proposed Ordinance give rise to a facial taking.

B. No as-applied taking

As to as-applied challenges, there are two subtypes. The first subtype is a "per se" taking, where the regulation deprives the property owner of 100% of the total economic value of the property.[20] The second subtype type of as-applied regulatory taking can occur where the property value is severely diminished as analyzed under a three-prong test set forth in *Penn Central Transportation Company v. City of New York* (1978) 438 U.S. 104.

i. No "per se" taking

Here, there is no "per se" taking as proposed Ordinances do not deprive the property owner of 100% of the total economic value of the property for a variety of reasons. As noted above, common oil extraction methods can continue to be used to extract petroleum. Legally existing oil and gas uses may continue as nonconforming uses even if both the proposed Ordinance and Zone Text Amendment 19-15 are adopted. Landowners are not prohibited from other uses of the property recognized by the zoning ordinance. The proposed Ordinance also recognizes and provides a specific exception for those extraordinary circumstances where such a "per se" taking may occur. Regardless, the proposed Ordinance serves to address nuisances associated by oil and gas operations – which is an exception to a claim of compensable "per se" regulatory taking.[21]

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[19] *See Hodel v. Virginia Surface Min. and Reclamation Ass'n, Inc.* (1981) 452 U.S. 264, 294-295 ; *see also Keystone Bituminous Coal Ass'n v. DeBenedictis* (1987) 480 U.S. 470, 495-96.)

[20] *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003.)

[21] *Lucas v. South Carolina, supra,* 505 U.S. 1003, 1029-1030.

ii. No taking for diminution of value under *Penn Central*

There is also not a compensable taking under a "diminution of value" theory.

The Supreme Court has established a three-prong diminution in value test 1) the character of the governmental regulation; (2) the economic impact of the regulation on the claimant; and (3) the regulation's interference with distinct, and reasonable, investment-backed expectations.[22] California courts may reject a takings claim based on any one of the three factors.[23]

Generally, regulatory takings claims based on the "diminution of value" theory rarely succeed. The California Supreme Court has noted that, "Even a significant diminution in value is insufficient to establish a confiscatory taking."[24] Mere diminution in property value, short of a complete reduction of all value, cannot by itself establish a taking.[25]

A taking has not occurred even when one of the rights in a property owner's "bundle" of rights is "destroyed" because this does not prohibit all economic benefit.[26] If a property owner retains certain rights, like the rights to possess or devise, then there is no taking.[27] The Supreme Court's takings jurisprudence requires that total takings be judged "by the property as a whole" and not just a portion of the total rights associated with the property.[28] The Court reaffirmed the vertical parcel-as-a-whole concept in *Keystone Bituminous Coal* with regard to a plaintiff who owned both a surface and mineral estate – despite state-law recognition of mineral estates as a separate property interest.[29] As a result, when owners of a severed coal estate without surface rights claimed a ban affected a total taking, the Supreme Court of Pennsylvania relied upon U.S. Supreme Court precedent to reject the claim and held the relevant parcel at issue "cannot be vertically segmented and must be defined to include both the surface and mineral rights."[30]

Here, the mineral rights cannot be separated from the other rights of the "parcel as a whole." Even assuming for the sake of argument there was a complete destruction of access to all mineral rights, there would still not be a compensable taking because the aggregate must be viewed in light of the entire parcel. Landowners with rights in the "property as a whole" are not prohibited from other uses recognized by the zoning ordinance. In fact, even if just the mineral rights were considered, the proposed Ordinance would not result in a compensable destruction of

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[22] *Penn Central Transportation Company v. City of New York* (1978) 438 U.S. 104, 124-125; *Palazzolo v. Rhode Island* (2001) 533 U.S. 606, 617.

[23] *Allegretti & Co. v. County of Imperial* (2006) 138 Cal.App.4th 1261, 1277.

[24] *Galland v. City of Clovis* (2001) 24 Cal.4th 1003, 1026.

[25] *See Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust* (1993) 508 U.S. 602, 645.

[26] *Andrus v. Allard* (1979) 444 U.S. 51, 65-66.

[27] *Ibid.*

[28] *Penn Central v. City of New York, supra,* 438 U.S. 104, 130-131; *see Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regional Planning Agency* (2002) 535 U.S. 302, 331.

[29] *Keystone Bituminous Coal Ass'n v. DeBenedictis* (1987) 480 U.S. 470, see also *Machipongo Land & Coal Co., Inc. v. Commonwealth* (Pa. 2002) 799 A.2d 751.

[30] *Machipongo Land v. Commonwealth, supra,* 799 A.2d 751, 766 .

the mineral right. The proposed Ordinance still enables an owner of a mineral estate to engage in conventional oil and gas extraction. The regulations also contain language to preclude an inadvertent taking. Simply stated, there is no reasonable basis for concluding the proposed Ordinance will result in any sort of a compensable taking.

C. "Savings Clause" not "Illusory" or Ambiguous

The correspondence also raises concerns that the "savings clause" is "illusory," and certain terms such as "reasonable investment backed expectation" and "nuisance" are ambiguous. No legal authority was provided regarding these issues.

The proposed Ordinance provides an exception under circumstances where 1) an owner/operator can establish a reasonable investment backed expectation before the effective date of the Ordinance; and 2) such well stimulation would not create a nuisance due to an adverse impact on persons or property within the City. Definitions for "reasonable investment backed expectation" and "nuisance" are not required in the proposed Ordinance, as the learned justices of the United States Supreme Court, etc., have already established parameters for these terms in a "takings" context.[31] As such, the exception in the proposed Ordinance is neither vague or illusory on its face.

IV. Ordinance Complies With CEQA

Finally, the correspondence raises concerns whether the proposed Ordinance is "necessary" to protect the environment, and whether the "Staff Report" is sufficient to provide substantial evidence in support of the proposed Ordinance.

No authority is cited for the novel premise a local agency is precluded from adopting regulations to protect the environment until it becomes "necessary" due to a pending application. Nor is there any legal authority for the premise that there must be a past record of well stimulation techniques within the City that have resulted in harm to the environment. Instead, CEQA Guidelines section 15308 only requires the protections act to "assure the maintenance, restoration, enhancement of the environment…"

There is also no authority to support the assumption that substantial evidence in support of the finding of a Categorical Exemption must only appear in the Staff Report. Instead, substantial evidence also include all facts, reasonable assumptions predicated upon facts, and expert opinion supported by the facts.[32] In other words, evidence may be found in light of the whole record.

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[31] See, e.g., *Penn Central v. City of New York, supra,* 438 U.S. 104; *Palazzolo v. Rhode Island, supra,* 533 U.S. 606, 617; and *Lucas v. South Carolina, supra,* 505 U.S. 1003, 1029-1030.

[32] CEQA Guidelines Section 15384.

Here, the record includes not only the Planning Commission Staff Report itself, but all the documents, studies, records, etc., included and referenced in the Staff Report, as well as power point presentations, public testimony, etc., provided during the Planning Commission hearing. Additionally, all public documents, comments and testimony provided in connection with the City's discussions of petroleum operations on March 18, 2014, April 15, 2014, April 29, 2014, and May 20, 2014 are also part of the record and may constitute "substantial evidence." Finally, additional evidence may continue to be added to the record at the continued hearing of the Planning Commission and at the City Council hearing.

Once the record as a whole is considered, there is substantial evidence to support a finding of Categorical Exemption under CEQA Guidelines section 15308.

V. Conclusion

We thank you for this opportunity to address your client's concerns and look forward to any additional input you may have on this topic.

Very truly yours,

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April 6, 2015

VIA ELECTRONIC MAIL

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Re: Proposed Zone Text Amendments 19-15 and 20-15 re Petroleum Operations

Dear Mr. Muller:

Thank you for your input provided by correspondence dated February 23, 2015, on behalf of The Carson Companies (TCC) in connection with proposed Zone Text Amendments 19-15 and 20-15 (Ordinances). The purpose of this response is to address and provide clarification to the issues you raised.

I. Proposed Ordinances Do Not Prohibit Legal Uses Already Operating

As a preliminary matter, the proposed Ordinances do not prohibit legally operating oil and gas uses already in existence. As a result, legally existing oil and gas uses may continue, subject to regulations and ordinances governing non-conforming uses, much in the same manner as other legally nonconforming uses may continue that do not involve petroleum uses.

What this means is legally operating oil and gas uses already in existence can continue to do a variety of routine matters to continue petroleum operations.[1] As there is apparently some misunderstanding regarding this issue, we will be recommending modifications to the proposed Ordinances to make this even more explicit.

That having been said, certain types of new development, expansion, change in intensity of use, modification or similar changes proposed in the nature of the existing oil and gas uses or site would be subject to the Municipal Code in effect at the time of the proposed change. For example, if the proposed Ordinances are adopted, an existing oil and gas use would be subject to the new requirements if the operation sought to expand the number of wells on a site, or if it

[1] These include routine well cleanout work; routine well maintenance; routine treatment for the purpose of removal of formation damage due to drilling; bottom hole pressure surveys; routine activities that do not affect the integrity of the well or the formation; the removal of scale or precipitate from the perforations, casing, or tubing; a gravel pack treatment that does not exceed the formation fracture gradient; or a treatment that involves emplacing acid in a well and that uses a volume of fluid that is less than the Acid Volume Threshold for the operation and is below the formation fracture gradient. Steam flooding, cyclical steaming, certain types of workovers and other traditional operations are also not precluded.