

# KIRKLAND ALERT

January 22, 2018

## California Court Invalidates Parts of County Ordinance Banning Well Stimulation Treatments and Underground Wastewater Injection

On December 28, 2017, the California Superior Court for Monterey County issued a ruling striking down parts of a ballot-initiative measure that sought to prohibit use of land for hydraulic fracturing (i.e., fracking) treatments and oil and gas wastewater injection and impoundment. The outcome may have ripple effects throughout the industry as other municipalities consider similar bans on fracking and wastewater injection.

The ruling addressed challenges to a Monterey County ordinance, known as Measure Z, approved by the electorate in the November 2016 election.<sup>1</sup> The ordinance prohibited well stimulation treatments (“WSTs”), including but not limited to fracking; underground wastewater injection and impoundment of wastewater; and the drilling of any new wells for the recovery of oil and gas on all land within the County’s unincorporated area.<sup>2</sup>

The initiative measure stated that oil and gas production operations using fracking and other well stimulation treatments and associated wastewater injection wells have been “shown to induce and/or exacerbate earthquakes.” The initiative further asserted that the risk of increased seismic activity in Monterey County is a “matter of particular concern” given the regular cycle of moderately large earthquakes in the region.<sup>3</sup>

Before the ordinance took effect, Chevron USA, Inc., Aera Energy LLC, and other associated petitioners filed petitions for writs of mandate alleging that Measure Z was preempted by state and federal law, effected a facial taking of their property, and violated their due process rights.

### *The Court’s Ruling*

In the widely anticipated ruling, Judge Thomas Wills first held that until the petitioners or another party actually propose or engage in WSTs, they have no standing to oppose Measure Z’s ban on such practices.

But the Court went on to hold that California’s state oil and gas legal and regulatory scheme “fully occupies the area of the manner of oil and gas production” and therefore preempts the Monterey County policy banning underground wastewater injection and prohibiting the drilling of any new wells.<sup>4</sup> Because Measure Z sought to

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regulate the manner of oil and gas production by restricting particular production techniques it “is in conflict with general law and is therefore preempted.”<sup>5</sup>

The Court held that Measure Z conflicted with both state and federal law governing underground injection. The Safe Water Drinking Act directed the Environmental Protection Agency “to oversee underground injection throughout the United States” and granted the State of California the primary enforcement responsibility. The county measure “directly conflicts” with the state’s mandate.

**Key intervenors, including Protect Monterey County, the advocacy group responsible for drafting Measure Z, are likely to appeal the decision.**

### *Key Takeaways*

- According to the trial court, California state-level oil and gas law governing oil recovery through the injection of fluids, including steam and water, controls in the face of conflicting county measures.
- Key intervenors, including Protect Monterey County, the advocacy group responsible for drafting Measure Z, are likely to appeal the decision.
- Energy companies operating in California should continue to monitor litigation surrounding Measure Z and engage in lobbying strategies related to state-wide ballot initiatives.
- Energy companies operating nationwide should monitor similar ordinances in their respective operating regions, such as the Delaware River Basin Commission’s decision to pass a resolution to start a rule-making process that could lead to a fracking ban in the Delaware River watershed.

### *Relevant Background on California Oil and Gas Law*

Oil and gas operations in California are governed by Division 3 of the Public Resources Code<sup>6</sup> and its implementing regulations.<sup>7</sup> Division 3 addresses oil and gas exploration and extraction in detail, including notices of intent to drill and abandon, blowout prevention, and regulation of oil sumps.<sup>8</sup> Effective January 1, 2014, the California Department of Conservation’s Division of Oil, Gas, and Geothermal Resources’ regulation of the oil and gas industry’s use of well stimulation treatments, including hydraulic fracturing, was codified by SB 4.<sup>9</sup>

These regulations, which created a state permitting system for WSTs, went into effect in July 2015.<sup>10</sup> Operators are now required, among other things, to ensure that all WST treatment fluids are directed into the zones of interest; that wellbores’ mechanical integrity is tested and maintained; and that well stimulation treatment fluids are of known quantity and description for both reporting and disclosure, among other requirements.<sup>11</sup>

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- 1 *Intended Decision*, December 28, 2017, *Chevron U.S.A., Inc., et al. v. County of Monterey*, Case No. 16-CV-3978, California Superior Court, Monterey County.
- 2 For the full text of Measure Z, see Monterey County, Cal., Protect Our Water: Ban Fracking and Limit Risk Oil Operations Initiative (Measure Z) at [http://www.montereycountyelections.us/a\\_measures\\_NOVEMBER\\_2016\\_EN\\_MZ.html](http://www.montereycountyelections.us/a_measures_NOVEMBER_2016_EN_MZ.html)
- 3 *Id.*
- 4 *See Intended Decision* at 30.
- 5 *Id.* (internal citations omitted).
- 6 Cal. Pub. Res. Code § 3000, et seq.
- 7 Cal. Code Regs. tit. 14, § 1712, et seq.
- 8 See §§ 3203, 3229, 3219, 380-3787.
- 9 Cal. Pub Res. Code § 3150, et seq.
- 10 Cal. Code Regs. tit. 14, §§ 1761, 1780-1789.
- 11 Cal. Code Regs. tit. 14, § 1782.

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