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Counties jumped gun on fracking bans

By Jeffrey Dintzer and Nathaniel Johnson

On Nov. 4, voters in two California counties — Mendocino and San Benito — approved bans on hydraulic fracturing (or "fracking") and other oil and natural gas well stimulation techniques in the unincorporated territory of those counties. Even though neither Mendocino nor San Benito County are home to existing fracking operations, the two prohibitions arrive at a particularly inopportune time for the state and expose the respective counties to potentially expansive legal liability.

Fracking and other advanced well stimulation techniques offer the opportunity to unlock previously inaccessible oil and natural gas from California's shale formations, with incredible economic benefits for the state. Since the city of Beverly Hills generated notoriety in April for enacting California's first municipal ban on hydraulic fracturing, local regulators have continued to push the envelope on legally precarious prohibitions of decades-old techniques for oil and gas production. Rather than subject this burgeoning industry to patchwork draconian prohibitions, city and county regulators should abide by the broad, progressive regulations enacted by Senate Bill 4 in early 2014.

SB 4 requires the secretary of the California Natural Resources Agency to complete an independent scientific study of well stimulation techniques, including fracking, by Jan. 1, 2015. In the meantime, California has wisely allowed fracking to continue under an interim statewide permitting scheme implemented by the Department of Conservation Division of Oil, Gas and Geothermal Resources (DOGGR). According to DOGGR, final regulations for the use of well stimulation techniques such as fracking in oil and gas production will go into effect on July 1, 2015, which will "protect health, safety, and the environment, and supplement existing strong well construction standards."

By permitting fracking while comprehensively studying its effects on human health and the environment, California has balanced the powerful economic benefits of fracking with concern for its citizenry. By vesting regulatory authority in a state entity, California has avoided the uncertainty that would plague a fracking industry exposed to inconsistent local regulations.

Despite the comprehensive regulations required by SB 4, the growth of fracking in other parts of the country has generated significant local backlash. Municipal and county governments in various parts of the country, including California, have rushed into the fray by proposing and enacting local bans or moratoria on various well stimulation techniques, including fracking.

Invariably, these prohibitive local regulations are based on ill-informed concerns about the alleged environmental consequences of fracking. Without fail, a central component of the anti-fracking narrative revolves around the risk of groundwater contamination by fracking, even though the best, recent science discredits the possibility of groundwater contamination caused by fracking. ("Science refutes fracking opposition," Daily Journal, Sept. 30, 2014). The recently-adopted fracking bans in Mendocino and San Benito Counties are no different, though the substance of the respective measures is quite distinct.

In Mendocino County, citizens adopted Measure S, which makes it unlawful to "engage in the unconventional extraction of hydrocarbons" within the county. The measure defines "unconventional extraction of hydrocarbons" to include fracking, horizontal drilling, waste injection wells, and ostensibly any other advanced well stimulation technique. The prohibition on extraction even includes the issuance of permits for engaging in fracking, such as those issued by DOGGR. Notably, there were no commercial oil or gas wells listed in the 2013 state records for Mendocino County.

Measure S does not stop at prohibiting fracking and all related activities though; it goes on to establish a "Community Bill of Rights" for county citizens and ecosystems, create strict liability for damages to any person or property in the county caused by "unconventional extraction" inside or outside the county, and declare any conflicting state, federal or international law null and void.

Measure J, adopted by the citizens of San Benito County, contains more familiar substance and may be the most ripe for challenge. The measure prohibits "High-Intensity Petroleum Operations" in unincorporated areas, including fracking, acidizing, steam injection and any other well stimulation treatment that increases permeability. Proponents of the measure could not identify any fracking occurring on wells in the county however there are over 20 active wells in the county that would prospectively be impacted by the measure's prohibitions on injection-related activities.

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Along with the uncertain environmental benefits of prohibiting oil and gas production techniques not even practiced in their counties, Mendocino and San Benito now face significant, related legal risks that could entrench the counties in costly legal battles. Setting aside, for now, the more dubious aspects of the Mendocino measure — such as an enunciation of rights for ecosystems — both measures are susceptible to serious legal challenges for overbreadth and preemption.

Even though both measures were intended to address the specific risks of fracking, the language adopted by the counties encompasses much more of the oil and gas industry than fracking. Neither the term "unconventional extraction of hydrocarbons" used by Mendocino County nor "High-Intensity Petroleum Operations" used by San Benito County imposes an exclusive limit on regulatory authority. The term "High-Intensity Petroleum Operations," as defined by San Benito County, would include any downhole activity designed to increase permeability of the well, i.e., the ability of the geologic formation to transmit fluids. If a conventional oil or natural gas well is damaged during drilling, and the oil or natural gas cannot flow into the well bore, operators in San Benito County are helpless — as they would be if such operators existed in Mendocino County. Restoring well productivity would require increasing permeability, an activity prohibited under the San Benito County ban.

In addition to the incredible threat an overbroad prohibition poses to the local oil and gas industry, the county itself could face substantial liability. Acquiring the property rights and operational capacity to conduct fracking and well stimulation treatments can be an expensive investment for operators, while providing significant benefits to royalty owners. By threatening the integrity of these operational investments, the measures adopted in Mendocino and San Benito Counties could constitute a taking of private property without just compensation in violation of the U.S. and California Constitutions.

Among the types of takings recognized by the U.S. Supreme Court is a "regulatory taking," where the government deprives the property owner of all economically beneficial use of the property. By prohibiting all well stimulation techniques related to fracking and eliminating the benefit of energy extraction from private property within county borders, the recently enacted measures could effect a regulatory taking. Should a court conclude such a broad prohibition on oil and gas operations unconstitutionally takes the right to extract natural resources, the county would be required to foot the bill of expensive just compensation to oil and gas companies.

Even though regulatory takings claims are often difficult to prove, the risk lies entirely with the county. Local prohibitions on fracking and other well stimulation techniques are probably preempted by the comprehensive regulatory scheme established by California with SB 4. SB 4 not only establishes broad and progressive regulations of fracking in the state, it mandates a permitting scheme that allows fracking to continue while the state completes an independent scientific study of the practice.

In California, courts search for a "conflict" between state and local laws to determine whether local land use regulations are preempted. *Big Creek Lumber Co. v. Cnty. of Santa Cruz* (2006) 38 Cal. 4th 1139, 1149–50. Local laws may be preempted by state laws through explicit language, a contradiction between the local and state law, or a state law so comprehensive there is no room for additional regulation at the local level. SB 4 does not include an explicit preemption clause, but county prohibitions on fracking both contradict the unequivocal state-wide policy to promote fracking and enter a regulatory field fully occupied by the state.

County prohibitions on fracking undeniably contradict SB 4 by banning an activity expressly permitted by the state. As an obvious hypothetical, DOGGR could permit a particular fracking operation otherwise prohibited by a county ordinance like that adopted in Mendocino or San Benito. The contradiction between fracking activities permitted by the state and subsequently prohibited by local governments formed the basis for several Colorado district court rulings issued in July and August that state law preempts local bans on fracking.

Beyond the obvious contradiction with the statewide permitting scheme established by SB 4, local regulations on fracking intrude on an area of industry comprehensively regulated by the state. By interfering with this carefully calibrated, statewide scheme, Mendocino and San Benito Counties likely could not defend their respective fracking prohibitions against a preemption challenge.

Fracking promises enormous economic benefits for the state of California. To fulfill that promise, the state has enacted comprehensive regulations to sustainably develop the industry. Reactionary local prohibitions by municipalities or counties on all well stimulation techniques threaten to eviscerate the growth of this increasingly vital industry. Even worse for local governments, such prohibitions could cause costly legal battles over preemption, as well as liability for taking private property without just compensation.

The state has taken progressive steps to realize the potential offered by the fracking industry. At a minimum, local lawmakers should allow the statewide regulatory process to unfold before embarking on unnecessary legal risks that could impose grave costs on the county and state.