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PERSPECTIVE

Fracking ban will have consequences

By Jeffrey Dintzer and Matthew C. Wickersham

On Feb. 28, the Los Angeles City Council approved a motion directing the city attorney to prepare an ordinance that will ban all oil and gas well stimulation activity, along with the use of waste disposal injection wells.

The city's motion is clearly intended to respond to the widespread controversy surrounding the practice of hydraulic fracturing, generated in response to the much more extensive use of high-volume, horizontal hydraulic fracturing operations taking place in other parts of the country. Conventional hydraulic fracturing is a technique that has been used in oil and gas operations here for over 60 years. Regulators and experts have repeatedly determined that the practice of hydraulic fracturing in the state poses no threat to groundwater, air pollution or seismic hazards.

Nonetheless, the city does not simply seek to ban the practice of hydraulic fracturing within the city. Instead, whether the council recognized it or not, the motion represents a de facto ban on the use of any well stimulation or injection wells within the city. This ordinance, if drafted and adopted as currently approved, will have devastating effects on oil and gas production within city limits, and will likely result in substantial unintended consequences for the city and for the tens of thousands of royalty owners, many on fixed incomes, who collectively receive millions of dollars each year.

First, the broad scope of the motion could prevent any oil and gas production operations within the city, not just the use of more "extreme" practices such as high-volume, horizontal hydraulic fracturing. Further, by seeking to dictate how operators conduct "down-hole" activities within the well itself, the city's regulations will conflict with — and therefore be preempted by — the comprehensive set of state-wide regulations that are within the jurisdiction of the state agency in charge of regulating oil and gas operations. Finally, to the extent that the regulatory ban is not immediately overthrown as overbroad and preempted (which we view as highly likely), the ban will expose the city to significant liability from operators and royalty owners seeking just compensation under the takings clause of the federal and state constitutions.

Although presumably intended to address the current hysteria concerning hydraulic fracturing, the city's motion uses broad, undefined terms that could be used to ban even routine well maintenance activities. The city has provided no assurances as to what it purports to include within the term "well stimulation."

As used in industry, the term generally refers to any down-hole activity that is conducted to restore or enhance the productivity of the well, which would include nearly all down-hole maintenance activity. Without routine maintenance, the wells will stop operating properly. If an ordinance were to prohibit all forms of "well stimulation," including routine maintenance operations, each and every well in the city limits would be forced overtime to shut in through a lack of proper maintenance.



Associated Press
Pumpjacks operating at the Inglewood oil fields in the Baldwin Hills area of Los Angeles, March 6.

The motion would also ban the use of waste disposal injection wells, another vague term that the motion fails to define. The majority of the oil operations in the Los Angeles Basin consist of waterflood operations where the water produced with the oil, sometimes representing over 97 percent of the total fluids pumped up the well, is reinjected back into the oil formation from which it was withdrawn to sweep out more oil. Injection wells within the context of enhanced oil recovery operations have different functions than dedicated waste disposal injection wells, yet both types of wells typically handle produced water. Absent clear definition, it is unclear whether the motion intends to ban the injection of produced water across the board, or a narrower subset of injection wells.

If oil and gas companies are not able to reinject the produced water, they are not able to produce at all and must shut in their wells. Instead of preventing oil companies from using new and purportedly untested methods, the city's ban will have the effect of shutting down an industry that has operated in Los Angeles for generations, providing well-paying jobs and revenue to the city and to the mineral owners.

As shown by the drastic consequences of the city's ban, consistent state-wide regulations for down-hole operations and well design are a necessary part of properly regulating oil and natural gas operations. Existing state law comprehensively addresses oil and natural 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.

State law also requires the state oil and gas supervisor to assure that oil and gas operations do not impact groundwater supplies, and to take any steps necessary to prevent damage to health, property or natural resources. The supervisor has met these objectives through robust regulations and field-specific rules ensuring that wells are constructed and maintained with adequate integrity to prevent infiltration of detrimental substances.

The Legislature has continued this approach with the statutes recently enacted as part of Senate Bill 4 (Pavley). SB 4 requires extensive environmental review and implementation of a permitting scheme for the use of

hydraulic fracturing and specified forms of well stimulation. However, all of these activities are to be conducted by the state agencies, not municipalities such as Los Angeles. Oil reservoirs do not follow political boundaries. An inconsistent patchwork of conflicting regulations would make it impossible to manage such reserves. By creating a conflict with the state regulations, including SB 4, the city's ban is preempted by state law.

Based on the overbreadth of its terms and preempted scope, the city's ban, if formally adopted, will be highly vulnerable to a facial challenge. However, if the city actually implements this ban, the dramatic consequences on oil and natural gas operations will leave the city facing regulatory takings claims from the tens of thousands of individuals who own the right to royalties for oil and gas reserves in Los Angeles. Such a regulation could result in the effective taking of the royalty owners' property rights. If a regulatory taking is shown, operators and royalty owners are entitled to payment of just compensation. Given the scope of oil and gas production that is currently ongoing in Los Angeles, the payment of this just compensation will result in a significant liability to the city, by some estimates several billions of dollars.

As shown, there are significant legal issues raised by the city's intended move towards banning all use of well stimulation and injection wells. While the city may simply be responding to the public opposition to the use of hydraulic fracturing, its actions are in conflict with the current regulatory framework for oil and gas operations. Its use of vague and undefined terms will also result in vastly overbroad regulations that will severely impact the entirety of oil and gas production operations within the city, which will subsequently impact the many employees and contractors whose livelihoods depend on the current operations within the city, and the substantial tax revenue that is currently being paid to a city with a serious budget deficit. And the ban's impact on operators and royalty owners will leave the city liable to claims of a regulatory taking from tens of thousands of individuals. Instead of blindly jumping on the bandwagon against hydraulic fracturing, the city should take time to consider the significant legal and policy consequences that could result from this regulation.



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