



**ALAMEDA COUNTY COMMUNITY DEVELOPMENT AGENCY  
PLANNING DEPARTMENT**

**STAFF REPORT**

**TO: PLANNING COMMISSION**  
**HEARING DATE: APRIL 4, 2016**

**GENERAL INFORMATION**

**PROPOSED ZONING ORDINANCE AMENDMENT:** Modify the Alameda County Zoning Ordinance (ACZO) to prohibit high intensity oil and gas operations in the unincorporated area, including Well stimulation by increasing the permeability of the formation; enhanced recovery wells that are injected with brine, water, steam, polymers, carbon dioxide, or other gasses into oil-bearing formations to recover residual oil and in some limited applications natural gas; hydraulic fracturing; acid fracturing; acid matrix stimulation treatment; acid well stimulation treatment; and disposal or storage of the substances used in or the waste or byproducts of the uses listed above, including but not limited to hydraulic fracturing fluid, acid well stimulation fluid, well stimulation treatment fluid, flowback fluid, wastewater or produced water. Modify the ACZO to prohibit Disposal or storage in pits or sumps of any wastewater or produced water that is a byproduct of any oil and gas operations (uses listed in 17.06.040(I)).

**ZONING:** All parcels zoned “A-Agriculture” would be affected

**GENERAL PLAN DESIGNATION:** All “LPA” (Large Parcel Agriculture), “WM” (Water Management) and “RM” (Resource Management) designations would be affected.

**ENVIRONMENTAL REVIEW:** This action would be exempt from the requirements of the California Environmental Quality Act (CEQA), CEQA Guidelines Section 15308, Class 8, “Actions by Regulatory Agencies for Protection of the Environment.” The action would result in no new physical impacts to the environment.

**RECOMMENDATION**

That the Planning Commission recommend approval to the Board of Supervisors regarding the proposed amendments to the Alameda County Zoning Ordinance.

**DESCRIPTION OF PROPOSAL**

Sections 17.06.100 through Section 17.06.140 are proposed to be added to the Alameda County General Ordinance Code and read as follows:

#### **17.06.100 High-Intensity Oil and Gas Operations – Definition**

For the purposes of this chapter, high-intensity oil and gas operations means any of the following uses:

- A. Well stimulation treatment – any treatment of a well designed to enhance oil or gas production or recovery by increasing the permeability of the formation. Well stimulation treatments include, but are not limited to, hydraulic fracturing treatments and acid well stimulation treatments.
- B. Enhanced recovery wells - wells that are injected with brine, water, steam, polymers, carbon dioxide, or other gasses into oil-bearing formations to recover residual oil and in some limited applications natural gas. The injected fluid thins (decreases the viscosity) or displaces small amounts of extractable oil and gas, which is then available for recovery. Examples include waterflood injection, steamflood injection, and cyclic steam injection.
- C. Hydraulic fracturing or “fracking” – a well stimulation treatment that, in whole or in part, includes the pressurized injection of hydraulic fracturing fluid into an underground geologic formation in order to fracture the formation, thereby causing or enhancing the production of oil or gas from a well.
- D. Acid fracturing – a well stimulation treatment that, in whole or in part, includes pressurized injection of acid into an underground geologic formation in order to fracture the formation, thereby causing or enhancing the production of oil or gas from a well.
- E. Acid matrix stimulation treatment – an acid treatment conducted at pressures lower than the applied pressure necessary to fracture the underground geologic formation.
- F. Acid well stimulation treatment - a well stimulation treatment that uses, in whole or in part, the application of one or more acids to the well or underground geologic formation. The acid well stimulation treatment may be at any applied pressure and may be used in combination with hydraulic fracturing treatments or other well stimulation treatments. Acid well stimulation treatments include acid matrix stimulation treatments and acid fracturing treatments.
- G. Disposal or storage of the substances used in or the waste or byproducts of the uses listed above, including but not limited to hydraulic fracturing fluid, acid well stimulation fluid, well stimulation treatment fluid, flowback fluid, wastewater or produced water, other than storage associated with transportation through the County for disposal or storage outside of the County.

#### **17.06.110 High-Intensity Oil and Gas Operations – Prohibited Use**

High-intensity oil and gas operations are prohibited in the unincorporated areas of the County. The development, construction, installation, or use of any facility, appurtenance, or above-ground equipment, whether temporary or permanent, mobile or fixed, accessory or principal, in support of high-intensity oil and gas operations is prohibited in the unincorporated areas of the County.

#### **17.06.120 High-Intensity Oil and Gas Operations – Amortization Period**

- A. Within one year of the effective date of this section, the owners and operators of any existing high-intensity oil and gas operations shall bring land uses into conformity with this ordinance.
- B. The one-year amortization period permitted by Subsection A may be extended on a case-by-case basis if the Planning Commission determines that a high-intensity oil and gas operations owner or operator has shown that one year is not a reasonable amortization period pursuant to state law and

Section 17.06.130. Any extension may be only for the minimum length of time necessary to provide a reasonable amortization period.

#### **17.06.130 High-Intensity Oil and Gas Operations – Consistent with State and Federal Law**

The provisions of sections 17.06.100 through 17.06.120 shall not be applicable to the extent, but only to the extent, they would violate the constitution or laws of the United States or of the State of California.

In the event a property owner contends that application of these provisions effects an unconstitutional taking of property, the property owner may request, and the Planning Commission may grant, an exception to application of these provisions in accordance with Section 17.06.140.

#### **17.06.140 High-Intensity Oil and Gas Operations – Nonconforming uses**

- A. A person claiming a vested right to uses prohibited by Sections 17.06.100 through 17.06.120 must apply to the County for a determination that the vested right exists. Notice of the hearing shall be made in accordance with the procedures provided by section 17.54.830. The determination shall be made by the Planning Commission, following a public hearing. Upon a determination that the vested right exists, the use may continue subject to the sections of this title concerning nonconforming uses (17.52.610 through 17.52.730). The determination shall be appealable to the Board of Supervisors pursuant to sections 17.54.670-17.54.710.
- B. The applicant for any exemption shall submit as part of the application any and all evidentiary support reasonably available sufficient to establish the basis for the claim of exemption.
- C. A determination of exemption application shall be approved or conditionally approved only if the review authority first makes the following findings:
  - 1. The applicant obtained prior to the effective date of this section, a vested right to conduct well stimulation treatment operations;
  - 2. Approving or conditionally approving the application is required because the applicant has shown that a one year amortization period is not a reasonable amortization period pursuant to state law; and
  - 3. The extension is no longer than the minimum length of time necessary to provide a reasonable amortization period.

No enforcement action shall be taken against any owner or operator of an existing facility if an application for a determination of exemption has been filed in compliance with this Section and the application has not expired, or final action to deny the application has not occurred.

#### **STAFF ANALYSIS**

The Board of Supervisors' Transportation and Planning Committee has directed staff to develop amendments to the County General Plan and Zoning documents that would enable the County to reduce and potentially prohibit high-intensity oil and gas operations as a land use in the County.

The Board Committee directed staff to develop the proposal after community members expressed concerns regarding a collection of enhanced well stimulation techniques commonly referred to as “fracking” but which include not only hydraulic fracturing but also mild acid injection and steam injection techniques.

This item has been before the Planning Commission twice before, both times in 2015. At the last Planning Commission hearing on this matter in May, 2015, Planning Staff and the Office of the County Counsel had tentatively concluded that an effective and legally defensible way to achieve the goals defined by the Board T&P Committee would be to remove the language addressing oil and gas activities from the documents governing land use, thus making these activities nonconforming uses; this way, the existing uses would be able to continue to proceed as originally approved, but could not expand or change significantly, and no new permits could be issued. Expired permits and activities at facilities that have not been operated for at least six months would be considered abandoned as uses and could not be reinstated. If well stimulation techniques were to be proposed for existing wells, it would require a modification of the existing permit, and in addition to the other findings required for such an approval, findings would need to be made that the new procedures neither significantly altered nor expanded the existing nonconforming use.

The Office of the County Counsel had advised that any new ordinance language specifically banning all oil extraction activity (including existing uses) or enhanced well stimulation techniques could place the County at risk of legal action. Lawsuits have been brought in other California jurisdictions, although staff knows of no conclusive decisions as of this date.

However, based partially on testimony from various residents of the unincorporated East County and the Oil and Gas Industry, the Planning Commission directed Staff to consult the County Agricultural Committee to obtain its input.

#### Presentation to the Agricultural Advisory Committee (AAC)

Staff brought the matter to the Agricultural Committee on two occasions. The Committee was concerned that removing language conditionally permitting oil and gas operations, and thus effectively discontinuing that use, would prohibit landowners from exercising mineral and property rights (this is more thoroughly summarized in the May 2015 Staff analysis, attached) . After an additional presentation at the Board of Supervisors Transportation & Planning Committee in September, 2015, Staff brought back to the Agricultural Committee a revised and more complex ordinance that does not change provisions for oil and gas operations generally and as practiced historically, but which prohibits High Intensity Operations including Fracking and other Well Stimulation types. That draft ordinance was substantially the same ordinance that the Commission now has under consideration. The Agricultural Committee was satisfied at its second meeting (October 27, 2015) that this new draft meets its needs, and no longer withheld its support for the idea.

Minutes of the October 27 meeting are attached.

#### Specifics of the Proposed Ordinance.

The proposed ordinance would define high intensity oil and gas operations in the unincorporated area, including Well stimulation by increasing the permeability of the formation; enhanced recovery wells that are injected with water and/or various chemicals into oil-bearing formations to recover residual oil and in some limited applications natural gas; hydraulic fracturing; acid fracturing; acid matrix stimulation treatment; acid well stimulation treatment; and disposal or storage of the substances used in or the waste

or byproducts of the uses listed above, including but not limited to hydraulic fracturing fluid, acid well stimulation fluid, well stimulation treatment fluid, flowback fluid, wastewater or produced water.

The Proposed Ordinance would prohibit these uses, including equipment necessary to conduct them.

The Proposed Ordinance would provide an amortization period of one (1) year in which any existing such operations could be brought into compliance with the new requirements.

The Proposed Ordinance requires itself to be consistent with State and Federal law.

The Proposed Ordinance would provide a procedure for any operator to demonstrate that a vested right exists to conduct the prohibited activities, and that an exemption should be granted by the Planning Commission. In order to prove the vested right, the following findings would need to be made:

1. The applicant obtained prior to the effective date of this section, a vested right to conduct well stimulation treatment operations;
2. Approving or conditionally approving the application is required because the applicant has shown that a one year amortization period is not a reasonable amortization period pursuant to state law; and
3. The extension is no longer than the minimum length of time necessary to provide a reasonable amortization period.

Finally, the Proposed Ordinance would prohibit the use of storage or percolation pits for disposal of waste water from any oil and gas operation.

#### Past and Existing Oil and Gas Activity in Alameda County.

Past and existing oil activity was discussed in the February 2015 staff analysis, which is attached.

#### Comment Letters and E-Mails Received

Numerous comment letters and e-mails were received on this matter in 2015, and all are described in the May, 2015 staff analysis (attached). A small number of new letters have been received since that date, and these are also attached.

#### Conformance with the General Plan

No passages in the General Plan support or restrict oil or gas exploration, extraction or production. Policy 167 conditionally permits the oil and gas use. The changes proposed would continue general oil and gas operations as a conditionally permitted use, and would be in conformance with the General Plan.

#### Environmental Review

This action is exempt from the requirements of CEQA, based on the following:

- (1) This Ordinance Amendment is not a project within the meaning of Section 15378 of the CEQA Guidelines, because it has no potential for resulting in physical change in the environment, directly or ultimately; and

- (2) This Ordinance Amendment is categorically exempt from CEQA pursuant to CEQA Guidelines Section 15307, Class 7, “Actions by Regulatory Agencies for Protection of Natural Resources” as an regulatory action taken by the County pursuant to its police power to assure maintenance and protection of natural resources; and
- (3) This Ordinance Amendment is categorically exempt from CEQA pursuant to CEQA Guidelines Section 15308, Class 8, “Actions by Regulatory Agencies for Protection of the Environment” as an regulatory action taken by the County pursuant to its police power to assure maintenance and protection of the environment; and
- (4) This Ordinance Amendment is not subject to CEQA under the general rule stated in CEQA Guidelines Section 15061(b)(3) that CEQA applies only to projects which have the potential for causing a significant effect on the environment. For the reasons set forth in subparagraphs (1), (2) and (3), it can be seen with certainty that there is no possibility that this Ordinance Amendment will have a significant effect on the environment.

## **CONCLUSION**

Staff recommends that the Planning Commission recommend to the Board of Supervisors the proposed amendments to the Alameda County Zoning Ordinance as described above.

### **PREPARED BY:**

Bruce Jensen, Senior Planner

### **REVIEWED BY:**

Albert Lopez, Planning Director

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## **ATTACHMENTS**

Draft Ordinance Change for Zoning Ordinance, Section 17  
Previous Staff Analysis for February, 2015  
Previous Staff Analysis for May, 2015  
Minutes of Meeting – Agricultural Committee, October 27, 2015  
Comment Letters since March, 2015