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Via E-mail and Overnight Mail

Mayor, City Councilmembers and
Planning Commission Members
City of Arvin
City Hall Council Chambers
200 Campus Drive
Arvin, CA 93203

RE: Proposed Ordinance No. 18-XX to Adopt Text Amendment No. 2017-04 and Ordinance for Regulation of Petroleum Facilities and Operations by Repealing Chapter 17.46, Title 17, and Adding Chapter 17.46 to Title 17 of the Arvin Municipal Code

Dear Mayor, City Councilmembers, and Planning Commission Members:

The Attorney General's Office is writing in support of the City of Arvin's ("City" or "Arvin") proposal to adopt the above-referenced Ordinance No. 18-XX to regulate petroleum facilities and operations within its boundaries ("Ordinance"). The Ordinance will repeal and replace the City's outdated regulations of oil and gas sites with new requirements, including zoning restrictions prohibiting oil and gas sites within specified zones and setbacks from residential and other sensitive areas. The Ordinance was developed for the purpose to protect public health, safety and the environment "by the reasonable regulation" of placement of oil and gas sites within the City of Arvin. (Ordinance, Exhibit B, Arvin Municipal Code, Title 17, Chapter 17.46 (hereinafter "Chapter 17.46"), § 17.46.01 (B).) As discussed in detail below, the proposed prohibited zones and setbacks are reasonable measures to regulate the placement of oil and gas sites in the City, the City has authority to adopt them, and they are not preempted.

I. City of Arvin

Arvin is home to a predominantly Hispanic, low-income community with a high percentage of young children as compared to other California communities.¹ The City's residents experience serious air quality and related public health problems. Arvin ranks as one of the most overburdened communities in California on CalEnviroScreen, a statewide mapping tool

¹ See CalEnviroScreen 3.0 Results for Arvin, CA <<https://oehha.maps.arcgis.com/apps/webappviewer/index.html?id=4560cfbce7c745c299b2d0cbb07044f5>> (as of June 5, 2018).

developed by the Office of Environmental Health Hazard Assessment of the California Environmental Protection Agency to identify communities disproportionately impacted by pollution.² CalEnviroScreen uses environmental, health, and socioeconomic information to produce scores and rank every census tract in the state. A census tract with a high score is one that experiences a much higher burden than a census tract with a low score.³ Specifically, CalEnviroScreen results show that the City's ozone and particulate matter concentrations are higher than 94 - 98% of the rest of the state. In addition to air quality and related public health issues, Arvin's residents are also exposed to high levels of pesticides (93rd - 98th percentile in the state) and drinking water contaminants (87th - 88th percentile in the state). The City's residents are especially vulnerable to pollution exposure given their high rates of poverty (99th percentile) and unemployment (95th percentile) and low levels of educational attainment (100th percentile).

The City is located in the southern end of the San Joaquin Valley in Kern County. The majority of oil and gas production in the state occurs in the San Joaquin Valley, and this region "suffers from chronic air pollution."⁴ Oil and gas production is a source of pollutants such as hydrogen sulfide, benzene, formaldehyde, hexane, and xylene.⁵ There are a number of active oil and gas sites located within the City. These sites contribute to the City's air pollution problems. In March 2014, eight Arvin families were evacuated after a toxic gas leak was detected from an underground oilfield production pipeline located near their homes. Following this incident, the Department of Oil, Gas and Geothermal Resources ("DOGGR") imposed a \$75,000 fine on the owner and operator of the pipeline.

II. The Ordinance

The Ordinance was developed at the direction of City Council in order to replace the City's existing regulations of oil and gas production that were adopted in 1965, more than 50 years ago. The Ordinance will institute various requirements related to the siting of oil and gas sites within Arvin's boundaries for the stated purpose of protecting public health, safety and the environment.

In particular, the Ordinance designates the specific zones in the City where oil and gas sites are allowed and prohibited. The prohibited zones include the City's residential zones, the pedestrian-oriented mixed-use overlay zone, the professional office zone, the neighborhood commercial and restricted commercial zones, the automobile parking zone, the architectural design zone, the precise development zone, and the open space zone. (Chapter 17.46, § 17.46.03.) Oil and gas sites are allowed in the City's general commercial zone, the

² See CalEnviroScreen 3.0 Results for Arvin, CA <<https://oehha.maps.arcgis.com/apps/webappviewer/index.html?id=4560cfbce7c745c299b2d0cbb07044f5>> (as of June 5, 2018).

³ See Office of Environmental Health Hazard Assessment, CalEnviroScreen 3.0 Report (January 2017) <<https://oehha.ca.gov/media/downloads/calenviroscreen/report/ces3report.pdf>> (as of June 6, 2018).

⁴ California Council on Science and Technology, An Independent Scientific Assessment of Well Stimulation in California (July 2015) ("CCST Study"), Volume III, p. 6.

⁵ *Id.*, p. 268.

manufacturing zones, the light and general agricultural zones, and the buffer zone. (*Id.*) In addition, the Ordinance specifies setbacks for oil and gas sites. Under the Ordinance, new oil wells must be located more than 300 feet from the property boundaries of any public school, public park, clinic, hospital, long-term health care facilities, residences or residential zones (with some exceptions), and commercially designated zones (*Id.*, § 17.46.022.A.1-3.) Importantly, the Ordinance specifically states that it supplements DOGGR's regulations of oil and gas activities and in cases of conflict with state laws and regulations, state laws and regulations will prevail. (*Id.*, § 17.46.05.)

III. The Adoption of Setbacks and Prohibited Zones to Protect Public Health Is Reasonable

The benefits of siting oil and gas sites away from residences and other sensitive receptors to reduce public health impacts have been recognized. A 2015 study conducted by the California Council on Science and Technology concluded that “[m]any of the constituents used in and emitted by oil and gas development can damage health and place disproportionate risks on sensitive populations.” (CCST Study, Volume III, p. 13.) This study also found that “[t]he closer citizens are to these industrial facilities, the higher their potential exposure to toxic air emissions and higher risk of associated health effects.” For this reason, “the scientific literature supports the recommendation for setbacks” and the “need for setbacks applies to all oil and gas wells.” (CCST Study, Volume II, p. 431.) A recent Maryland public health study recommended a 2,000-foot setback from well pads in Maryland. (University of Maryland, Maryland Institute for Applied Environmental Health, Potential Public Health Impacts of Natural Gas Development and Production in the Marcellus Shale in Western Maryland (July 2014), p. 91.)

To help reduce the potential health impacts from oil and gas production activities, a number of local jurisdictions in oil-producing states, such as Texas, have established setbacks even stricter than the setbacks and prohibited zones proposed in the Ordinance. (See City of Dallas Development Code, Chapter 51A, Art. IV § 51A-4.203(b)(3.2)(F)(ii)(aa) [establishing 1,500-foot setback between oil and gas production sites and protected uses]; City of Flower Mound Code of Ordinances, Subpart A, Chapter 34, Art. VII, § 34-422(d) [establishing setbacks between oil and gas wells and residential areas, schools, parks, and public highways ranging from 750 feet to 1,500 feet]; City of Denton Development Ordinance, Subchapter 5, § 35.5.10.2 (B) [establishing setbacks between new gas drilling and production sites and residential, commercial and mixed use areas ranging from 500 to 1,000 feet].) Setbacks and prohibited zones have also been implemented by local jurisdictions in California. (See City of Carson Municipal Code, Article IX Planning and Zoning, Chapter 5 Oil and Gas Code, §§ 9502, 9521 [prohibiting the location of oil and gas sites in residential, commercial neighborhood and commercial automotive, mixed use, open space, and special uses zones and establishing 750-foot setback between wells and the property boundary of any public school, public park, clinic, hospital, long-term health care facility, residences and residential zones (with certain exceptions), and various commercial designated zones].)

In light of Arvin's severe air pollution problems, the overall disproportionate pollution burdens experienced by Arvin's residents, and the community's vulnerability to that pollution,

the proposed setbacks and prohibited zones in the Ordinance are reasonable to reduce air pollution and public health impacts from oil and gas operations within the City. Indeed, as the proposed Findings of Fact supporting the Ordinance recognize, the deleterious impacts of oil and gas operations, including odors, air pollution and particulate matter, “are not localized, but can be spread” at distances of more than 1,500 feet. (Ordinance, Exhibit A, Finding of Fact No. IV.) Because of these negative impacts in Arvin, its oil and gas sites “should be directed away from areas with residential land use designations, and other sensitive uses, and the operations regulated to reduce adverse impacts on residents and the community.” (*Id.*, Finding of Fact No. VII.)

Importantly, the proposed restrictions will not prohibit all oil and gas operations in the City but rather the Ordinance will allow such operations to continue in a manner that prevents the future placement of wells near designated sensitive areas. The Ordinance will not prevent the operation of existing oil and gas wells located within the prohibited zones or setbacks if these sites can demonstrate vested rights. (See Chapter 17.46, §§ 17.46.02.B, 17.46.022.C.) Moreover, the proposed prohibited zones and setbacks will not eliminate future access to subsurface oil and gas resources. The City has determined that oil and gas resources located within Arvin’s prohibited zones and setbacks can be accessed through horizontal directional drilling and other methods, including rezoning areas to change allowed uses. (Ordinance, Exhibit A, Finding of Fact No. XII.)

IV. The City Has Authority to Adopt Zoning and Setback Provisions for Oil and Gas Sites

The Ordinance’s proposed prohibited zones and setbacks are within the City’s power to regulate land uses within its jurisdiction. As the California Supreme Court has explained, “[l]and use regulation in California historically has been a function of local government under the grant of police power contained in article XI, section 7 of the California Constitution.” (*Big Creek Lumber Co. v. City of Santa Cruz* (2006) 38 Cal.4th 1139, 1151.) Thus, a “city ha[s] ‘the unquestioned right to regulate the business of operating oil wells within its city limits, and to prohibit their operation within delineated areas and districts, if reason appears for so doing.’” (*Beverly Oil Co. v. City of Los Angeles* (1953) 40 Cal.2d 552, 558.) Indeed, a city’s authority to regulate zoning within its boundaries is “one of the most essential powers of the government, one that is the least limitable.” (*Id.* [citing *Chicago & Alton R. Co. v. Tranbarger* (1915) 238 U.S. 67, 68].) Consistent with these principles, California’s appellate courts have found that the “[e]nactment of a city ordinance prohibiting exploration for and production of oil, unless arbitrary, is a valid exercise of the municipal police power.” (*Hermosa Beach Stop Oil Coalition v. City of Hermosa* (2001) 86 Cal.App.4th 534, 555. The City of Hermosa Beach found that the ban “is necessary to preserve the environment, as well as to protect the public health, safety and welfare of people and property” within the city. (*Ibid.*) The court upheld the ban, concluding it is “presumptively a justifiable exercise of the City’s police power.” (*Ibid.*)

Similarly, here the proposed Ordinance seeks to institute setbacks and prohibited zones for the purpose of protecting public health, safety and the environment. Moreover, the Ordinance is supported by extensive findings demonstrating that these limitations on oil and gas activities

within Arvin are necessary to protect the local environment and public health of the City's residents. (See Ordinance, Exhibit A, Findings of Fact.) The Attorney General's Office believes that the proposed setbacks and prohibited zones in the Ordinance are properly within the City's police power.

V. The Setbacks and Prohibited Zones Provisions Are Not Preempted by State Law

The Attorney General's Office understands that some commenters have asserted that the Ordinance is preempted by state regulation of oil and gas operations. "[W]hen 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, absent a clear indication of preemptive intent from the Legislature, that such regulation is *not* preempted by state statute." (*Big Creek Lumber Co.*, 38 Cal.4th at p. 1150 [emphasis in original].) As the California Supreme Court has explained, local zoning ordinances prohibiting oil and gas drilling within the local jurisdiction's territory are legal. (See *Pacific P. Assn. v. Huntington Beach* (1925) 196 Cal. 211, 217; *Beverly Oil Co. v. City of Los Angeles* (1953) 40 Cal.2d 552, 558.)

Here, the California legislature has not expressed a "clear indication of preemptive intent" with respect to local zoning and land use regulations regarding the location of oil and gas activities within a city or county. (See Pub. Resources Code, § 3690 ["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...zoning... public safety, [and] nuisance."].) Indeed, as the Attorney General has recognized, while state oil and gas regulations likely preempt any local regulations of subsurface oil and gas activities, local regulations of surface activities for purposes such as environmental protection and public safety, among others, are not necessarily preempted by state laws. (59 Ops. Cal. Atty. Gen. 461, 479-480 (1976).) The prohibited zones and setback provisions of the Ordinance are not regulations of subsurface activities. Rather, as discussed above, the provisions are zoning and land use regulations adopted for the purpose of protecting public health and safety from the impacts of oil and gas activities. Consequently, in light of the above analysis, the prohibited zones and setback requirements in the Ordinance are not expressly preempted by state law.

Local regulations may also be preempted by implication. Implied preemption is found only where the claimant demonstrates that the: 1) the state law completely occupies the field of regulations leaving no space for local regulation, 2) the local law duplicates the state law, or 3) the local law contradicts state law. (See *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.* (2013) 56 Cal.4th 729, 754-755.) A local law contradicts state law when it is "inimical" to it. (*Big Creek Lumber Co.*, 38 Cal.4th at p. 1150.) "The 'contradictory and inimical' form of preemption does not apply unless the ordinance directly requires what the state statute forbids or prohibits what the state enactment demands." (*City of Riverside*, 56 Cal.4th at p. 743.) However, "[p]reemption by implication of legislative intent may not be found when the Legislature has expressed its intent to permit local regulations. Similarly, it should not be found

when the statutory scheme recognizes local regulations.” (*People ex rel. Deukmejian v. Cty. of Mendocino* (1984) 36 Cal.3d 476, 485.)

Under the standards for implied preemption, the proposed setbacks and prohibited zones in the Ordinance are not preempted by implication. First, and as discussed above, state law has not completely occupied the field of regulation related to the location of oil and gas activities for purposes of protection of public health, safety and the environment. (See Pub. Resources Code, § 3690; 59 Ops. Cal. Atty. Gen. at p. 481 [“[t]he state does not appear to have occupied [the field of well location] to the exclusion of local entities”].)

Second, the proposed setbacks and prohibited zones do not duplicate state law. State law does not include provisions prohibiting the location of oil and gas sites in specified zoning areas. Additionally, while the state law regulating oil and gas operations oil and gas operations contains well spacing requirements, they are not identical to the proposed setbacks. The state’s well spacing requirements dictate that a well located within 100 feet of the parcel boundary or a public street or 150 feet of another well is a public nuisance. (Pub. Resources Code, § 3600.) By comparison, the proposed setbacks in the Ordinance do not state that a well located within the proscribed limits is a public nuisance. Instead, the Ordinance requires wells to be sited more than 300 feet from residential and other sensitive areas in order to protect the health of the community.

Third, the setbacks and prohibited zones do not contradict state regulation of oil and gas activities. The proposed local restrictions were developed to protect public health and the environment and do not interfere with the state’s goal to develop and utilize oil and gas resources. Specifically, the Ordinance will not prevent the operation of oil and gas wells currently existing within the prohibited zones and/or setbacks if these sites can demonstrate vested rights and will not eliminate future access to subsurface oil and gas resources located in the restricted areas. (See Ordinance, Exhibit A, Finding of Fact No. XII; Chapter 17.46, §§ 17.46.02.B, 17.46.02.C.) For these reasons, the proposed setbacks and prohibited zones do not contradict but rather align with the state’s goal to encourage the wise development of oil and gas resources while preventing damage to life, health, property, and natural resources. (Pub. Resources Code, § 3106.) Moreover, even if the imposition of setbacks and prohibited zones could conflict with state regulations, the Ordinance specifically states that in the event of any such conflict the state law is controlling. (Chapter 17.46, § 17.46.05.) Thus, the proposed setbacks and prohibited zones in the Ordinance cannot contradict the state’s oil and gas law, and therefore, in our opinion, these requirements are not preempted by implication.

This conclusion is consistent with the 1976 Attorney General opinion on the issue of local regulation of oil and gas activities. The opinion concluded that local governments can prohibit oil and gas operations within all or part of their territory and such prohibitions are not preempted. (59 Ops. Cal. Atty. Gen. at pp. 468, 480, 483, 489, 491, 492.) The opinion also stated that local governments can adopt setbacks if: 1) the setbacks do not contradict a specific well spacing variance or plan approved by the state, 2) are more stringent than the state requirements, and 3) do not frustrate the purpose of the state regulations. (*Id.* at p. 484.) Here the setbacks do not contradict a well spacing plan, are more stringent than the state well spacing regulations, and

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appear not to frustrate the purpose of the state regulations. Therefore, the Attorney General's Office believes that proposed setbacks and prohibited zones in the Ordinance are not preempted by state law.

For the reasons provided above, the City of Arvin should adopt the prohibited zones and setbacks proposed in the Ordinance.

Thank you for the opportunity to submit these comments.

Sincerely,



TATIANA K. GAUR
Deputy Attorney General

For XAVIER BECERRA
Attorney General