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RE: *El Paso County's proposed oil and gas regulations*

Dear Mr. Monsson:

I am writing to express the Colorado Oil and Gas Conservation Commission's ("COGCC") concerns regarding El Paso County's proposed oil and gas regulations. In its correspondence dated November 14, 2011, the COGCC noted some of its general concerns with the proposed regulations and also expressed its interest in working collaboratively with El Paso County to address local oil and gas issues through the COGCC's state program. This letter supplements the general comments and concerns raised in the COGCC's prior letter, and also reiterates the COGCC's desire for El Paso County to work with the COGCC to address local concerns through the COGCC's existing state program.

**I. The COGCC's Statutory Charge**

Under the Colorado Oil and Gas Conservation Act ("Act"), the General Assembly charged the COGCC with fostering the responsible development of Colorado's oil and gas resources in a manner consistent with the protection of public health, safety and welfare, including protection of the environment and wildlife. C.R.S. § 34-60-102. The COGCC has broad powers to further the state's interest in oil and gas development, including the power to pass regulations governing all aspects of development. The Commission Rules of Practice and Procedure, 2 CCR 404-1, are available at <http://cogcc.state.co.us/>. Any person can petition the Commission at any time to modify its regulations. *See* Commission Rule 529.a.

## **II. Local Land Use Regulations Affecting Oil and Gas Operations**

### **A. State Preemption Under *County Comm'rs v. Bowen/Edwards Assocs., Inc.*, 830 P.2d 1045 (Colo. 1992) and *Voss v. Lundvall Bros., Inc.*, 830 P.2d 1061 (Colo. 1992).**

In 1992, the Colorado Supreme Court issued two decisions on the same day addressing state preemption of local oil and gas regulations.

In *County Comm'rs v. Bowen/Edwards Assocs., Inc.*, 830 P.2d 1045 (Colo. 1992), the Colorado Supreme Court explained that “[t]he purpose of the preemption doctrine is to establish a priority between potentially conflicting laws enacted by various levels of government.” *Id.* at 1055. The court further explained that local regulation may be expressly or impliedly preempted by state law, and that local regulations may also be preempted by virtue of being in operational conflict with state regulations. The court held that operational conflicts arise where a local rule, if enforced, “would materially impede or destroy a state interest.” *Id.* at 1059. The court further held that the state’s interest in responsible resource development supports the uniform regulation of all technical aspects of oil and gas operations and that conflicting county regulations create operational conflicts and must yield to the state’s interest:

There is no question that the efficient and equitable development and production of oil and gas resources within the state requires uniform regulation of the technical aspects of drilling, pumping, plugging, waste prevention, safety precautions, and environmental restoration. Oil and gas production is closely tied to well location, with the result that the need for uniform regulation extends also to the location and spacing of wells.

...

[T]here may be instances where the county’s regulatory scheme conflicts in operation with the state statutory or regulatory scheme. For example, the operational effect of the county regulations might be to impose technical conditions on the drilling or pumping of wells under circumstances where no such conditions are imposed under the state statutory or regulatory scheme, or to impose safety regulations or land restoration requirements contrary to those required by state law or regulation. To the extent that such operational conflicts might exist, the county regulations must yield to the state interest.

*Bowen/Edwards Assocs.*, at 1059-1060.

In the companion case of *Voss v. Lundvall Bros., Inc.*, 830 P.2d 1061 (Colo. 1992), the Colorado Supreme Court applied the analysis set forth in *Bowen/Edwards* and invalidated a city ordinance imposing a total ban on drilling of any oil or gas wells within the City of Greeley. In doing so, the court analyzed the COGCC's powers and obligations under the 1992 version of the Act and noted that "the regulation of oil and gas development and production has traditionally been a matter of state rather than local control." *Id.* at 1068.

In 2002, the Colorado Court of Appeals applied *Bowen/Edwards* and invalidated various local ordinances geared toward oil and gas development. In *Town of Frederick v. North Amer. Res. Co.*, 60 P.3d 758 (Colo. App. 2002), the Court of Appeals held, as a matter of law, that the Town of Frederick's attempt to pass more stringent setback, noise abatement and visual impact rules conflicted, on their face, with the COGCC's regulatory regime and were therefore preempted. The Court of Appeals rejected the town's argument that it was entitled to "go farther" than the rules and regulations passed by the COGCC because "the local imposition of technical conditions on well drilling where no such conditions are imposed under state regulations, as well as the imposition of safety regulations or land restoration requirements contrary to those required by state law, gives rise to operational conflicts and requires that the local regulations yield to the state interest." *Id.* at 766. Further, the Court of Appeals observed that operational conflict preemption can occur where state and local governments attempt to regulate the "same subject" irrespective of whether the activity concerns purely technical aspects of development:

Certain provisions of the Town's ordinance do regulate technical aspects of drilling and related activities and thus could not be enforced. However, other provisions of the ordinance, such as those governing access roads and fire protection plans, do not purport to regulate technical aspects of oil and gas operations, even though they may give rise to operational conflicts with a state regulation addressing the same subject and thus be preempted for that reason.

*Id.* at 764.

In 2006, the Court of Appeals again applied *Bowen/Edwards* and invalidated various local ordinances geared toward oil and gas development. In *Bd. of County Comm'rs of Gunnison County v. BDS Int'l LLC*, 159 P.3d 773 (Colo. App. 2006), the Court of Appeals held, as a matter of law, that Gunnison County's regulations concerning financial assurance, fines and examination of records conflicted, on their face, with the COGCC's regulatory regime and were therefore preempted. The Court of Appeals also ordered that an evidentiary hearing was necessary to determine whether numerous other county rules, which touched on the same subjects as COGCC regulations, were preempted. *Id.* at 779. The evidentiary hearing contemplated by the Court of Appeals' opinion never occurred and the case was dismissed.

## **B. Post 1992 Statutory Amendments Expanding the COGCC's Jurisdiction**

The Supreme Court has not addressed state preemption of local oil and gas regulations since the *Bowen/Edwards* and *Voss* decisions in 1992. In the intervening years, the General Assembly has dramatically increased the scope of COGCC's statutory mandate. After each statutory change, the COGCC promulgated extensive regulations dealing with oil and gas operations.

### **i. 1994 Amendments to the Act**

In 1992, in *Bowen/Edwards*, the Supreme Court held that § 34-60-106(4) and (11) of the Act did not manifest a legislative intent to regulate all phases of oil and gas activity. Section 34-60-106(11), in its then-existing version, directed the COGCC to “promulgate rules and regulations to protect the health, safety, and welfare of the general public in the drilling, completion, and operation of oil and gas wells and production facilities.”

In 1994, the General Assembly amended § 34-60-106(11) via Senate Bill 94-177. The final phrase of § 34-60-106(11) now reads “in the conduct of oil and gas operations,” rather than “in the drilling, completion, and operation of oil and gas wells and production facilities.” In addition, a broad definition of “oil and gas operations” was added to the Act:

‘Oil and gas operations’ means exploration for oil and gas, including the conduct of seismic operations and the drilling of test bores; the siting, drilling, deepening, recompletion, reworking, or abandonment of an oil and gas well, underground injection well, or gas storage well; production operations related to any such well including the installation of flow lines and gathering systems; the generation, transportation, storage, treatment, or disposal of exploration and production wastes; and any construction, site preparation, or reclamation activities associated with such operations.

C.R.S. § 34-60-103(6.5).

The 1994 amendments to the Act broadened the state's interest and authority beyond what they were when *Bowen/Edwards* and *Voss* were decided. Additionally, following the passage of Senate Bill 94-177, the COGCC promulgated extensive regulations dealing with oil and gas operations.<sup>1</sup>

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<sup>1</sup> The 1994 amendments to the Act, as well as the 1996 and 2007 amendments discussed below, contain statements to the effect that the amendments should not be construed to affect the existing land use authority of local governmental entities. Nonetheless, the Court of Appeals has recognized that the “expanded regulations” resulting from these statutory amendments “may give rise to additional areas of operational conflict with analogous local regulations.” *Town of Frederick*, at 763.

**ii. 1996 Amendments to the Act**

In 1996, the General Assembly amended C.R.S. § 34-60-106(15), which addresses the powers of the COGCC, by adding the following language:

No local government may charge a tax or fee to conduct inspections or monitoring of oil and gas operations with regard to matters that are subject to rule, regulation, order, or permit condition administered by the commission. Nothing in this sub-section (15) shall affect the ability of a local government to charge a reasonable and nondiscriminatory fee for inspection and monitoring for road damage and compliance with local fire codes, land use permit conditions, and local building codes.

In doing so, the General Assembly drew a distinction between local government land use permits and Commission rules, orders, and permit conditions, allowing local governments to assess a fee for inspections and monitoring associated with the former, but not the latter.

**iii. 2007 Amendments to the Act**

In 2007, the General Assembly passed House Bills 07-1298 and 07-1341, codified at C.R.S. §§ 34-60-106 and 34-60-128 (collectively, the “2007 Amendments”). The 2007 Amendments required the COGCC to pass new regulations to establish a timely and efficient procedure for reviewing drilling permit and spacing order applications, to protect public health, safety, and welfare and to minimize adverse impacts to wildlife resources. A major reason the General Assembly required such a rulemaking was to address concerns created by the recent increase in the permitting and production of oil and gas in Colorado. The 2007 Amendments also require the COGCC to consult with the Colorado Department of Health and Environment and the Colorado Division of Parks and Wildlife during the permitting process in appropriate cases.

Following the passage of the 2007 Amendments, the COGCC comprehensively updated its regulations. In adopting the new rules and amendments, the Commission conducted a lengthy rulemaking proceeding. The rulemaking record included thousands of pages of public comment, written testimony, and exhibits and 12 days of public and party testimony. The Commission spent another 12 days deliberating on the rules before taking final action. The resulting regulations have been heralded as a national model, balancing both conservation and responsible development. As with prior COGCC regulations promulgated in response to new statutory directives, “these expanded regulations may give rise to additional areas of operational conflict with analogous local regulations.” *Town of Frederick*, at 763.

### **III. El Paso County's Proposed Regulations**

The COGCC has no objection to many of El Paso County's proposed regulations, such as those dealing with transportation, transportation impact studies, maintenance, site access, fire protection and emergency management. However, other aspects of El Paso County's proposed oil and gas regulations create operational conflicts with the COGCC's regulations. The most significant conflicts are summarized below.

#### **A. The County's Proposed Setback Rules**

The County's proposed setback rules conflict with state law. Proposed County Rule 5.2.37(E)(2), if adopted, would require a minimum setback of 500 feet for minor facilities, such as a single well pad built and operated for the purpose of exploratory drilling, and 500 feet or more, on a "case by case basis," for major facilities, such as a single well pad built for production purposes. In contrast, COGCC Rule 603.a. provides that "the wellhead shall be located a distance of one hundred fifty (150) feet or one and one-half (1-1/2) times the height of the derrick, whichever is greater, from any building unit, public road, major above ground utility line, or railroad." In high density areas, COGCC Rule 603.e. extends setbacks to 350 feet. Proposed County Rule 5.2.37(E)(2) gives rise to operational conflicts under *Town of Frederick*.

#### **B. The County's Ban on Excavated Pits**

The County's ban on excavated pits conflicts with state law. Proposed County Rule 5.2.37(E)(3) would categorically ban the use of excavated storage pits. However, the COGCC authorizes such pits in appropriate circumstances and subject to stringent requirements. An outright ban gives rise to an unavoidable operational conflict because "the local imposition of technical conditions on well drilling where no such conditions are imposed under state regulations ... gives rise to operational conflicts and requires that the local regulations yield to the state interest." *Town of Frederick*, 60 P.3d at 766. *See also Colo. Mining Assoc. v. Bd. of County Comm'rs of Summit County*, 1999 P.3d 718 (Colo. 2009) (state's regulation of mining chemicals prohibited county from banning their use).

#### **C. The County's Proposed Water Quality Regulations**

Proposed Rule 5.2.37(D)(12) imposes numerous technical requirements on operators in order to "ensure the preservation and protection of those groundwater resources that could be affected by oil and gas operations."

The technical matters El Paso County seeks to regulate through proposed Rule 5.2.37(D)(12) are comprehensively regulated by the COGCC. By statute, the COGCC is required to regulate "oil and gas operations so as to prevent and mitigate significant adverse environmental impacts on any air, water, soil, or biological resource resulting from oil and gas operations to the extent necessary to protect public health, safety, and welfare, including protection of the environment and wildlife resources." C.R.S. § 34-60-106(2)(d). In order to carry out its statutory responsibility, the COGCC has passed numerous regulations for the

protection of water. In addition to technical regulations meant to ensure wellbore integrity and proper waste management, COGCC Rule 317B provides extensive regulations concerning “Public Water System Protection” and COGCC Rule 324A requires that any operation shall not degrade air, water, soil or biological resources.

The COGCC also has an extensive ground and surface water monitoring program. Various COGCC regulations (e.g., COGCC Rules 317B, 318, and 608) and orders (e.g., Causes 112-138, 112-156, and 112-157) require operators to collect baseline water samples in certain areas and for certain types of wells; the COGCC can and does add special permit conditions to require such sampling on a well-by-well basis; and the COGCC collects such data itself in response to landowner requests and where oil and gas development moves into new areas. In addition, the COGCC has worked with the oil and gas industry on a new initiative, through which oil and gas operators who drill new wells will collect groundwater samples before and after drilling and hydraulic fracturing. The data will be provided to the COGCC, who will manage it in a central database.

Under the circumstances, El Paso County’s attempt to regulate the technical aspects of water quality protection incident to oil and gas operations is preempted. *Oborne v. Board of County Comm’rs of Douglas County*, 764 P.2d 397, 401 (Colo.App. 1988) (“The Act grants to the Commission specific jurisdiction to prevent pollution of water supplies.... To the extent that plaintiffs’ drilling operations may present problems in these areas, the General Assembly has determined that it is the Commission, and not the counties, that should address those problems.”); *Bowen/Edwards Assocs.*, at 1060 n7 (reaffirming *Oborne*).

Although the “[p]rotection of public water supplies is a matter of both state and local concern and may be regulated by local governments,” *Bd. of County Comm’rs of Gunnison County v. B.D.S. Int’l, LLC*, 159 P.3d 773, 780 (Colo. App. 2006), proposed Rule 5.2.37(D)(12) nonetheless gives rise to operational conflicts under *Oborne* and *Bowen/Edwards Assocs.*

#### **D. The County’s Proposed Wildlife Impact Rules**

Proposed Rule 5.2.37(D)(2) requires applicants to consult with the Colorado Division of Parks and Wildlife (“CDPW”) in order to “ensure” that impacts to wildlife and wildlife habitat are avoided or mitigated to the “maximum extent practicable.” The proposed rules prohibit the issuance of a county permit absent “documented consultation” with CDPW.

The County’s proposed rules conflict with or are redundant of state law. The 2007 Amendments required the COGCC to pass comprehensive regulations to minimize adverse impacts to wildlife resources. In response, the COGCC developed five pages of new regulations in collaboration with CDPW. These regulations impose special operating requirements in all areas (Rule 1204), apply additional operating requirements in sensitive wildlife habitat and restricted surface occupancy areas (Rule 1203), mandate consultation with the CDPW in sensitive wildlife habitat (Rule 1202), and require operators to avoid restricted surface occupancy areas where feasible (Rule 1205). As a result of these new regulations, the COGCC consults with the CDPW where appropriate, but not in every single circumstance. See COGCC Rule 306.c. (Consultation with CDPW). The County’s attempt

to impose additional requirements for the protection of wildlife is unnecessary and the proposed rules conflict with COGCC requirements.

Proposed Rule 5.2.37(D)(2) gives rise to operational conflicts under *Town of Frederick* and *Bowen/Edwards Assocs.*

#### **E. The County's Proposed Visual Impact, Noise Emission and Lighting Rules**

Proposed Rules 5.2.37(D)(7), (10) and (11) address visual impact, noise emission and lighting. These rules have the potential to give rise to operational conflicts with the COGCC's 800-Series Rules, which regulate noise abatement, lighting, visual impact mitigation, and odors and dust.

In order to avoid or minimize some of these conflicts, El Paso County could avail itself of COGCC Rule 801. By doing so, El Paso County could pass its own aesthetic regulations so long as such regulations could be harmonized with the COGCC's regulatory regime. However, El Paso County could not adopt its own noise regulations without violating C.R.S. § 30-15-401(1)(m)(II)(B) ("Ordinances enacted to regulate noise on public and private property pursuant to subparagraph (I) of this paragraph (m) shall not apply to ... oil and gas production subject to the provisions of article 60 of title 34, C.R.S.").

For example, assuming El Paso County availed itself of COGCC Rule 801, proposed Rule 5.2.37(D)(7) would nonetheless give rise to operational conflicts. Proposed Rule 5.2.37(D)(7) addresses visual impacts and authorizes County officials to require "specific visual mitigation measures," including a "minor relocation of the facility." Proposed Rule 5.2.37(D)(7) gives rise to operational conflicts because "oil and gas production is closely tied to well location, with the result that the need for uniform regulation extends also to the location and spacing of wells." *Bowen/Edwards Assocs.*, at 1059. County officials have no authority to relocate a facility permitted by the COGCC.

#### **F. The County's Proposed 14-Step Permitting Process**

Some aspects of the County's proposed permitting process conflict with state law. Under the Act, the General Assembly charged the COGCC with the responsibility to implement timely and efficient procedures for the review of applications for permits to drill. C.R.S. § 34-60-106(11)(a)(I)(A). El Paso County's proposed regulations will materially impair the state's interest in the timely and efficient approval of drilling permits because the process requires compliance with the problematic provisions discussed above.

## CONCLUSION

The County should reject the proposed rules discussed above as being in operational conflict with the COGCC's regulatory regime. The County should reject the proposed rules discussed above for the additional reason that exhaustive local regulations are unnecessary. El Paso County can accomplish its objectives through the Local Governmental Designee program, through which the COGCC can impose permit-specific conditions of approval. *See* COGCC 305.d. ("[T]he Director may attach technically feasible and economically practicable conditions of approval to the Form 2 or Form 2A as the Director deems necessary to implement the provisions of the Act or these rules pursuant to Commission staff analysis or to respond to legitimate concerns expressed during the comment period.").

Additionally, the COGCC encourages El Paso County to consider whether a Memorandum of Understanding would be beneficial. Gunnison County and the COGCC recently entered into a MOU. As specified in the MOU, the COGCC and Gunnison County intend to enter into an intergovernmental agreement pursuant to C.R.S. §34-60-106(15) whereby the COGCC will assign its facilities inspection function to Gunnison County. Gunnison County believes such an assignment will promote public confidence and increase transparency concerning oil and gas development in the county. The COGCC can also address local concerns through area specific orders under COGCC Rule 503 and geographic area plans under COGCC Rule 513.

Sincerely,

FOR THE ATTORNEY GENERAL

A handwritten signature in blue ink that reads "JOHN E. MATTER, JR." in a stylized, cursive font.

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Assistant Attorney General  
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303-866-5041

cc: David Neslin, Director COGCC