

**BEFORE THE OIL AND GAS CONSERVATION COMMISSION  
OF THE STATE OF COLORADO**

IN THE MATTER OF CHANGES TO THE	)	CAUSE NO. 1R
DRAFT RULES AND REGULATIONS OF THE	)	
OIL AND GAS CONSERVATION	)	DOCKET NO. 0803-RM-02
COMMISSION OF THE STATE OF COLORADO	)	

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**NOTICE OF OBJECTION TO THE SCHEDULED SEPTEMBER 4TH EXECUTIVE  
SESSION MEETING OF THE COLORADO OIL AND GAS CONSERVATION  
COMMISSION AND MOTION TO PRESERVE RECORD OF PRIOR EXECUTIVE  
SESSION PROCEEDINGS PENDING FINAL AGENCY ACTION**

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The Colorado Oil and Gas Association (“COGA”) and Colorado Petroleum Association (“CPA), (collectively the “Moving Parties”), by and through their undersigned counsel, respectfully submit the following Notice of Objection to the Scheduled September 4th Executive Session Meeting of the Colorado Oil and Gas Conservation Commission (“Executive Session”) and Motion to Preserve Record of Executive Session Proceedings (“Notice of Objection and Motion”) until the conclusion of this rulemaking proceeding.

**Notice of Objection**

As grounds for their objection, the Moving Parties state as follows:

1. The Colorado Oil and Gas Conservation Commission (“COGCC” or the “Commission”) has called the Executive Session to discuss legal issues related to the rulemaking.<sup>1</sup> Under the Colorado Sunshine Law,<sup>2</sup> all meetings of any state public body at which public business is discussed are declared to be public meetings and open to the public. However, when a state public body calls an executive session meeting that is authorized by the Colorado Sunshine Law, such a meeting is not open to the public.<sup>3</sup> The Moving Parties submit that the Colorado Sunshine Law does not permit an executive session meeting by the COGCC for the published purpose.

2. The notice given on the Commission’s website announcing the Executive Session does not on its face satisfy the statutory requirements for holding an executive session meeting of the COGCC that is closed to the public. When holding an executive session meeting, a state public body must describe with specificity a permissible topic of discussion for an executive session meeting and include a specific citation to the statute.<sup>4</sup>

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<sup>1</sup> A notice is posted at <http://cogcc.state.co.us>, a copy of which is attached as Exhibit A to this Notice of Objection.

<sup>2</sup> COLO. REV. STAT. §§ 24-6-101 to –402 (2007).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at § 24-6-402(3)(a).

3. The Commission has failed to give an adequate description of the purpose of the scheduled Executive Session. A state public body must announce “in as much detail as possible without compromising the purpose” of the closed meeting the purpose for which an executive session meeting is authorized.<sup>5</sup> The Commission’s website posting has failed to meet this statutory requirement.<sup>6</sup> The Commission has simply stated that it will “discuss legal issues related to the rulemaking.” This blanket statement also does not meet the requirements of the statute.

4. Furthermore, the Commission must vote to approve the Executive Session by a two-thirds majority of the entire membership of the Commission at a properly convened public meeting of the Commission.<sup>7</sup> The parties to the rulemaking have been given no notice that the Commission met at a prior public meeting, duly noticed to and open to the public, to approve by a two-thirds majority vote or greater this Executive Session.

5. The Commission has also failed to show that it meets any of the other statutory requirements to hold the scheduled Executive Session. Under the Sunshine Law, an executive session is only appropriate in certain enumerated instances. Among those topics the Commission may discuss in an executive session, the only topic resembling a foundation for holding the scheduled Executive Session is “conferences with an attorney representing the state public body concerning disputes that are subject to pending or imminent court action[.]”<sup>8</sup> The Commission has stated that it relies on this provision in its website posting, but has not demonstrated that this rulemaking process is subject to pending or imminent court action, since final agency action has not been taken, no appeal has been filed or other judicial remedy sought by any party, and the parties are still closer in their positions than at any time in this proceeding.

6. The Commission’s attempt to invoke the Sunshine Law’s exception to public meetings of public bodies located at CRS § 24-6-402(3)(a)(III), concerning state statutes that specify “matters required to be kept confidential” is wholly misplaced and without support of applicable case law or even a written attorney general’s opinion. The Commission’s counsel did this once before, with respect to an executive session held on June 24, 2008, convened over similar objections of these Parties, by simply invoking the provisions of CRS § 13-90-107(1)(b), but that section does not specify “matters required to be kept confidential” (such as medical or employment records); rather, it merely establishes that attorneys may not be examined without the consent of his or her client as to the advice given. This codification of the common law attorney-client privilege does not meet the exception from the requirement to make meetings of this Commission available to the public, because the requirement to hold meetings, even one with counsel providing advice (which is commonly provided by counsel in open, public meetings for virtually all other public bodies, including state boards and commissions), does not require the examination of counsel concerning privileged communications. Indeed, counsel’s advice to public bodies rendered at open, public meetings, is not entitled to a claim of privilege under any

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<sup>5</sup> *Id.*

<sup>6</sup> *Supra*, note 1.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at § 24-6-402(3)(a)(II).

circumstance, so any reliance on CRS § 13-90-107(1)(b) to invoke the public meetings exception in CRS § 24-6-402(3)(a)(III) can not withstand scrutiny.

7. It is highly inappropriate and improper for the Commission's members to go into a private meeting with the Commission staff and its legal counsel at any point in this rulemaking, a proceeding in which the Commission staff has advocated the proposed regulatory changes and the Commission's members are expected to be open-minded and impartial with respect to the outcome of this proceeding.

### **Motion to Preserve Record of Prior Executive Sessions**

In addition to the foregoing objection, and based upon the same grounds for objection to the scheduled Executive Session, the Moving Parties seek by this motion an order of the Commission to preserve the statutorily required record and/or minutes of prior executive sessions held in connection with this proceeding over the objections of these and other parties on the same or similar grounds, so the issue of whether they must be produced and whether such meetings violated the Sunshine Law may be deferred and possibly avoided pending the outcome of this rulemaking proceeding. As additional grounds for this motion, the Moving Parties state:

8. Failure to grant this motion and preserve the record of prior executive sessions may require piecemeal attention to the preservation of such record, causing an unnecessary and premature or possibly unnecessary distraction from these proceedings.

9. If the Commission and its counsel are truly confident that their pattern of repeated exclusion of the public from their conduct of this Commission's public business is lawful, then preserving the record of such sessions to avoid the noted distractions until final agency action is taken in this proceeding will result in no prejudice to the interests of the Commission or the conduct of its duties.

The undersigned counsel are authorized to state that Anadarko Petroleum Corporation, Black Hills Exploration and Production, Inc., Pioneer Natural Resources USA, Inc., and Williams Production RMT Co. join in this Notice of Objection and Motion.

WHEREFORE, the Moving Parties respectfully request that the Commission order that the record of all executive sessions held in connection with this proceeding be preserved until thirty days following final agency action in this proceeding, to defer and or avoid a possible dispute over access to such record.

Dated this 4th day of September, 2008.

Respectfully submitted,

s/ Kenneth A. Wonstolen

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- and -

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NATURAL RESOURCES USA, INC.

**CERTIFICATE OF SERVICE**

I hereby certify that one (1) original and fifteen (15) true and correct copies of the attached **NOTICE OF OBJECTION TO THE SCHEDULED SEPTEMBER 4TH EXECUTIVE SESSION MEETING OF THE COLORADO OIL AND GAS CONSERVATION COMMISSION AND MOTION TO PRESERVE RECORD OF PRIOR EXECUTIVE SESSIONS** were served by hand-delivery on the 4th day of September, 2008, upon the Colorado Oil and Gas Conservation Commission (“COGCC”), as follows:

Patricia Beaver, Hearing Manager  
Docket No. 0803-RM-02  
Oil and Gas Conservation Commission  
1120 Lincoln Street, Suite 801  
Denver, Colorado 80203

and further certify that two (2) true and correct copies of said notice were served by hand-delivery on the 4th day of September, 2008, upon the Department of Law, as follows:

Kelly Rees, Esq.  
Colorado Department of Law  
1525 Sherman Street, 7<sup>th</sup> Floor  
Denver, Colorado 80203

and also further certify that one (1) true and correct copy of said petition was served by hand-delivery on the 4th day of September, 2008, upon the COGCC, as follows:

Joshua Epel, Esq., Assistant General Counsel  
DCP Midstream  
370 Seventeenth Street, Suite 2500  
Denver, Colorado 80202

and lastly certify that true and correct electronic or paper copies of said petition were e-mailed or mailed First-Class on the 4th day of September, 2008, to:

Patricia Beaver at [tricia.beaver@state.co.us](mailto:tricia.beaver@state.co.us)  
Marc Fine at [marc.fine@state.co.us](mailto:marc.fine@state.co.us).  
Kelly Rees at [kelly.rees@state.co.us](mailto:kelly.rees@state.co.us)  
All Parties on the COGCC Service List for  
Docket No. 0803-RM-02.

/s Linda Bondar

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## **EXHIBIT A**

Rulemaking Hearing Executive Session: September 4, 2008

The Colorado Oil and Gas Conservation Commission will go into an Executive Session on Thursday, September 4, at approximately 10:00 a.m. to discuss attorney-client privileged confidential legal advice to the Commission regarding the Draft Rules, pursuant to C.R.S. § 24-6-402(3)(a)(II) & (III).