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

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

MEMORANDUM CONCERNING THE SCOPE OF STANDING TO APPEAL COGCC ACTION ON APDs AND FORMS 2A

SUBMITTED TO THE ATTORNEY GENERAL BY THE INDUSTRY PARTIES

I. Under the Current Rules, Only the Operator and Local Government Designee Have Standing to Appeal APD Decisions.

The current rules of the Colorado Oil and Gas Conservation Commission (the "Commission") provide that, "[f]or purposes of seeking relief or a ruling from the Commission…" on any matter not specifically enumerated "…only persons who can demonstrate that they are directly and adversely affected or aggrieved by the conduct of oil and gas operations or an order of the Commission and that their interest is entitled to legal protection under the act may be an applicant." Rule 503b(7). With respect to appealing a Commission decision regarding a Permit-to-Drill (an "APD"), Rule 503.b(6) specifically provides that "…the relevant local government shall be the applicant…." Therefore, the Commission has consistently interpreted the current rules such that only the local government designee ("LGD") or operator has standing to initiate an appeal of APD decisions.

The Commission's approach to appeals of APD decisions described above is consistent with the Colorado Administrative Procedures Act ("APA"), which provides that in order for a party to have standing to seek review of an agency action, the party must be "adversely affected or aggrieved." §24-4-106(4). Under the APA, an aggrieved party is one who suffers actual loss or injury or being exposed to potential loss or injury to legitimate interests including, but not limited to, business, economic, aesthetic, governmental, recreational, or conservational interests. §25-4-102(3.5). In short, a party must have suffered an injury in fact to a legally protected interest in order to be an "aggrieved party." *Bd. of County Commr's of La Plata County, et al, v. Colo. Oil and Gas Conservation Commn.,* 81 P.3d 1119, 1122 (Colo. App., 2003). Additionally, for purposes of judicial review, the injury must be sufficiently direct and palpable to allow a court to say with fair assurance that there is an actual controversy proper for judicial resolution. *Id.*

Like any administrative agency, the Commission only has those powers expressly set forth in its enabling statute, the Oil and Gas Conservation Act, codified at §§34-60-101 *et seq.*

(the “OGC Act”). Section 34-60-106(14) of the OGC Act provides in pertinent part that "[b]efore an operator commences operations for the drilling or any oil or gas well, such operator shall evidence its intention to conduct such operations by giving the surface owner written notice….The notice of drilling shall also be provided to the local government in whose jurisdiction the well is located…." By contrast, §34-60-106(17)(c) of the OGC Act requires, in the context of closing an underground natural gas storage cavern, that notice must be given to "all owners of property, both surface and subsurface, ***occupied by and immediately adjacent to*** the underground natural gas cavern…." (emphasis added). Thus, in the context of closure of an underground natural gas storage cavern, adjacent landowners are entitled to notice, while in the context of drilling operations, they are not, by operation of express language in the OGC Act. Comparison of these two provisions makes clear that the General Assembly, while cognizant of adjacent landowners, did not intend for them to receive notice or have standing with respect to drilling operations. Accordingly, under the OGC Act the issue of the standing of adjacent landowners as to drilling operations has largely been settled and H.B. 1298 and H. B. 1341 did nothing to enlarge or alter the standing of adjacent landowners. Therefore, to endow adjacent landowners with standing to initiate the appeal of APDs and Forms 2A in the context of drilling operations occurring solely on adjacent private lands would go beyond the intent of the General Assembly as proscribed in the OGC Act, which the Commission may not do.

II. In the Present Rulemaking, the Commission Should Not Alter its Position That Only the Local Government Designee or Operator Has Standing to Appeal APD Decisions.

The Commission’s Acting Director and the Attorney General’s Office have raised the question of whether the OGC Act allows other parties besides the operator and the LGD to appeal APD and Form 2A decisions to the full Commission. We suggest the answer to that question is no for a variety of reasons, including the lack of any language in recent amendments to the OGC Act compelling this result or a departure from past interpretations of the OGC Act and implementing rules; the practical consequence of inviting many challenges to garden variety APDs that will raise numerous varied questions of how “affected or aggrieved” a particular person or group is with respect to a given APD and/or Form 2A, inevitably causing the failure of the Draft Rules to ensure the “timely and efficient” review and issuance of APDs and approved Forms 2A by Commission staff; and finally, the nature of agency action upon APDs and Forms 2A at the staff level, being ministerial rather than discretionary. These and other considerations are set forth in more detail below.

A. <u>Expansion of the Right to Appeal APD Decisions is Neither Compelled Nor Necessary</u>

Aside from the operator and the LGD, the party most likely to be affected by an APD decision is the surface owner. Yet, the surface owner is protected by the “reasonable accommodation” doctrine and by any surface use agreement in place. In the 2007 session, the General Assembly directly addressed the impact of oil and gas development on landowners, adopting H.B. 1252 which codifies the reasonable accommodation doctrine. Therefore, to the extent surface owners are alleging a breach of the “reasonable use” standard, they do not have a legally protectible interest to be addressed in the permitting process, and the Commission has not been authorized to adjudicate such issues. Furthermore, surface owners have other avenues to

protect their interests. For example, the surface owner can bring public health and environmental concerns created by oil and gas operations on their land to the Director's attention during the public comment process. Additionally, they can rely on common law protections and bring a suit against the operator for nuisance. Thus, surface owners do not need an appeal right or a right to participate in the permitting process to raise these issues or to protect their interests.

Other parties which may allege they are "adversely affected or aggrieved" by the approval of an APD include adjacent landowners and citizens groups. However, adjacent landowners have no right to dictate surface use on land in which they do not own an interest, and operators have no obligation to accommodate adjacent landowners. In adopting H.B. 1252, noted above, the legislature had an opportunity to expand the rights of adjacent landowners with respect to oil and gas development on neighboring land, but declined to do so. Instead, the accommodation obligation of operators flows only to the surface owner, and the proposal to endow adjacent landowners and other parties with standing to appeal APD and Form 2A decisions stands in direct contradiction to H.B. 1252, codified at §34-60-127. The Commission is not a land use authority, and has no authority to regulate surface use in order to benefit adjacent landowners. So long as such adjacent surface use is conducted in conformance with the COGCC's rules and standards, the issuance of an APD should not be appealable to the Commission by such persons, as they are not directly affected or aggrieved, and their interests are protected by compliance with COGCC rules, the enforcement of which can still be compelled by them if need be. The right of citizens groups is even more tenuous, since the land in question is private, not public land. With respect to federal or state owned lands, citizen's groups may, on particular facts, be able to meet the standard of an affected or aggrieved person, and thereby have standing to protect the public interest. But where the lands in question are privately owned, citizens groups should have no standing to initiate an appeal of oil and gas permitting decisions on lands in which they do not possess any legally protected interest.

B. <u>The Expansion of the Right to Appeal APD and Form 2A Decisions is Likely to Have Substantial Negative Consequences to the Efficient Development of Colorado's Oil and Gas Resources</u>

As a practical matter, expanding the right to initiate an appeal of an APD and/or Form 2A decision beyond the operator and LGD will open the door for virtually any party that alleges they have been "adversely affected or aggrieved" to compel full Commission review of an approved APD and/or Form 2A. This could lead to countless appeals by a variety of parties which would hopelessly bog down the Commission and effectively bring the permitting process to a halt. This would significantly undermine the Commission's objectives to "…foster the responsible, balanced development…of oil and gas in the state of Colorado…." §34-60-102. Administrative efficiency, particularly for routine matters such as APD and Form 2A approvals, requires bright-line, definitive guidelines for review of agency actions, which limit such review only to those parties who possess a legally protected interest which is most directly affected by agency action. Therefore, the right to appeal an APD approval should remain limited to the operator and LGD.

C. <u>The Permitting Process is a Ministerial Act</u>

Under C.R.C.P. 106(a), judicial review of an agency action is available for those acts which are "quasi-judicial," but not for those acts that are merely "ministerial." *Bourgeron v. City and County of Denver*, 159 P.3d 701, 704 (Colo. App., 2006). Whether an agency action is quasi-judicial or ministerial depends on the nature of the decision and the process by which it is reached. *Cherry Hills Resort Dev. Co. v. City of Cherry Hills Village*, 757 P.2d 622 (Colo. 1988). Acts which require the exercise of agency discretion or the application of legal standards or policy considerations to a set of facts are generally quasi-judicial, while acts that are properly characterized as merely administrative or executive are ministerial. *Bourgeron* at 705.

Similar to the availability of judicial review, the ability to appeal those acts of the COGCC staff which are ministerial should also be limited. The review of an APD by the Commission is a routine, administrative task handled at the staff level, not unlike the issuance of a building permit by a local government planning department. This review does not involve the application of legal or policy considerations to a set of facts, but simply the approval or denial of an APD and/or Form 2A based upon the determination that all the necessary requirements and standards are satisfied. Therefore, any ability to review such acts should be narrow and appropriately limited to those parties most affected by the APD decision.