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US FIRST CLASS MAIL

David Neslin
Colorado Oil and Gas Conservation Commission
1120 Lincoln Street, Suite 801
Denver, Colorado 80203

Re: Memorandum Regarding Provision For Citizen
Standing In Permitting Matters In The Proposed Rules

Dear Mr. Neslin:

This correspondence briefly identifies the rationale to establish broad citizen standing in permitting matters in the proposed rules.

I. OIL AND GAS CONSERVATION ACT.

The right to participate in agency permitting proceedings is governed by the agency's enabling legislation. Williams Natural Gas Co. v. Mesa Operating Ltd. Partnership, 778 P.2d 309 (Colo. App. 1989); Colorado State Board of Optometric Examiners v. Dixon, 440 P.2d 287 (1968). A statute must be read and considered as a whole in order to ascertain the General Assembly's intent in passing it. Williams at 311. The initial consideration therefore must be the provisions of the Oil and Gas Conservation Act.

Section 34-60-108(2), C.R.S. provides that no order "shall be made by the Commission without a hearing upon at least twenty day's notice." Section 34-60-108(4), C.R.S. requires that the Commission "shall cause" one publication of notice, at least ten days before the hearing, in a newspaper of general circulation in Denver and "in a newspaper of general circulation in the county where the land affected, or some part thereof, is situated." As the Court of Appeals found in Williams, "(t)his requirement of publication in a Denver newspaper, concerning a hearing affecting property some distance away, evidences the General Assembly's recognition that the impact of the

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business of the commission extends far beyond the boundaries of the property involved.” Williams at 311.

Section 34-60-108(7) allows “any interested person” to petition the Commission on “any matter within the jurisdiction of the Commission...” (Emphasis added.) On filing of a petition, the Commission shall fix a date for a hearing. The Court of Appeals in Williams stated that the Oil and Gas Conservation Act “is ... unambiguous in its provisions concerning the conduct of hearings.” Section 34-60-108(2) mandates that “any interested person shall be entitled to be heard.” Williams at 311. “All persons who have filed a timely protest shall be given full opportunity to be heard” at the hearing. Furthermore, the Act contains “no requirement that a person seeking to participate must demonstrate an appropriate interest, motive, or economic connection as a requisite to being heard by the commission.” Williams at 311.

Further, 34-60-108(7), C.R.S. provides that “any interested party desiring to protest the granting of the petition” shall have the right to protest the granting of the petition.

II. STATE ADMINISTRATIVE PROCEDURE ACT.

The State Administrative Procedure Act, at 24-4-105(2)(c) C.R.S., states that, to assure that all parties to any agency adjudicatory proceeding are accorded due process of law, “(a) person who may be affected or aggrieved by agency action shall be admitted as a party to the proceedings upon his filing with the agency a written request therefore, setting forth a brief and plain statement of the facts which entitle him to be admitted and the matters which he claims should be decided.”

The State Administrative Procedure Act, at 24-4-102, C.R.S. defines:

- a. “Person” to “include an individual, limited liability company, partnership, corporation, association, county, and public or private organization of any character other than an agency.”
- b. “Party” includes “any person or agency named or admitted as a party, or properly seeking and entitled as a right to be admitted as a party, in any court or agency proceeding subject to the provisions of this article.”
- c. “Aggrieved”, for the purpose of judicial rulemaking, “having suffered 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.”
- d. “Interested person” to “include any person who may be aggrieved by agency action.”

24-4-105(2)(c) states that “A person who may be affected or aggrieved by agency action shall be admitted as a party to the proceeding upon his filing with the agency a written request therefore...”

Further, pursuant to the Administrative Procedure Act, at 24-4-104(5), C.R.S., a proceeding for revocation, suspension, annulment, limitation or modification of a previously issued license “shall be commenced” by the filing of a written complaint by a “complainant.”

Finally, the apprehension that a broadly defined status of “party” will unduly thwart or prolong hearings is defeated by 24-4-105 (c), C.R.S., which states that “Nothing in this subsection (2) shall prevent an agency from admitting any person or agency as a party to any agency proceeding for limited purposes.”

III. CASE LAW.

In general, the settled law in Colorado is that a petitioner has standing if: (1) there is an allegation that the challenged action has caused or threatens to cause injury in fact; and (2) the interest sought to be protected is arguably within the zone of interest to be protected or regulated by the statute in question. Wimberly v. Ettenberg, 570 P.2d 535 (Colo. 1977).

Based on the 2007 legislation, the Commission now has the explicit obligation and authority to protect public health, safety and welfare, the environment and wildlife resources; this obligation and authority defines the “zone of interests” to be protected and regulated. A member of the public can now clearly point to the new statutory zone of public and private interests to fulfill the Ettenberg criteria.

IV. VIOLATION OF THE EQUAL PROTECTION CLAUSE.

The United States Supreme Court has held that the Equal Protection Clause “is essentially a direction that all persons similarly situated should be treated alike.” City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985). Generally cases in Equal Protection jurisprudence focus on either a claim of disparate treatment based on the plaintiff’s membership in a racial group or other “suspect” class or on an allegedly irrational legislative classification.

In the current rulemaking, the discussion of who is entitled to initiate a hearing has devolved to suggestions, devoid of factual foundation, of rather arbitrary distances from an epicenter of a well. A determination of standing based on such an arbitrary foundation will be subject to equal protection challenge.

V. DENIAL OF PROCEDURAL DUE PROCESS.

In examining a procedural due process claim, courts conduct a two part inquiry:

1. whether the defendant deprived the plaintiff of a constitutionally protected liberty or property interest; and
2. if so, whether that deprivation occurred without due process of law. Williams v. Seniff, 342 F.3d 774, 786-87 (7th Cir. 2003).

Regarding the first Williams prong, it is strongly suggested that citizens – beyond the permit applicant, surface owner and narrowly constrained “adjacent landowners” - have an interest in their health, safety, welfare, the environment and wildlife. As the evidence at the hearing clearly demonstrates, these personal as well as public interests are, in fact, affected by oil and gas operations. In an illustrative case, Cabrera v. Bayamon, 370 F. Supp. 859 (D.P.R. 1974) plaintiff landowners were found to have the right to the free and peaceful enjoyment of their property, without the threat to their life, health, safety and property posed by improper interference by government officials under color of law.

Regarding the second Williams prong, it is suggested that a deliberate denial of procedural standing safeguards, actually contemplated in a rulemaking and built into the administrative procedure, will be found to be a denial of rudimentary due process.

VI. MODEL STATE ADMINISTRATIVE PROCEDURE ACT.

The issue of who can initiate an adjudicative hearing is illuminated by the Model State Administrative Procedure Act, National Conference Of Commissioners On Uniform State Laws, at §4-102, Adjudicative Proceedings; Commencement, which mandates that an agency “shall commence an adjudicative proceeding upon the application of any person” (emphasis added) unless certain exclusionary criteria are met.

Thank you.

Truly yours,

David Baumgarten
Gunnison County Attorney