

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

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

**CLOSING BRIEF AND FINAL ALTERNATIVE PROPOSALS OF THE COLORADO
ASSOCIATION OF HOME BUILDERS AND THE NATIONAL ASSOCIATION OF
INDUSTRIAL AND OFFICE PROPERTIES**

The Colorado Association of Home Builders (“CAHB”) and the National Association of Industrial and Office Properties (“NAIOP”), through their undersigned counsel, Randall J. Feuerstein of Dufford & Brown, P.C., hereby submit their Closing Brief and Final Alternative Proposals as follows:

I. INTRODUCTION

CAHB and NAIOP are state wide trade organizations representing the development and building communities that purchase, sell, develop and improve land, undeveloped real estate and developed real estate for home building and industrial, office and mixed use commercial real estate. Together, they have over 4,600 members in Colorado. CAHB’s and NAIOP’s perspective is that of a surface owner who may or may not own an interest in minerals and who is contemplating a change in use from agriculture or vacant land to home or commercial building.

Their objectives in this rule making include:

- Minimizing surface disturbance by oil and gas operations;
- Maintaining the contract rights created through surface use agreements, leases and other agreements with operators;
- Minimizing surface area lost to safety setbacks and preventing increased setbacks;
- Assuring the provision of adequate notice to surface owners of oil and gas operations and permitting and planning proceedings of the Colorado Oil and Gas Conservation Commission (“COGCC”); and
- Enabling consultation and inspection even if a surface use agreement exists.

CAHB and NAIOP filed Preliminary and Final Prehearing Statements which included Alternative Language Proposals, Direct and Rebuttal Testimony of Chris Elliott and Exhibits. Alternative Language (in Power Point) and color copies of the Exhibits were tendered at the

hearings. Mr. Elliott testified and the undersigned counsel made argument and cross-examined witnesses.

The Alternative Language attached as Attachment 1 and addressed in this Brief is based upon the clarified Rules filed 06/18/08 and posted on the COGCC's web site 6/20/08. In most respects, the Alternative Language is the same as or similar to that presented at the hearings. A few changes are offered below to address some oil and gas industry concerns regarding permitting and consultation.

Black text denotes the current Rules. Red text is the clarified (6/18/08) Rules, and blue text is the CAHB/NAIOP alternative. The order presented below tracks the order of consideration of the Rules.

II. DISCUSSION

A. Reclamation Rule 1004. The clarified Rules resolved the CAHB and NAIOP issue.

B. Notice Rule 305. CAHB and NAIOP were concerned with the clarified Rules' provisions requiring a surface owner to request (or "opt in") for subsequent notices under Form 2 APDs or Form 2A Location Applications. The unintended consequence is that failure to opt in would trigger a waiver of subsequent notices, which then could result in subsequent surface owners not receiving any notice of entry or operations. Due process dictates that notice reasonably calculated to apprise a party of pending proceedings and to provide that party an opportunity to participate is required. *Feldewerth v. Joint School District 28-J*, 3 P.3d 467, 471 (Colo. App. 1999); *Douglas County Board of Comm'rs v. Public Utilities Comm'n of State of Colorado*, 829 P.2d 1303, 1310 (Colo. 1992). Advance notice should be provided to surface owners for Forms 2 and 2A Applications, drilling, consultation, entry with heavy equipment, re-entry with heavy equipment and reclamation. Also, any waiver of notice should not be binding upon subsequent surface owners.

The CAHB and NAIOP alternatives in slides 2-5 of Attachment 1 are designed to remove the "opt in" requirement, or essentially return to current notice requirements, and to specify that waiver by a surface owner will not bind subsequent surface owners. To CAHB's and NAIOP's knowledge, no other parties opposed this alternative.

C. Permitting Rule 303. CAHB and NAIOP encourage the COGCC to consider the following revisions to permitting Rule 303:

- Include in the information required of an operator for both Forms 2 and 2A the surface owner protections applicable to the well or location requested in the application;
- Consider approval of Form 2A applications state wide; and
- Limit approved permit durations to one rather than three years.

The COGCC Director should have all relevant facts available when adjudicating permit applications. Whether the application is consistent with surface use protections contained in a surface use agreement, lease or other agreement is relevant to the Director's decision. Alternatively, CAHB and NAIOP recommend a "check the box" procedure for Forms 2 and 2A enabling applicants to state that the well or location is consistent with any agreement between the applicant and surface owner (slide 20).

CAHB and NAIOP have requested that Form 2A be approved state wide. Otherwise, the Form 2A requirements should be combined with APDs, and Form 2A eliminated entirely.

CAHB and NAIOP members prefer to have oil and gas drilling and construction occur prior to home and commercial building construction. Thus, a one year Form 2A approval duration is preferable to the proposed three years. In addition, the approved APD duration should not be increased to three years. The surface impacts of oil and gas operations are significantly reduced if the surface is unimproved when drilling and construction occur. Three years to drill or locate would unduly delay the surface owner's entitlement process.

The CAHB and NAIOP alternatives for clarified Rule 303 are contained in slides 6-10.

D. Consultation Rule 306. The clarified Rules continue to bar consultation and inspection benefits for a surface owner who has negotiated a surface use agreement. Those benefits should exist for all surface owners regardless of the existence of a surface use agreement, when an issue exists that has not been previously agreed by a surface owner and operator. Site conditions, surface use and parties could have changed compelling consultation and inspection as a means to avoid conflict and delay in permit processing. In response to industry concerns, CAHB and NAIOP revised their originally submitted alternative language to enable these benefits for an item or issue that was not previously covered in an agreement between the surface owner and operator. As before, CAHB and NAIOP have provided that any waiver of consultation by one surface owner should not bind subsequent owners. Slides 11-15 denote the CAHB and NAIOP alternative language for clarified Rule 306. Also, CAHB and NAIOP have suggested the "check the box" alternative (slide 20) described above as a substitute for its Rule 306 alternative language.

E. Planning Rules 216 and 521. CAHB and NAIOP believe that surface owners should be included in Comprehensive Drilling Plan and Memoranda of Agreement proceedings. Thus, the alternative language changes the surface owner from a discretionary invitee to a mandatory invitee of an operator (slide 16). Language is also added to Rule 521.a (slide 17) to require notice of Memoranda of Agreement processes to be given to surface owners. Because surface owners are affected by CDPs and MOAs, fundamental fairness dictates that they should be included through at least the provision of notice.

F. Bonding Rule 703. CAHB and NAIOP learned in the work group sessions that the surface owner protection bonding of Rule 703 had not been used. The current amounts of \$2,000 for non-irrigated land and \$5,000 for irrigated land are inadequate because the fees and expenses to recover the bond could exceed the amount. Therefore, CAHB and NAIOP requested an increase to \$5,000 and \$10,000 respectively, or a blanket of \$40,000 instead of

\$25,000 (slide 18). Alternatively, CAHB and NAIOP suggested having the surface owner protection financial assurance be covered by the clarified Rule 706 bonding provisions (slide 19).

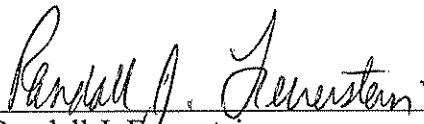
G. Safety Rule 603. The COGCC Staff did not propose changes to safety setback Rule 603. The environmental parties did, however, propose to increase wells and facilities setbacks from 150' to 1000' from residences, except in the Greater Wattenberg Area. No science was offered to support this radical change.

CAHB and NAIOP oppose any increase in safety setbacks because that area is lost to surface development. Even though the Rule 603 setback would apply to operators, local governments adopt the COGCC setbacks or increase them for setting ordinances and regulations that will be applicable to land developers. One well or facility site with a 1000' setback results in the loss of 72 acres of developable surface without a corresponding credit for open space.

III. CONCLUSION

For the foregoing reasons, CAHB and NAIOP respectfully request that their alternative language be adopted in conjunction with the clarified Rules.

Dated July 30, 2008



Randall J. Feuerstein

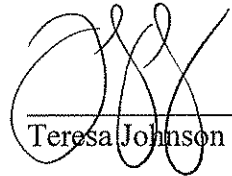
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **CLOSING BRIEF AND FINAL ALTERNATIVE PROPOSALS OF THE COLORADO ASSOCIATION OF HOME BUILDERS AND THE NATIONAL ASSOCIATION OF INDUSTRIAL AND OFFICE PROPERTIES** was served this 30th day of July, 2008 as follows:

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| Colorado Oil and Gas Conservation Commission marc.fine@state.co.us | Via e-mail |
| All parties listed on the Party List on the COGCC website | Via e-mail |
| Patricia Beaver, Hearing Manager Docket No. 0803-RM-02 Oil and Gas Conservation Commission 1120 Lincoln Street, Suite 801 Denver, CO 80203 | Via hand-delivery 1 original and 15 copies |
| Kelly Rees Colorado Department of Law 1525 Sherman Street, 7 th Floor Denver, CO 80203 | Via hand-delivery 2 copies |
| Joshua Epel, Assistant General Counsel DCP Midstream 370 17 th Street, Suite 2500 Denver, CO 80202 | Via hand-delivery 1 copy |



Teresa Johnson

ATTACHMENT 1

ALTERNATIVE LANGUAGE SLIDES

Summary of Rules Affected by CAHB/NAIOP Alternate Proposals



Rule 305.b.(1).C.ii

Notices of Oil & Gas Operations

Notice of Form 2A Submittals

All individual notices and agency notifications required under this subsection shall:

- ~~ii. Inform the recipient of his or her right to receive the subsequent notices set out in Rule 305.b.2 to 305.b.5, as applicable, and of the fact that this right will be waived if the recipient does not notify the applicant of his or her desire to receive these subsequent notices by a specified date that is ten (10) days from the date of actual service of the notice called for in this subsection.~~

Rule 305.b.(2) Notices of Oil & Gas Operations Notice of Drilling

Before an operator shall commence operations for the drilling of any well, such operator shall evidence its intention to conduct such operations by giving ~~any party that has indicated a desire to receive it pursuant to Rule 305.b.1.C.ii~~ the surface owner and local governmental designee written notice thereof as provided in subparagraph c below. ~~Where required, s~~Such notice of drilling shall be mailed or hand delivered to the surface owner not less than thirty (30) days prior to the date of estimated commencement of operations with heavy equipment as set forth in the notice and shall be mailed to the local governmental designee not less than thirty (30) days prior to the date of estimated commencement of operations with heavy equipment as set forth in the notice. Operators shall retain a record of such notice of drilling for a minimum of one (1) year. Such written notice also shall be posted on or near the proposed drill site at least thirty (30) days prior to commencement of operations with heavy equipment. ~~If notice for the commencement of operations is waived by the surface owner under this rule, the local governmental designee notice under this Rule 305.b. shall be received no later than the business day preceding commencement of operations with heavy equipment.~~ The operator shall confirm that the surface owner notice requirements of this Rule 305.b have been completed or waived before the Director approves an Application for Permit-to-Drill, Form 2.

Rule 305.b.3

Notices of Oil & Gas Operations

Notice of Subsequent Operations

Before an operator shall commence subsequent well operations, such operator shall evidence its intention to conduct such operations by giving ~~any party that has indicated a desire to receive it pursuant to Rule 305.b.1.C.ii~~ the surface owner written notice thereof in accordance with paragraph c. below. Subsequent well operations shall mean those operations that will materially impact surface areas beyond the existing access road or well site for any well, including operations such as fracturing or recompletion of the well but shall not include routine service and maintenance operations including but not limited to the changing of pumps. ~~Where required, s~~Such notice of subsequent operations shall be mailed or hand delivered not less than seven (7) days prior to the date of estimated commencement of operations with heavy equipment as set forth in the notice.

Rule 305.f

Notices of Oil & Gas Operations Waiver

~~Any and all of the surface owner~~ notice requirements set forth in this Rule 305 may be waived by the affected surface owner or any other party entitled to such notification at any time. ~~Any and all local governmental designee notice requirements set forth in this Rule 305 may be waived by the affected local governmental designee(s) at any time.~~ Such waiver shall not be binding upon subsequent surface owners.

Rule 303.c Form Requirements

Attached to and part of the Permit-to-Drill, Form 2, as filed shall be a current 8½" by 11" scaled drawing of the entire section(s) containing the proposed well location with the following minimum information:

...

* (18) Surface Owner name, address and other contact information.

*See slide number 20 for alternative language.

Rule 303.d.(2) Form 2A Oil & Gas Location Assessment Information Required

In all instances, the Form 2A requires the attachment of **the following information**. Where the information required under this section has been included in a federal Surface Use Plan of Operations meeting the requirements of Onshore Oil and Gas Order Number 1 (72 Fed. Reg. 10308 (March 7, 2007)), then the operator may attach the completed Surface Use Plan of Operations and identify on the Form 2A where the information required under this section may be found therein.

...

* M. A description of all surface and surface owner protections included in any surface use agreement, lease, easement, right-of-way or other written or oral agreement with the applicant or operator or its predecessor.

N. Written evidence that notice of Form 2A has been provided by the applicant or operator to the surface owner.

*See slide number 20 for alternative language.

Rule 303.d.(3)A.i. Form Requirements Form 2A Oil & Gas Location Assessment

Form 2A Requiring Approval

The Oil and Gas Location Assessment, Form 2A, requires Commission or Director approval prior to approval of Permits-to-Drill, Form 2, or other permit applications, in the following circumstances:

- i. The proposed oil and gas location will disturb more than one (1) acre. ~~and is located in one of the following counties in Colorado:~~
 - ~~a. Garfield;~~
 - ~~b. Mesa; or~~
 - ~~c. Rio Blanco.~~

Rule 303.e.(2) Form Requirements Processing Time

Processing time for approvals under this section

If the Director has not issued a decision on an Application for Permit-to-Drill, Form 2, or, where approval is required, an Oil and Gas Location Assessment, Form 2A, within seventy-five (75) days of a determination that such application is complete, the operator may request a hearing before the Commission on the permit application. Such a hearing shall be expedited and the matter shall be heard at the next regularly scheduled Commission hearing at which time the matter can be legally heard, and all parties who have been provided actual written notice shall be deemed to have waived any individual notice requirements to the contrary.

Rule 303.j.(2)

Form Requirements; Permit Expiration for Oil & Gas Location Assessments, Form 2A

If construction operations are not commenced on an approved location within ~~three (3) years~~ **one (1) year** after the date of approval, then the approval shall become null and void. The Director shall not approve extensions to Oil and Gas Location Assessments, Form 2A.

Rule 306.a Consultation with Surface Owner

~~*Where a proposed oil and gas location is not subject to a surface use agreement, or other legal arrangement between the operator and the Surface Owner, the operator shall undertake a~~ good faith effort to consult with the Surface Owner about any item or issue not already covered by a Surface Use Agreement, or any other agreement, between the Surface Owner and applicant or their predecessors ~~shall occur~~ at a time mutually agreed to by the parties prior to the commencement of operations with heavy equipment upon the lands of the surface owner.

*See slide number 20 for alternative language.

Rule 306.a.(3).B.iv Consultation with Surface Owner Onsite Inspection; Purpose

The purpose of the onsite inspection shall be to determine whether technical or operational conditions of approval should be attached to an approved Application for Permit-to-Drill, Form 2, or Oil and Gas Location Assessment, Form 2A, in order to:

...

***iv.** The onsite inspection provided herein shall not address matters of surface owner compensation or property value. ~~future use of the property, or any private party contractual issues between the operator and the surface owner.~~

*See slide number 20 for alternative language.

Rule 306.a.(3).E.i Consultation with Surface Owner Approval of Application for Permit-to-Drill

The Director shall withhold approval of an Application for Permit-to-Drill, Form 2, and an Oil and Gas Location Assessment, Form 2A, until the expiration of the ten (10) business days period provided above in Rule 306.a.3, except under the following circumstances or as otherwise provided in these rules:

- ~~* i. A surface use or other relevant agreement has been executed;~~
- ~~or~~
- ~~ii. i. The Rule 306.a consultation has been waived by the surface owner pursuant to Rule 306.a.5.~~

*See slide number 20 for alternative language.

Rule 306.a.(5) Consultation with Surface Owner Waiver

The requirement to consult with the surface owner may be waived by the affected surface owner or the surface owner's appointed tenant at any time by submittal to the operator in writing. Such waiver shall not be binding upon subsequent surface owners.

Rule 306.e Consultation Final Reclamation Consultation

In preparing for final reclamation and plugging and abandonment, the operator shall use its best efforts to consult in good faith with the affected surface owner (or the tenant when the surface owner has requested that such consultation be made with the tenant). Such good faith consultation shall allow the surface owner (or appointed tenant) the opportunity to provide comments concerning preference for timing of such operations and all aspects of final reclamation, including but not limited to the desired final land use and seed mix to be applied. Such consultation shall occur as soon as reasonably practicable following cessation of operations or plugging and abandonment.

Rule 216.d.(2) Comprehensive Drilling Plans Procedures

Participants

Operators shall invite the Surface Owners, Colorado Department of Public Health and Environment and the Colorado Division of Wildlife to participate in development of the Comprehensive Drilling Plan. Operators are encouraged to invite the local governmental designee and surface owners to participate. In many cases, participation by these agencies and individuals will facilitate identification of potential impacts and development of presumptive conditions of approval to minimize adverse impacts.

Rule 521.a

Memoranda of Agreement with Local Governments

Pursuant to C.R.S. §29-20-105, and Section 128(4) of the Act, the Commission may enter into a memorandum of agreement with a local government to clarify, coordinate, and harmonize the relationship between the Commission's rules and the local government's regulations or ordinances. Such an agreement shall be consistent with the purposes and provisions of the Act, including fostering the responsible, balanced development, production, and utilization of oil and gas in a manner consistent with protection of public health, safety, and welfare, including protection of the environment and wildlife resources, as well as providing a timely and efficient procedure for permits and approvals. In negotiating the agreement, the Director shall consult with the Colorado Department of Public Health and Environment and the Colorado Division of Wildlife. The Commission staff or local government shall provide notice of Memorandums of Agreement processes to affected surface owners.

Rule 703

Surface Owner Protection

The financial assurance required by this section shall be in the amount of ~~two thousand dollars (\$2,000)~~ **five thousand dollars (\$5,000)** per well for non-irrigated land, or ~~five thousand dollars (\$5,000)~~ **ten thousand dollars (\$10,000)** per well for irrigated land. In lieu of such individual amounts, operators may submit statewide, blanket financial assurance in the amount of ~~twenty five thousand dollars (\$25,000)~~ **forty thousand dollars (\$40,000)**.

Rule 703 (continued)

OR:

~~The financial assurance required by this section shall be in the amount of two thousand dollars (\$2,000) per well for non-irrigated land, or five thousand dollars (\$5,000) per well for irrigated land. In lieu of such individual amounts, operators may submit statewide, blanket financial assurance in the amount of twenty five thousand dollars (\$25,000).~~

The financial assurance required by this section shall be provided by the bonds required in Section 706 for soil protection and plugging and abandonment.

ALTERNATIVE LANGUAGE

(for rules 303.d.(2) [slide 7]; 303.c [slide 6];
306.a [slide 11]; 306.a.3.B.iv [slide 12];
306.a.3.E.i [slide 13])

Include as an option on Form 2 and Form 2A:

The well or location covered by this application for a permit is consistent with the applicable Surface Use Agreement or any other agreement between the applicant and the Surface Owner.