

BEFORE THE OIL AND GAS CONSERVATION COMMISSION
STATE OF COLORADO

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)

**REBUTTAL STATEMENT OF
BERRY PETROLEUM COMPANY**

Berry Petroleum Company (“Berry”) provides this statement in rebuttal to the prehearing statements, testimony and Cost-benefit and Regulatory Analysis of the Commission Staff, the prehearing statement of the Colorado Environment Coalition *et al* and the prehearing statements of other parties who support the rules.¹

I. THIS RULEMAKING IS PRIMARILY A FACT-FINDING RULEMAKING, RATHER THAN A POLICY-MAKING RULEMAKING. THE COMMISSION CANNOT ADOPT THE DRAFT RULES USING ITS FLAWED FACT-FINDING PROCESS OR BASED ON THE FACTUAL RECORD BEFORE IT.

The standard of review for a rulemaking proceeding is one of reasonableness of the agency action. *Colorado Ground Water Commission v. Eagle Peak Farms, Ltd.*, 919 P.2d 212 (Colo.1996). Whether an action is reasonable turns on the nature of the determination or action by the administrative agency. The Draft Rules before this Commission are *not* rules that can be based primarily on policy considerations, with factual determinations playing only a tangential role. To the contrary, this rulemaking, which is a comprehensive rewrite of highly technical rules that have profound impacts, turns upon discrete facts capable of demonstrative proof rather than upon policy. *Citizens for Free Enterprise v. Department of Revenue*, 649 P.2d 1054 (Colo. 1982); *Brown v. Colorado Ltd. Gaming Control Commission*, 1 P.3rd. 175, 176 (Colo. App. 1999). Therefore, the reasonableness of whatever rules this Commission ultimately adopts will turn upon the factual support for those rules, as well as upon whether they are otherwise lawful and constitutional.

Berry and other parties have raised numerous procedural objections to this rulemaking through motions and in their Final Prehearing Statements.² Berry reiterates those objections

¹ Rebuttal Witnesses: Given the time constraints for the hearing imposed under the current process, Berry does not currently plan to use rebuttal witnesses, but it reserves the right to call witnesses in rebuttal as needed during the course of the hearing.

² *See e.g.* Motions to Limit the Scope of Rulemaking and Bifurcate the Rulemaking Proceeding filed by the Colorado Oil and Gas Association on May 1, 2008 and by the Colorado Petroleum Association on May 8, 2008; Final Prehearing Statement of Berry Petroleum Company and attached exhibits dated May 14, 2008 and the prehearing statements of numerous parties,

here. These procedural defects, particularly the inadequate time given for prehearing comment and for the hearing itself, suggest that the Commission is improperly viewing this as a rulemaking to be based upon policy decisions, with factual determinations playing a tangential role. It is not. The Commission has embarked on a monumental fact-finding endeavor, but has failed to give the parties or itself the means or time to properly complete that endeavor.

Even with those procedural deficiencies, however, it has become obvious that there is no and can be no factual record to support these Draft Rules. The evidence presented by the Commission Staff fails to demonstrate the need for these regulations. The Staff's Cost-Benefit and Regulatory Analysis is a case in point—among other problems, its quantitative analysis of the short-term and long-term consequences of the Draft Rules under C.R.S. 24-4-103(4.5)(b) is wholly inadequate and incomplete. *See e.g. Colorado Oil & Gas Association Rebuttal Statement*, pp. 4-6.

On the other hand, the factual record, including as set forth in the prehearing statements, testimony and exhibits of the parties listed in Footnote 2, clearly demonstrates that there is no factual basis for the Draft Rules. Rather than pursuing a flawed process and adopting flawed rules that are ultimately doomed to failure (*see* C.R.S. § 24-4-106(7)), the Commission should establish a reasonable process over a reasonable period of time geared toward in-depth fact-finding. At the same time, the Commission can send the parties back to the table to attempt to reach consensus rules where practicable.³ This is not a policymaking rulemaking where fact-finding is tangential. Fact-finding is at the core of the Commission's responsibility. It cannot adopt these Draft Rules using the current process or based on the current record.

II. THE DRAFT RULES WILL DELAY PERMITTING AND DRILLING AND THEREBY SUBSTANTIALLY INCREASE THE RISK TO OPERATORS THAT THEIR OIL AND GAS LEASES WILL EXPIRE.

A number of parties have discussed the various ways in which the retroactive nature of the Draft Rules impair or may impair vested rights acquired under existing laws and regulations.⁴ This section describes another example of that problem.

It is a common practice for an oil and gas company to pay a substantial amount of money, sometimes hundreds of millions of dollars, to acquire leases or to acquire the right to explore and

including Marathon Oil Company, Williams Production RMT Company, Anadarko Petroleum Corporation and Pioneer Natural Resources USA.

³ Berry has joined the Consensus Alternative for Yuma County. In so doing, Berry does not in anyway concede that the record supports the adoption of the Draft Rules for any region of Colorado. Berry objects the Draft Rules for all regions.

⁴ *See* Final Prehearing Statement of Berry Petroleum Company, p. 3 and Exhibit D (Pioneer Natural Resources USA Inc. memorandum entitled "*The Retroactive Components of the Draft Rules are Unconstitutional and Exceed the Commission's Authority*") and Exhibit E (Anadarko Petroleum Corporation memorandum entitled "*The Draft Rules Unconstitutionally Interfere With Contracts and are Inconsistent with the Reasonable Accommodation Doctrine*").

develop a working interest in leases held by another party. Companies enter into such agreements relying on the requirements and time-frames under the existing regulations. Often such agreements include very strict deadlines for the acquiring party to explore, develop and drill wells. If the acquiring party fails to meet the strict deadlines, it may face contractual claims that it has lost its interest and/or that it must pay liquidated damages.

Therefore, if the rules are changed in midstream to impose substantial delays and obstacles to exploration, permitting and drilling, such delays and obstacles could cause an operator to miss its contractual deadlines and be faced with claims and litigation for damages or the loss of its interest. The Draft Rules create just such a risk. They are replete with provisions that will substantially delay permitting and drilling.

For example, Draft Rule 1208a imposes numerous “Timing Limitation Areas” that restrict development activities during at least a 90-day period every year.⁵ These 90-day delays could prevent an operator from exercising its vested exploration and drilling rights within its contractual deadlines, thereby impairing those contracts. To the extent Draft Rule 2008 and other Draft Rules apply retroactively to impair existing contracts, they are unlawful and unconstitutional. At a minimum, the Commission should clarify that the Draft Rules have no application to vested rights and contracts in existence prior to the adoption of the rules.

III. THE RELEASE OF WATER CONTAINING MINOR TRACES OF NON-TOXIC DRILLING ADDITIVE FROM A PIT AT BERRY SITE 12-213 WAS FULLY MITIGATED BY BERRY UNDER EXISTING RULES AND THE INCIDENT PROVIDES NO EVIDENCE TO SUPPORT DRAFT RULE 317B OR ANY OTHER DRAFT RULE.

The Colorado Environmental Coalition wrongly cites two recent incidents in the Garden Gulch area in support of proposed Rule 317B. *See* Prehearing Statement of the Colorado Environmental Coalition, *et al.*, filed May 14, 2008 at p. 23. One of those incidents involved the release of water containing minor traces of non-toxic drilling additive from a pit at Berry site 12-213. The release literally consisted of 99.8% (or more) of water. The Coalition’s reference to the Berry incident is both inaccurate and irrelevant.

First, Berry site 12-213 is not within a Public Water System Source Water Assessment Area, so the incident at site 12-213 is utterly irrelevant to proposed Rule 317B.

Second, there were no impacts to the waters of the Garden Gulch. Since January 17, 2008, when sampling of the discharge began, numerous samples have been taken and trends in chemical concentrations have been carefully monitored. Samples of the seep and drainage downgradient of the site consistently showed that benzene concentrations were less than one part

⁵ For example, proposed Rule 1208a(7) provides for sage-grouse that Development Activity shall be restricted in areas within 4 miles of active lek sites between March 15 and June 15. An operator might elect pursuant to proposed Rule 1208b to consult with the Colorado Division of Wildlife, but that consultation also takes time and there is no guarantee that the CDW will waive the Timing Limitation.

per billion (the Federal drinking water standard is 5 ppb and the Colorado drinking water standard is 1.2 ppb) and no Federal or Colorado drinking water standards were exceeded in any way whatsoever. *See* Berry Petroleum Company Abatement and Corrective Action Response filed with the Commission on March 28, 2008 (“Abatement Response”).

Finally, Berry’s Abatement Response shows that the existing Rules are more than sufficient to protect Colorado water supplies from oil and gas operations. The Abatement Response shows the many actions Berry has taken, consistent with the Rules, to mitigate the discharge, to sample and test for chemicals, to communicate with the Commission and the community and to prevent future incidents. Berry prides itself on being a responsible environmental steward in Colorado and in all of the states in which it operates. The incident at site 12-213 provides no evidence to support a rule change – to the contrary, Berry’s response is a testament to its stewardship and to the sufficiency and efficacy of the existing rules.

CONCLUSION

The Commission cannot adopt the Draft Rules using the current process or based upon the current record.

Respectfully submitted this 6th day of June, 2008.

Berry Petroleum Company

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CERTIFICATE OF SERVICE

I hereby certify that one original and fifteen (15) true and correct copies of the Berry Petroleum Company's Final Prehearing Statement was served by courier delivery on the 6th day of June, 2008, and filed with the Colorado Oil and Gas Conservation Commission, as follows:

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

and further certify that two (2) true and correct copies were also served by courier delivery on the 14th day of May, 2008, to the Department of Law, as follows:

Kelly Rees
Colorado Department of Law
1525 Sherman Street, 7th Floor
Denver, CO 80203

and also certify that an electronic copy was delivered to:

Marc Fine at marc.fine@state.co.us and all of the parties listed on the Party List found at the COGCC website.

/s Dorina O'Toole

Dorina O'Toole