

**BEFORE THE OIL AND GAS CONSERVATION COMMISSION
OF THE 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
BLACK HILLS EXPLORATION AND PRODUCTION, INC.**

Black Hills Exploration and Production, Inc. (“Black Hills” or “Party”) submits this Rebuttal Statement (“Rebuttal”) in connection with the Commission’s consideration of changes to its rules for oil and gas development in Colorado (“Draft Rules”). This Rebuttal is also submitted in accordance with Colorado Oil and Gas Conservation Commission (“COGCC” or the “Commission”) Rule 529 and pursuant to the First, Second and Third Prehearing Orders, in this proceeding, Cause No. 1R, Docket No. 0803-RM-02.

Black Hills submits this Rebuttal concerning points raised in the Commission’s and other parties’ prehearing statements, written testimony and exhibits, as well as certain legal, procedural and other objections for the Commission’s consideration. This Rebuttal is organized as follows:

- I. INTRODUCTION;
- II. THE POLLUTION PREVENTION CHECKLIST REQUIRED BY DRAFT RULE 206 FAILS TO PROVIDE ANY ADDITIONAL PROTECTION FOR RESOURCES AND IS NOT JUSTIFIED BY A DEMONSTRATED NEED;
- III. THE SURFACE DRINKING WATER SUPPLY AREAS REQUIREMENTS OF DRAFT RULE 317B IGNORE EXISTING PROTECTIONS;
- IV. THE PROPOSED REVISIONS TO THE HEARING APPLICATION PROCESS IN DRAFT RULE 503.B THREATEN TO CREATE CONTENTIOUS CONFLICTS AND AN INEFFICIENT PROCESS;
- V. THE DRAFT RULE 513 CONCERNING GEOGRAPHIC AREA PLANS EXCEEDS THE COMMISSION’S AUTHORITY;
- VI. LA PLATA COUNTY’S PROPOSED EXPANSION OF DRAFT RULE 608 TO CONVENTIONAL OIL AND GAS OPERATIONS IS IMPRACTICAL AND UNJUSTIFIED;
- VII. THE COMMISSION DISREGARDS THE RELEVANT FEDERAL REQUIREMENTS CONCERNING STORMWATER CONTROL MEASURES;
- VIII. THE TESTIMONY CONCERNING THE TIMING LIMITATIONS UNDER DRAFT RULE 1208 ARE UNSUPPORTED BY SCIENTIFIC STUDY AND MORE RESTRICTIVE THAN ANALOGOUS FEDERAL REQUIREMENTS;

IX. PROCEDURAL AND OTHER OBJECTIONS.

I. INTRODUCTION.

The prehearing statement of the Commission purports to offer both administrative and technical justifications for the changes made by the Draft Rules. As described below, the justifications offered by the Commission are insufficient to support the broad changes imposed in the Draft Rules. The Commission has proposed an array of technically complex requirements that will make operational compliance both costly and difficult. Such rules must have a firm scientific foundation to ensure that they both achieve the intended objective and are technically feasible. The prehearing statement of the Commission and supporting materials from Commission Staff fail to supply the technical analysis and empirical data that would provide a reasoned basis for the rules. Without such a basis, the requirements of the Draft Rules threaten to be a two-fold failure: failing to provide the desired protection for environmental and wildlife resources while imposing a burden on industry that could be economically insurmountable. The same criticism is true of the administrative justifications offered for procedural changes to the rules. Without an efficient process that is directly connected to the operational realities faced by oil and gas companies, procedural requirements will fail to provide the information the agency needs while creating irrelevant paperwork.

The employees of Black Hills reside in Colorado and enjoy the benefits of a healthy environment just as many of the individuals and parties to this rule making. Black Hills supports reasoned and appropriate regulation to safeguard those resources for all of Colorado's citizens and demonstrates that support through daily compliance with the rules applicable to its operations. Moreover, Black Hills recognizes that the recent increase in oil and gas activity has raised concerns for both the Commission and many of the participants to this rule making. Ill-considered regulation, however, will not resolve those concerns and will instead merely create regulation for regulation sake.

This rebuttal statement addresses the information offered in the prehearing statements of the Commission and other parties. Black Hills seeks to demonstrate that the justifications offered by the Commission and other parties seeking an expansion of regulation do not support the proposed changes. Black Hills maintains the objections the Draft Rules asserted in its prehearing statement and adopts the comments made in the rebuttal statements of Pioneer the Colorado Oil & Gas Association, Natural Resources USA, Inc. and Anadarko Petroleum Company as applicable. In addition, Black Hills adopts the changes to the Draft Rules proposed by Bill Barrett Corporation in Exhibits H and I to its prehearing statement.

II. **THE POLLUTION PREVENTION CHECKLIST REQUIRED BY DRAFT RULE 206 FAILS TO PROVIDE ANY ADDITIONAL PROTECTION FOR RESOURCES AND IS NOT JUSTIFIED BY A DEMONSTRATED NEED.**

The Commission's witnesses proffered in favor of Rule 206.b's Pollution Prevention Checklist requirement, Martha Rudolph and David Neslin, cite no data whatsoever regarding observed impacts of oil and gas activity that will be addressed through adoption of this requirement. Rather, they generalize that rapid growth in oil and gas activity in one area of the

state, the Piceance Basin, warrants adoption of this requirement to, in effect, remind operators who may be “unaware of the regulatory requirement[s],” because regulatory inspections presumably will not keep pace with growth in oil and gas activity. Rudolph Testimony at 2. Neither Mr. Neslin nor Ms. Rudolph make mention of the request for an additional 21 full time equivalent (FTE) staff to be afforded COGCC to implement and enforce its rules from this year going forward, which would seem to obviate the need for this requirement.

Ms. Rudolph also fails to reference any data concerning actual impacts, making only vague reference to potential impacts (“damage that *may* result from the failure to comply with the regulatory requirements *may* occur”) that might result from failure to remind operators of their regulatory requirements. Rudolph Testimony at 2. Of course, this can be said of the operators in any regulated activity, without any data demonstrating the need for or efficacy of a proposed requirement, simply because the statement is so speculative. This is not a sound basis for regulation, and not consistent with long-standing requirements for the development of well-tailored regulations based on empirical data showing a need for specific regulation.

Moreover, Ms. Rudolph goes on to state that “[t]he Checklist is not intended to be used as an enforcement tool...”, but then contradicts herself by saying, “failure to complete the Checklist when required or including false information could result in enforcement actions.” Rudolph Testimony at 3. The Commission and Ms. Rudolph, employed by CDPHE, simply can’t have it both ways. The Checklist is either informational or it is an enforcement tool to be used in lieu of additional inspection resources (despite the huge increase in staffing at COGCC obtained from the Legislature this past session). If the Commission “does not intend” to use the Checklist as an enforcement tool, there should be no problem expressly prohibiting its use in enforcement proceedings, and then the Commission’s intent will surely be fulfilled.

The Checklist also requires certification by an operator’s representative with environmental responsibilities. Such a requirement, especially given the veiled potential for use in enforcement, will require audit-like assurance of conditions before certification, and greatly increases the burdens of compliance with this “educational” requirement. The Commission has failed to account for the true cost and burden of such a certification requirement in its regulatory impact analysis, and Ms. Rudolph simply opines, without data or analysis, that costs of compliance should actually be reduced. Rudolph Testimony at 4. She makes no mention of the cost or burden of annual audits for the many facilities to be covered in the Piceance Basin. Such costs can be quite significant, especially for numerous remotely located facilities.

Ms. Rudolph also asserts that use of the proposed Checklist will “help to reduce minor upset conditions, as well as more significant operating problems,” but again, she cites no data or analogous checklist requirements with demonstrated benefits of this type. Rudolph Testimony at 4. There is simply no demonstrated foundation for her testimony, and it should therefore be discounted by the Commission, especially given her role as a representative of a science-based agency, where data-based requirements for regulatory action are universal.

Ms. Rudolph’s final assertions regarding Draft Rule 206.b concern a comparison of the requirement to other state or federal certification requirements, and she concludes that such other requirements are far more burdensome because they require “broad self-certification,” which can be “very difficult to provide.” Rudolph Testimony at 4. She asserts the Checklist does not require that type of effort, but a review of the sample form of Checklist, posted on the

Commission's website, indicates otherwise. Just the first two items on the checklist regarding chemical inventory would require a current review or determination, *i.e.*, an audit, of chemicals at each of potentially hundreds of facilities in order to answer the yes/no questions accurately and truthfully. Other items on the Checklist are no less burdensome when applied to numerous remotely located facilities. The Commission's witnesses in favor of Draft Rule 206.b have not demonstrated a need for the Pollution Prevention Checklist in the Piceance Basin, and have failed to adequately evaluate the burden of such a requirement. The prehearing statements of other parties to this proceeding, including OGAP, are equally unavailing.

III. THE SURFACE DRINKING WATER SUPPLY AREAS REQUIREMENTS OF DRAFT RULE 317B IGNORE EXISTING PROTECTIONS.

Black Hills presents this rebuttal to several points made by COGCC and CDPHE Water Quality Control Division ("WQCD") staff, and proponents of Rule 317B. Rule 317B is designed to address "potential" problems and risks that oil and gas development "may cause" to public water supplies even though such perceived problems and risks are "not common at this time in Colorado." Steve Gunderson/Dave Akers/Greg Naugle (collectively, "Gunderson") Testimony, at 3. Black Hills maintains that this Rule unfairly singles out the oil and gas industry, and is arbitrary because it is based on pure conjecture. Moreover, as conceded by Director Neslin, the proposed Rule would require decommissioning and relocation of many oil and gas facilities currently located and operating within the exclusionary zone established by Rule 317B. Neslin Testimony at 54. Aside from these fundamental problems with Rule 317B, none of the comments or Prehearing Statements presented by the Rule's proponents to date demonstrates any need or justification for such a sweeping and unrealistic exclusion of oil and gas operations and ancillary facilities (including pitless drilling systems) from potentially large tracts of land in Colorado, leaving potentially large reserves of petroleum permanently undeveloped. Nor do the Prehearing Statements or comments point to any authority or provide any reason for allowing COGCC through this Rule to disregard its statutory obligation to prevent waste.

A. The assertion that current directional drilling techniques are sufficient to facilitate development of oil and gas reserves from outside Rule 317B's exclusionary zone is disingenuous.

WQCD staff take the position that Rule 317B will not inhibit the industry's efficient development of oil and gas resources because of the availability of current directional drilling technology. Gunderson Testimony at 6. Such a position is meritless and ignores the costs and burdens of directional drilling programs, as described in detail in Colorado Petroleum Association's Rebuttal Statement regarding Rule 317B.

In addition, CBM development in particular demonstrates why directional drilling is not a practical alternative to oil and gas operations within the exclusion zone. The nature of the geologic formations and the natural gas recovery process associated with CBM development makes directional drilling impossible. WQCD's position ignores the realities of CBM operations. Accordingly, Draft Rule 317B's required exclusionary zone will prevent CBM production in large areas, rather than promoting such production, as required by the OGC Act.

B. More appropriate local regulation of oil and gas operations to protect public water supplies pursuant to C.R.S. § 31-15-707 is available.

To support establishment of the five-mile exclusionary zone under Rule 317B, testimony from Gunderson states that the proposed rule is consistent with C.R.S. § 31-15-707(b). Gunderson Testimony at 4. This particular statutory provision authorizes local governments to enact local regulations for protection of local waterworks and associated sources of public drinking water. Other proponents of Rule 317B present the same or similar grounds for adopting such overly broad restrictions on oil and gas surface locations. *See, e.g.* Colorado Environmental Coalition, et al. (collectively, “CEC”) PHS at 19. In particular, they point out that the distance of five miles extending upstream from public water supply intakes, which the CDPHE has deemed protective in its best professional judgment, is consistent with § 31-15-707. Gunderson Testimony at 5. Black Hills strongly disagrees.

However, where local governments such as the City of Rifle have adopted watershed protection ordinances pursuant to § 31-15-707, the ordinances adopted do not operate to broadly ban all activities conducted in the vicinity of or within drinking water supply areas. Instead, local watershed ordinances like Grand Junction’s typically require a permit and satisfaction of certain performance standards in order to legally perform activities located in the watershed and upstream of a public water supply intake, including activities which create a risk of injury to waterworks or public water supplies, *See* City of Grand Junction PHS at 3; Antero Resources PHS at 10. In such circumstances, oil and gas operations are permissible as long as such operations can be and are conducted in compliance with the local ordinance requirements, including obtaining permits, implementing BMPs, and conducting stabilization activities. What these ordinance do not do, in stark contrast to Rule 317B, is impose a rigid proscription on all oil and gas operations within the watershed or upstream of the public water supply intake. Rule 317B imposes such a proscription on oil and gas operations in a large, predetermined five-mile/500-foot exclusion zone without any consideration of protective measures that are available and are already implemented by oil and gas operators, and without regard to the other commercial activities in the proposed exclusionary zones that arguably pose a potential threat to drinking water if releases to the environment should occur.

Moreover, the authority given to local governments under § 31-15-707 to enact watershed ordinances, and the fact that many local governments have enacted such ordinances, further underscores the fact that Rule 317B is duplicative and unnecessary for protection of public water supplies. This is particularly true given the other federal and state regulatory schemes that overlay local watershed protection measures to protect public water supplies, such as Colorado’s Colorado Discharge Permit System, stormwater and water quality programs, and the federal Clean Water Act § 404 (33 U.S.C. § 1344) and Spill Prevention Control and Countermeasure (“SPCC”) programs. Given the existence of all these other water quality protection programs, Gunderson’s theory that no current state and federal requirements specifically address the components of Rule 317B is clearly inaccurate.

C. Rule 317B should not be extended to cover domestic water supplies.

Gunnison County urges COGCC to extend Rule 317B to cover domestic water wells. Gunnison County PHS at 7. The scope of the proposed definition of “surface waters drinking supply areas” and of the proposed exclusionary zone under Rule 317B, applied just to public

water supplies, potentially removes large areas in the state from oil and gas operations. Going further and applying this Rule such that oil and gas operations and related facilities are prohibited within certain distances from domestic water wells and private surface water supplies is completely infeasible and unrealistic, given the number of domestic water wells, surface headgates and intakes, and surface water resources that exist in the State. Such expansion of Rule 317B would severely cripple the oil and gas industry statewide in Colorado, and lock out large portions of reserves from development. Even application of the performance standards under Rule 317B.c to operations in the vicinity of any domestic well or private water supply would impose an undue hardship and burden on operators. COGCC should reject any notion that Rule 317B should also apply to domestic water supplies. The Best Management Practices (“BMPs”) utilized by operators provide more than sufficient protection for such water sources, and without a body of empirical evidence demonstrating that significant contamination is occurring, there is simply no justification for imposing these very burdensome additional restrictions on operations.

D. Rule 317B should not cover facilities ancillary to oil and gas operations.

Gunnison County also suggests that Rule 317B should apply to all “ancillary facilities” in addition to oil and gas operations. As defined in the Rule 100 Series, “ancillary facilities” includes all equipment, buildings, structures and improvements associated with or required for operation of a well site, pipeline, or compressor facility, including roads, well pads, tank batteries, and pits. This definition, in conjunction with the scope of “oil and gas operations,” would result in a ban of any equipment or structure related to oil and operations (*e.g.*, vehicles, shacks, staff housing, unused parts, etc.) from designated exclusion zones, and a prohibition on any roads or pipelines from crossing or running adjacent to public supply segments, regardless of whether such equipment, structure, road or pipeline has any impact on public water supplies. This is simply impractical and unrealistic, and would result in increased use-intensity of surface lands located outside of exclusion zones where such ancillary facilities would need to be constructed. Gunnison County offers no evidence of how such structures are impacting water quality.

IV. THE PROPOSED REVISIONS TO THE HEARING APPLICATION PROCESS IN DRAFT RULE 503.B THREATEN TO CREATE CONTENTIOUS CONFLICTS AND AN INEFFICIENT PROCESS.

The Draft Rules make important changes to the standing requirements for requesting a hearing before the Commission under Rule 503.b. The ability to request a hearing within ten days after the decision of the Director opens the approval process to a potentially lengthy period of delay. By expanding the entities with the ability to request such a hearing, the draft rules increase the chance that routine development of oil and gas locations will become subject to extended, contentious debate. The COGCC is not a court of general jurisdiction and the hearing process should be carefully limited to address issues appropriate to the Commission’s expertise.

A. Adjacent landowners and public at large should not have the authority to request a hearing.

The testimony offered by the Commission states that the operator, the surface owner, the local government, the CDOW, and the CDPHE have the ability to request a hearing. *See* Neslin Testimony at 27. Black Hills supports the clarification offered by Director Neslin that adjoining landowners will not have the right request a hearing, *see id.* (“Although the initial pre-draft proposal would also have allowed adjoining landowners to request a hearing . . . the Draft Rules would not allow them to do so”), and language of the draft rules should be amended to reflect that determination. The current language of the draft rule allows the “owner of the affected surface land” to request a hearing. That vague phrase should be replaced with the clearly defined term “surface owner.” Adjoining landowners are still protected by enforcement of COGCC rules and the common law of nuisance.

Gunnison County and other parties have proposed that any member of the public should be allowed to request a hearing regarding the approval of an APD or a Form 2A. *See* Gunnison County PHS at 8-9. Such a process would force the Commission to review any claim, frivolous or not, brought by parties who may have only the most attenuated interests in the oil and gas development. Under Gunnison County’s proposal, a resident of New York City opposed to oil gas development in principle could request a hearing on any approval of an APD. As noted above, the Commission is not a court that is equipped to review such claims. Nor is it appropriate to treat development on private lands in a manner identical to development on public lands. The public at large is protected by well-established rules that allow those with interests adversely affected by development to bring claims in a court. These rules appropriately balance public interests against the interest of private property owners. As a technical and fact finding body it is not the Commission’s role to resolve such claims. Finally, opening the hearing process to any member of the public would surely have a major impact on the Commission’s ability to conduct a timely and efficient review.

B. Additional Review by CDPHE and CDOW is inappropriate.

Black Hills also objects to the inclusion of the CDPHE and CDOW among those parties with the ability to request a hearing on the approval on APD or Form 2A. Both agencies have had extensive input into the creation of the Draft Rules and have helped author rules to protect the resources under their jurisdiction. Both agencies will have a continued role in the development of basin-wide rules and comprehensive drilling plans. And, as envisioned by the legislature, both agencies will have the opportunity to consult with regard to the approval of permits related to oil and gas development. It is the duty of the Commission to review the various inputs from the agencies and to appropriately balance development and protective measures. Indeed, the statutory scheme under H.B. 1298 and H.B. 1341 called for consultation with these agencies to aid the Commission in striking that balance, the opportunity to contest the Commission’s decision has no place in that scheme. Approval of APDs and surface development is, therefore, for the Commission to decide. After the opportunity to consult, CDPHE and CDOW should not further affect the process by requesting a hearing. Allowing the agencies the opportunity to request a hearing provides them with the ability to demand that operators accept their requests or face the increased delay that would result from a hearing. Indeed, CDOW has publicly stated its intention to force operators “to come to the table” in order to achieve agency aims. Dave Buchanan, *Wildlife Panel Wrestles with Energy Drilling*, Grand

Junction Daily Sentinel, Apr. 30, 2008, at 1A. The additional leverage CDPHE and CDOW can exercise because of their ability to request a hearing therefore effectively undercuts Commission's authority.

V. THE DRAFT RULE 513 CONCERNING GEOGRAPHIC AREA PLANS EXCEEDS THE COMMISSION'S AUTHORITY.

Draft Rule 513 is not required by H.B. 1298 and H.B. 1341 and has the potential to create conflicts between federal land use planning and state planning.

Director Neslin states that "H.B. 1298 directs the Commission to adopt rules addressing geographic area planning. C.R.S. § 34-60-128(3)(d)(III)."¹ Neslin Testimony at 28. In fact, H.B. 1298 states that the Commission shall adopt rules to address "encouraging operators to utilize . . . geographic area analysis to provide for orderly development of oil and gas fields" within the context of minimizing impacts to wildlife resources and ensuring proper reclamation. The Draft Rules do not address this mandate and instead state that Geographic Area Plans may "include alternative development scenarios, designate units, adopt spacing orders, implement sampling or monitoring plans, or require consolidation of facilities" among "multiple operators, in multiple sub-basins or drainages, over a period of ten (10) years or more." The language of H.B. 1298 simply does not support this sweeping provision in the Draft Rules. Nothing in the Draft Rules indicates that operators will be encouraged to use geographic area analysis; rather, the Draft Rules state that basin-wide requirements will be imposed by Rule. Nor do subjects identified by Draft Rule 513 necessarily relate to geographic area analysis. Moreover, the scope of such planning seems unconnected to the realities of development. Planning specific location requirements and spacing orders for ten years or more does not account for how technological conditions or geologic knowledge may change. Finally, Director Neslin's statement that industry supported a "geographic area or basin-specific planning procedure" does not mean that industry supports the language of the Draft Rule.

Black Hills conducts the majority of its operations on federal lands subject to comprehensive federal land use management and planning. Both broad-level and site-specific planning are conducted by federal agencies and operators pursuant to federal statutes. These plans address specific conditions relevant to the area under consideration and implement appropriate environmental and public health protections. As described in Black Hills' prehearing statement, the Commission lacks authority to contradict or countermand these federal land use plans through the creation of essentially redundant and/or expanded state planning documents. Because Draft Rule 513 contemplates planning for broad geographic areas, it raises the potential for interference with the federal land use plans.

¹ The correct citation should be § 34-60-128(3)(d)(II).

VI. LA PLATA COUNTY'S PROPOSED EXPANSION OF DRAFT RULE 608 TO CONVENTIONAL OIL AND GAS OPERATIONS IS IMPRACTICAL AND UNJUSTIFIED.

As an operator engaged in significant conventional oil and gas well operations, but only limited CBM development, Black Hills feels compelled to address La Plata County's suggestion that the proposed CBM rules in Rule 608.a and 608.b should be extended to apply also to conventional oil and gas wells. There is no demonstrated justification for imposing these onerous requirements on the entire oil and gas industry, let alone the CBM development industry. The cost and burden of surveying and assessing water wells, abandoned oil and gas wells, abandoned mines and surface water features as a condition for operation of every conventional oil and gas well in this state would substantially outweigh the benefits from such requirements. Moreover, the primary purpose and intent of the baseline testing in Rule 608 is to ascertain if there are any impacts on surface and groundwater sources from methane seepage emanating from coal formations, operational and abandoned CBM wells, and coal mines. Application of Rule 608 to conventional oil and gas wells serves no legitimate purpose, and there has been no showing by COGCC or any other proponent that the requirements imposed by Rule 608 must be extended to operation of conventional oil and gas wells.

Black Hills also has serious concerns about the undue burden that would be imposed by these arduous rules on operators. Extensive testimony provided by COGCC staff attempts to support the purpose of these substantial and costly monitoring requirements on very questionable grounds. For example, Ms. Baldwin concludes that the proposed rule will not affect the industry's ability to develop oil and gas resources because operators already collect samples from nearby water well and surface water features. *Id.* at 5. This reason, however, does not justify imposing extensive surveying and assessment requirements and responsibilities on operators for abandoned oil and gas wells or coal mines that the operator never owned or had any other involvement with.

Moreover, COGCC clearly intends through these rules to force the petroleum industry to provide COGCC with a convenient data collection and assessment program at no cost to COGCC. Baldwin Testimony at 3. COGCC would rely on this program to ensure that impacts from improperly plugged and abandoned wells, unplugged orphan wells and abandoned coal mines are "identified and mitigated." *Id.* Given this objective and that Rule 608.a(1) would give COGCC the authority to "review the assessment and take appropriate action to pursue further investigation and remediation if warranted," COGCC appears to be setting up a regulatory framework through these rules for allocating orphan liability to operators. There is certainly no statutory basis or authority in Colorado in H.B. 1341 or the OGC Act for the imposition of orphan liability on oil and gas operators, as CERCLA or environmental statutes in other states addressing abandoned hazardous waste sites do.

COGCC should reject the request to extend Rule 608 to cover conventional oil and gas wells.

VII. THE COMMISSION DISREGARDS THE RELEVANT FEDERAL REQUIREMENTS CONCERNING THE STORMWATER CONTROL MEASURES.

A. Rule 1002.f conflicts with and improperly supersedes the federal and state industrial stormwater permit exemption for oil and gas operations, and is inconsistent with industrial stormwater permitting requirements.

Written testimony from David Neslin and Steve Gunderson/Dave Akers/Greg Naugle (collectively “Gunderson”), and comments from Colorado Environmental Coalition, et al. (collectively “CEC”) all assert that the proposed stormwater control measures that would apply under Rule 1002.f to the operation phase would fill the “gap” in stormwater regulation “enjoyed” by the oil and gas industry, and would be consistent with stormwater control requirements applicable to ongoing operations at other industrial sectors, in particular, metal mining. Neslin Testimony at 40; Gunderson Testimony at 12; CEC PHS at 32. The City of Grand Junction suggests 1002.f should go a step further by actually requiring stormwater permits for oil and gas operations. Grand Junction PHS at 2. However, the assertion that Rule 1002.f is justified and reasonable because it is consistent with industrial stormwater permitting requirements generally covering mining operations ignores the fact that mining operations, like oil and gas operations, are exempted from stormwater permitting requirements where stormwater flows from the mine site are without contamination from contact with onsite wastes or products.

The so-called regulatory “gap” targeted by COGCC and CEC is the exemption of oil and gas operations from industrial stormwater permitting requirements provided by Congress under § 402(1)(2) of the Clean Water Act (33 U.S.C. 1302(1)(2)).² Congress created this exception after careful consideration of oil and gas operations and of the impacts that unnecessary stormwater control requirements would have on ongoing operations. The Colorado Discharge Permit System (“CDPS”) stormwater permits issued by CDPHE (and the NPDES stormwater permits issued by EPA) for oil and gas operations do not apply stormwater runoff uncontaminated by contact with overburden, raw material, intermediate products, finished product, byproduct or waste products. 5 C.C.R. 1002-61.3(2)(c). In Colorado, this exemption also applies to mining operations. § 61.4(3)(b)(i)(C). As EPA explained in the NPDES Phase I stormwater permit rulemaking, the fact that stormwater at oil and gas operation sites generally does not come into contact with contaminating wastes or materials is the reason why Congress chose to exempt oil and gas operations from industrial stormwater permitting requirements under the Clean Water Act § 402(1)(2). *See* 55 Fed. Reg. 47990 (Nov. 16, 1990). EPA also took the position that contamination by contact of stormwater with onsite wastes and materials must occur *before* an operator is subject to industrial stormwater permitting requirements. *Id.*

Rule 1002.f, as proposed, would require implementation of additional BMPs to control precipitation-related runoff contacting materials, wastes, equipment and activities that only has “the potential” to cause pollution surface water. 1002.f(1)(A). Thus, Rule 1002.f would apply to all stormwater runoff associated with any and all aspects oil and gas operations and equipment, even if such stormwater never actually comes into contact with contaminating materials onsite. Such a requirement not only conflicts with the carefully crafted federal and state exemptions granted to oil and gas operations from industrial stormwater permitting requirements, but

² That exemption is reflected under CDPHE regulations through 5 C.C.R. § 1002-61.3(2)(c).

completely disregards the very reasons why these exemptions from industrial stormwater permitting requirements were fashioned by Congress and incorporated by CDPHE in the stormwater permitting program regulations, without any justification whatsoever.

B. Rule 1002.f is inconsistent and incompatible with the stormwater control measures imposed under CDPHE stormwater permits for construction activities.

Through written testimony and comments, Gunderson, Margaret Ash and CEC also maintain that Rule 1002.f is consistent with and “align[s] with the spirit and intent” of the CDPHE stormwater permitting requirements that apply to oil and gas construction activities. Gunderson, Testimony at 12; Ash Testimony at 18-19. Rule 1002.f’s requirement that erosion be “prevented” on unpaved surfaces is impractical and completely incompatible with the stabilization requirements applicable to unpaved surfaces under CDPS construction stormwater permitting requirements. CDPHE guidance provides that unpaved surfaces such as well pads and roads that are needed for drilling and production operations must be prepared in such a manner as to “minimize” erosion, such as preventing rill erosion on pad surfaces and roads. *See Stormwater Fact Sheet, Construction at Oil and Gas Facilities, CDPHE, Water Quality Control Division*, at 2, July 2007. Ironically, this guidance further notes that COGCC interim stabilization requirements in the Rule 1000 Series (*i.e.*, as that Series is currently written), are consistent with this CDPHE guidance. The requirement under Rule 1002.f that erosion be *prevented* instead of minimized renders CDPHE and COGCC stabilization policies and requirements inconsistent, and puts operators in a position of having to comply with conflicting stabilization requirements.

In light of testimony and comments from COGCC and CEC, and Gunnison County’s recommendation that issuance of a COGCC permit be conditioned on obtaining a CDPHE stormwater permit (Gunnison County PHS at 11), Black Hills points out that unlike under Rule 1002.f, construction stormwater permits issued by CDPHE under 5 C.C.R. 1002, § 61.3(2)(f)-61 only cover oil and gas operations that disturb at least one acre or operations disturbing less than one acre that are part of a common plan of development. Thus, if Rule 1002.f is adopted, operators that may otherwise qualify for an exemption from stormwater permitting requirements based on reduced acreage of disturbance, or even based on an R-Factor waiver,³ may still be subject to the onerous stormwater control measures under Rule 1002.f.

The bottom line is that, contrary to the written testimony and comments in favor of adopting Rule 1002.f, the Rule is not consistent with either industrial or construction stormwater permitting requirements, and the Rule reflects a disregard by COGCC and other proponents clearly not cognizant of the nature of oil and gas operations, of the legitimate reasons why oil and gas activities are presently exempted from certain stormwater permitting requirements.

³ The R-Factor waiver allows a site owner or operator to apply for a waiver from State Stormwater Construction Permit requirements coverage when the R-Factor for a construction project, as calculated using the State-approved method, is less than five. The “R-Factor” is a way to measure erosion potential based on the duration of the project and time of year. In general, a project will qualify for the waiver if it is completely stabilized within a month or two of the start of construction. *See* 5 C.C.R. 1002-61.3(2)(f)(ii)(B), and *WQCD Stormwater Fact Sheet at pp. 4-5*.

C. Rule 1002.f is duplicative and unnecessary.

Testimony from Gunderson and Ash and comments from CEC support the fact that Rule 1002.f is duplicative and unnecessary. As Ash observes in her testimony:

Operators are already required to take precautions to prevent adverse impacts to air, soil, biological and water resources...The expanded BMPs are standard practices for stormwater pollution prevention; therefore, the industry is already implementing many of these measures.

Ash Testimony at 18.

In addition, Gunderson and CEC both assert that Rule 1002.f is based on many of the same elements as stormwater management plans required of operators. Gunderson Testimony, at 12, and CEC PHS at 32 (“These BMPs are consistent with the stormwater management plans already required under the CDPHE construction permit program.”). As previously pointed out in its Prehearing Statement, Black Hills already implements numerous measures both voluntarily and in accordance with other applicable state and federal law and regulations to control stormwater discharges at operation sites and facilities. Black Hills PHS at 10. This includes stormwater control measures implemented by Black Hills during construction activities under the stormwater management plan that remain in place through the operation phase. Comments from COGCC and WQCD staff and proponents of the Draft Rules reflect that Rule 1200.f would simply impose duplicate requirements on operators, and are therefore unnecessary.

VIII. THE TESTIMONY CONCERNING THE TIMING LIMITATIONS UNDER DRAFT RULE 1208 ARE UNSUPPORTED BY SCIENTIFIC STUDY AND ARE MORE RESTRICTIVE THAN ANALOGOUS FEDERAL REQUIREMENTS.

A. Statements made concerning the Timing Limitation Areas (“TLAs”) in Draft Rule 1208 by both the Commission and other Parties to this rulemaking lack foundation and reasoning.

House Bills 1298 commands the Commission to adopt a set of regulations that allow operators to implement best management practices whenever reasonably practicable. Instead of following this charge, the Commission has presented the “one-size-fits-all” Rule 1208 that is unsupported by any evidence. The Commission has not adequately addressed the need for a statewide set of Draft Rules because the Commission has not done studies or surveys of the effects of oil and gas operations on specific wildlife species in each distinct producing basin in Colorado. Throughout the testimony submitted with the Commission’s Prehearing Statement, the various agencies admit and recognize that whether certain wildlife species are impacted by oil and gas operations is unknown. Commission’s Statement of Basis and Purpose at 54. Rather than providing specific studies in the relevant areas concerning specific species that may be affected by oil and gas operations, the Commission simply states that there is a “potential” for a negative effect. For instance, with respect to the Black-tailed prairie dog (“BTPD”), White-tailed prairie dog (“WTPD”) and Gunnison’s prairie dog (“GUPD”) prairie dog colony timing limitation, DOW stated:

Impacts from oil and gas development on BTPD communities **have not received substantial empirical study**. While it is **presumed** that there are potential direct impacts from placing structures directly on BTPD colonies, **the effect of placing structures nearby (but off of) colonies is not entirely known**.

The seasonal timing limitation . . . is intended to avoid impacts of oil and gas development on GUPD and WTPD during periods when they **could potentially** be metabolically and behaviorally sensitive to disturbance.

The impact [of] oil and gas disturbance on reproducing GUPD and WTPD **has not been studied**.

DOW Staff Testimony at 85-86 (emphasis added). Despite this lack of research and understanding on the part of the DOW, the Commission has presented a set of Draft Rules that impose severe burdens on oil and gas operations. Given the lack of evidence, the Draft Rules cannot possibly represent an appropriate balance between promoting development and protecting resources. This failure should be addressed and remedied by the Commission by eliminating the overly restrictive TLAs and introducing a set of proposed BMPs. Utilizing flexible best management practices as contemplated by H.B. 1298 would allow operators to tailor their activities to avoid impacts to wildlife without the significant and unnecessary burdens imposed by the TLAs. With regard to these and other wildlife related provisions contained in the rules, Black Hills adopts the proposal of Bill Barrett Corporation (“BBC”) contained in Exhibits C and E to BBC’s prehearing statement.

B. Pipeline construction activities should not be subject to the timing limitations.

The Sierra Club, in its Prehearing Statement, fails to recognize the realities of pipeline construction and Draft Rules protecting wildlife during pipeline construction. In its Prehearing Statement, the Sierra Club states:

The timing limitation requirements set forth in Rule 1208 should not give an exemption for construction of oil and gas Lines [sic], as construction activities can be highly disruptive to wildlife habitat due to the high levels of activity, including traffic, that can seriously disturb wildlife.

Sierra Club, Rocky Mountain Chapter PHS at 2. The construction of gathering lines is appropriately exempted from Draft Rule 1208 because of the manner in which these facilities are installed. The Sierra Club has failed to recognize that the construction of gathering lines is a temporary intrusion. As the equipment moves across the surface, the installation team trenches, welds, x-rays, lays, sets and reclaims in a matter of days and weeks. Timing limitations would be inappropriate given the short duration of these activities.

Moreover, the Draft Rules already provide for wildlife protection during pipeline construction in Draft Rule 1207. This Rule provides specific protections to wildlife species during the pipeline construction phase.

C. The timing limitations contained in the draft rules are too rigid.

The Wildlife Parties' argument that the TLAs are appropriate because they track federal guidelines fails to recognize how the federal TLAs are implemented. In its Prehearing Statement, the Wildlife Parties incorrectly assert:

In all but a few cases we have identified, the conditions of Draft Rules 1208 and 1209 are equivalent or less stringent than commonly-applied federal lease stipulations, conditions of approval and management prescriptions.

Wildlife Parties PHS at 5. That statement is inaccurate.

Unlike the Draft Rules, federal lease timing limitations routinely allow for substantial activities to occur during periods of limitation. For example in the San Juan basin, timing limitations permit “[r]outine well activities (activities that are conducted in the course of maintaining production operations at a well site such as daily site visits, minor repairs on surface equipment or removal of produced water by truck.)” Northern San Juan Basin Coal Bed Methane Project Final Environmental Impact Statement, Appendix B-2. The Draft Rules, however, prohibit any “oil and gas operations.” The Commission has, therefore, presented an approach to TLAs that is significantly more stringent than that those imposed under federal leases without any justification for such a restrictive approach.

The Wildlife parties also assert that “[f]illing in what is in effect a regulatory gap on state and private lands is neither unreasonable nor unexpected; practices that are feasible and economical on federal lands can reasonably be extended to all lands under COGCC jurisdiction over oil and gas operations.” Wildlife Parties PHS at 5. That statement ignores important differences between public lands and private lands and fails to recognize existing conditions. First, federal public lands are subject to plenary control by the federal government which has authority to protect any resources for the benefit of the public at large. That is not true of private property. Private property owners have important rights of control over when and how their land is developed. The assertion that there is a “regulatory gap” with respect to such lands ignores appropriate limits on governmental authority. Second, even if the COGCC attempts to impose timing limitations on the oil and gas industry, it will not control other activities on private lands, such as construction. Thus, there is no support for the notion that limiting oil and gas activity alone will provide any benefit to wildlife. Third, federal timing limitations have been developed based on extensive study and in consideration of local conditions. The state rules represent a broadly applied restrictive approach that is not based on a comparable foundation of empirical data.

Finally, the state rules may conflict with the existing timing restrictions contained in federal leases. Black Hills already complies with the well-developed federal controls concerning wildlife protection on its federal leases. Where there is a conflict between the federal protections and the state rules, the federal protections control.

IX. PROCEDURAL AND OTHER OBJECTIONS

Black Hills notes that the inconsistencies described above are reflected in several portions of the Commission's prehearing statement and its supporting testimony. For instance, Director

Neslin states that Rule 306.a regarding consultation with surface owners merely incorporates existing policy. Neslin Testimony at 22-23 (“This policy has existed since January 2005.”). Existing consultation with surface owners, however, is directed at addressing surface owner concerns. Under the Draft Rules, that focus has shifted entirely to consideration of additional conditions of approval by CDPHE and CDOW that may be imposed without any connection to the requirements of the rules. Regarding Draft Rules 306.c and 306.d, Director Neslin asserts that consultation with CDPHE and CDOW will usually take place as a result of an operator’s request for a variance from the rules. *See* Neslin Testimony at 23 (“Limiting consultation primarily to variance requests is appropriate because the Draft Rules incorporate a variety of environmental and wildlife requirements which should generally protect those resources.”). That assertion ignores ability of the agencies to undercut the general sufficiency of the rules by requesting hearing under Rule 503.b as described above or by seeking to impose additional conditions of approval through the on-site inspection process. As discussed above, such inconsistency between the proffered justification for the rules and actual impact of the rules occurs throughout the Commission’s prehearing statement and its supporting testimony. Black Hills objects to this consistent failure to address the rules as written.

House Bills 1298 and 1341 charge the Commission with developing a timely and efficient process to consider the impacts of oil and gas development on public health, wildlife and the environment, with limited consultation with sister agencies. Black Hills supports these goals, but is troubled by both the substantive changes to the rules, as described above, and the process the Commission has structured for the consideration of its proposed changes. No party, the Commission included, has had sufficient time to comprehensively analyze the impact of the Draft Rules.

Given the narrow legislative mandate and compressed schedule to adopt rules, the legislature likely envisioned minimal changes to the existing Commission rules. Months before the legislation was even passed, the Commission staff embarked on a path “[i]n early 2007 . . . to enhance clarity, respond to new information, and reflect current policy and practice.” Neslin Testimony at 8. After the pre-draft proposal was published in late 2007, the regulated community and other stakeholders were invited to participate in technical workgroups in early 2008. Despite six weeks of stakeholder meetings and the benefit of industry’s technical experience, evidence and testimonials concerning the potential impact of the pre-draft proposal on the oil and gas industry, Commission staff issued a set of Draft Rules that did not address the pragmatic concerns raised by the regulated community. By adopting an abbreviated schedule for the consideration of these broad changes, the Commission is undercutting the appropriate analysis that should accompany such technically detailed regulation.

The Draft Rules raise significant procedural, statutory and constitutional issues that will have real operational and economic impacts on the oil and gas industry, as well as many mineral owners, royalty owners, and local governments, in Colorado. Accordingly, Black Hills reasserts the factual, procedural, and legal arguments raised in its prehearing statement. The Commission’s Draft Rules go far beyond the legislative mandate and improperly delegate substantial roles to CDPHE and DOW and, potentially, to local governments under the Memorandum of Agreement (“MOA”) concept in the Draft Rules. In addition, the Commission has not demonstrated the need for additional regulation or properly considered its economic impact. This unbalanced approach threatens to compromise the Colorado Oil and Gas Act’s

overarching purpose of promoting oil and gas development while also protecting public health and the environment.

Dated this 6th day of June, 2008.

Respectfully submitted,

/s John R. Jacus

John R. Jacus, No. 14139
Sherry H. Bursey, No. 34122
Sam Niebrugge, No. 39006
Davis Graham & Stubbs LLP
1550 Seventeenth Street, Suite 500
Denver, Colorado 80202
Telephone: 303-892-9400
Facsimile: 303-893-1379
E-Mail: john.jacus@dgsllaw.com
E-Mail: sherry.bursey@dgsllaw.com
E-Mail: sam.niebrugge@dgsllaw.com

ATTORNEYS FOR BLACK HILLS
EXPLORATION AND PRODUCTION, INC.

CERTIFICATE OF SERVICE

I hereby certify that one (1) original and fifteen (15) true and correct copies of the attached **REBUTTAL STATEMENT OF BLACK HILLS EXPLORATION AND PRODUCTION, INC.** 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, Colorado 80203

and further certify that two (2) true and correct copies of said petition were served by courier delivery on the 6th day of June, 2008, to the Department of Law, as follows:

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

and further certify that one (1) true and correct copy of said petition was served by courier delivery on the 6th day of June, 2008, to the State of Colorado, as follows:

Joshua Epel, 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 delivered to:

Patricia Beaver at tricia.beaver@state.co.us
Kelly Rees at kelly.rees@state.co.us
Marc Fine at marc.fine@state.co.us.

All Parties on the COGCC Service List for Docket No. 0803-RM-02.

/s Linda Bondar _____