

**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 COLORADO ASSOCIATION  
OF HOME BUILDERS AND NATIONAL ASSOCIATION  
OF INDUSTRIAL AND OFFICE PROPERTIES

This rebuttal statement of the Colorado Association of Home Builders (“CAHB”) and the National Association of Industrial and Office Properties (“NAIOP”) is hereby submitted by and through their undersigned counsel, Randall J. Feuerstein, of Dufford & Brown, P.C. as follows:

**I. Background**

CAHB is the statewide trade association for the home building industry, representing over 3800 members and affiliated local associations striving to meet the housing needs of Coloradans. CAHB’s members represent individuals and entities that purchase, sell, develop and improve land, undeveloped real estate and developed real estate for home building. Its members deal each and every day with conflicts between oil and gas operators and surface owners arising when development of the surface and development of the minerals occur at the same time.

NAIOP is a national trade association for developers, owners, investors, asset managers and other professionals in industrial, office and mixed-use commercial real estate. NAIOP has 52 chapters in the United States, Canada and Mexico representing over 17,000 members involved in commercial and mixed-use real estate. In Colorado, NAIOP represents over 850 members. Similar to CAHB, NAIOP’s members also deal with conflicts between oil and gas operators and surface owners arising out of concurrent mineral development and surface ownership, development and use.

**II. Executive Summary**

Rule 603 – Setbacks. CAHB and NAIOP oppose increasing well and production facility setbacks from a residence to 1,000 ft. This alternate proposal is offered by the Colorado Environmental Coalition (“CEC”) and other environmental groups who have joint party status with CEC. With such an extreme setback, surface area loss around a well or facility to a 1,000 ft. radius totals 72 acres. Local governments tend to adopt similar setbacks that are then applied to landowners and developers who seek to subdivide and improve real property. Open space credit is not given to surface owners for safety setback areas.

Rule 306 and Part 1000 – Consultation. The opportunity for surface owners to have consultation on locations and reclamation should not, in CAHB’s and NAIOP’s view, be

summarily denied or removed if a surface use agreement exists. The subject of the consultation may not necessarily have been addressed in that agreement, and the existence of that agreement would create the unintended result of no opportunity for consultation when it may be presently needed. Thus, consultation may avoid delay in permitting and reclamation. It may also result in further agreement between the operator and surface owner about locations and reclamation where and when presently needed.

Rule 303(h) (1) and (2) – Form 2 and 2A Approvals Duration. CAHB and NAIOP believe that the permit durations for Forms 2 and 2A should be set at one year. It is best for the surface developer and operator alike to have mineral development and exploration activities occur prior to surface development. There is also disruption to fewer members of the public if the mineral activities occur before the surface of the land is improved. Three years will result in unreasonable delay to surface development approvals.

Rule 303(a) – Local Government Participation. While local government participation in inspection and consultation processes is not opposed by CAHB and NAIOP, the Draft Rules should not enable local governments to set aside the benefits reached by surface owners and operators in surface use agreements.

### **III. Rebuttal Discussion**

#### **A. Rule 603 – Setbacks**

The Colorado Environmental Coalition (“CEC”) and other environmental groups who are joint parties with CEC are requesting that Commission Rule 603 be amended to provide a safety setback from wells and other production facilities of 1,000 ft. from a residence. CAHB and NAIOP are opposed to increasing safety setbacks for many reasons.

A residential surface owner, who desires that wells and other production equipment be located 1,000 ft. or more from a residence, generally has the ability to negotiate that particular protection in a surface use agreement to address what may be infrequent situations related to specific residences or home owners. CAHB and NAIOP are unaware of any setbacks of such magnitude. In fact, the largest setback relating to wells is 350 feet for high density areas. Commission Rule 603(c). Therefore, such a significant setback of that magnitude should not be established by Commission rule.

As CAHB and NAIOP discussed in their direct testimony, rebuttal testimony, and has presented in their exhibits, safety setbacks result in loss of otherwise developable surface area. This loss of use of surface for safety setback area results even though a Commission rule would be applicable only to the oil and gas industry. This occurs because local governments often adopt the safety setback imposed by the Commission’s rules and regulations and in many instances, impose greater setbacks. A radius of 1,000 ft. around a well or production facility would amount to the loss of surface area for development purposes of 72 acres.

B. Rule 306 and Part 1000 – Consultation.

The proposed rules and the positions of some industry parties provide for avoiding consultation where surface use agreements exist. Consultation is an important right in current rules and policies for locations and reclamation. It should not be taken away merely based on the existence of a surface use agreement.

From a practical standpoint, applicants and operators may seek to have the surface owner waive any applicable consultation obligation; but that waiver should be voluntarily given and in writing. Although waiver of consultation may exist in some surface use agreements, it does not necessarily follow that waiver is specifically stated in all agreements.

Moreover, the subject of the consultation may not have been an item specifically covered in the surface use agreement. For example, the operator and surface owner may be new and different from the original parties to the surface use agreement. There may be changed circumstances in relation to the proposed locations or reclamation activities. Thus, consultation should not be linked to the existence of a surface use agreement - a term not defined in the current or proposed Draft Rules.

C. Rule 303(h)(1) and (2) – Form 2 and 2A Approvals.

CAHB and NAIOP encourage their members to use surface use agreements to accommodate mineral development and exploration so that they occur prior to construction of improvements for surface development. In that manner, surveying, grading, infrastructure installation and other surface improvements' construction may occur after and may work around well sites, tanks, flow lines, pipelines and other facilities rather than having rigs, tankers and other mineral operations work around residences, schools, parks, buildings and other surface improvements.

Obviously, there would be fewer owners, residents and tenants disrupted with mineral development and exploration operations that occurred prior to building and subdivision construction and completion. For those reasons, CAHB and NAIOP believe that one year, rather than three years, should be the duration of all approved Form 2 and Form 2A permits. To wait three years for commencement of drilling operations likely will delay surface development approvals and completion.

D. Rule 303(a) – Local Government Participation.

CAHB and NAIOP are familiar with the role of local government in the approval process for land use issues such as annexation, rezoning, subdivision and special permit uses. Their members deal frequently with local governments and welcome their input in the surface development process. Any rule alternatives proposed by local government should not enable local governments to negate the bargained for rights and benefits negotiated between surface owners and operators in surface use agreements.

The Rebuttal Testimony of Chris Elliott in support of the foregoing is attached hereto as Schedule 1.

**IV. Reservation of Rights and Conclusion**

CAHB and NAIOP hereby reserve their rights to supplement the issues and their positions on the Draft Rules as may be necessary during the rulemaking proceeding. They reserve their right to present additional testimony, witnesses and exhibits for purposes of rebuttal and to consider alternate proposals and revisions to the Draft Rules.

For the foregoing reasons, CAHB and NAIOP respectfully request that the Commission adopt the Draft Rules, as modified by the Alternate Proposals of CAHB and NAIOP, and grant such other and further relief as may be just and proper.

Respectfully submitted this 6<sup>th</sup> day of June, 2008:

  
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Randall J. Feuerstein


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and the National Association of Industrial and Office Properties

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **REBUTTAL STATEMENT OF COLORADO ASSOCIATION OF HOME BUILDERS AND NATIONAL ASSOCIATION OF INDUSTRIAL AND OFFICE PROPERTIES** was caused to be served this 6<sup>th</sup> day of June, 2008 as follows:

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 e-mail and hand-delivery 1 original and 15 copies
Kelly Rees, Esq. Colorado Department of Law 1525 Sherman Street, 7 <sup>th</sup> Floor Denver, CO 80203	Via e-mail and hand-delivery 2 copies

  
\_\_\_\_\_  
Teresa Johnson

# SCHEDULE 1

**BEFORE THE OIL AND GAS CONSERVATION COMMISSION  
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REBUTTAL TESTIMONY OF CHRIS ELLIOTT

**Q. PLEASE STATE YOUR NAME:**

A. My name is Chris Elliott.

**Q. HAVE YOU PREVIOUSLY SUBMITTED DIRECT WRITTEN TESTIMONY IN THIS RULE MAKING PROCEEDING?**

A. Yes. I submitted testimony on behalf of the Colorado Association of Home Builders ("CAHB") and on behalf of the National Association of Industrial and Office Properties ("NAIOP").

**Q. HAVE YOU REVIEWED ALTERNATE RULE PROPOSALS OF PARTIES IN THIS PROCEEDING?**

A. I have reviewed the prehearing statements, alternate proposals and testimony of some of the various parties in this rulemaking proceeding.

**Q. DOES CAHB AND NAIOP HAVE CONCERNS RELATED TO THE COLORADO ENVIRONMENTAL COALITION'S POSITION IN THIS RULE MAKING PROCEEDING?**

A. Yes they do. The Colorado Environmental Coalition proposes a 1,000 ft. well and other production equipment safety setback for all areas of the state except the Greater Wattenburg basin or Area ("GWA"). As I explained in my direct testimony and also as shown in the CAHB and NAIOP exhibits, safety setbacks result in the loss of a substantial amount of surface area for development purposes. With a 1,000 ft. safety setback radius, the potential exists that 72 acres of surface area will be lost for development purposes. That amount of surface loss is unreasonably detrimental to surface owners, especially those such as members of CAHB and NAIOP who may desire to subdivide and develop their properties. For example, surface use agreements frequently provide that lot lines may not be included within an oil and gas operations area including safety setbacks. In addition, surface improvements are also prohibited to be

built in that area. Thus, from a practical standpoint, the setback area becomes unusable for surface development.

**Q. WHAT IS THE SIGNIFICANCE OF A SAFETY SETBACK IMPOSED BY THIS COMMISSION ON THE OIL AND GAS INDUSTRY RATHER THAN ON A SURFACE OWNER?**

A. Although the safety setback would be a rule and regulation imposed against the oil and gas industry by the Commission and not enforced against a surface owner, local governments frequently apply the same or a greater safety setback that is established by ordinance and imposed against surface owners and surface developers. Thus, a local government is likely to impose generally the same, if not more stringent, safety setbacks, than the Commission imposes on the oil and gas industry. In addition, when a surface owner loses the use of land as a result of the application of a safety setback, then this land is not given any form of open space credit by local governments, even though the land essentially remains as open space. For example, open space for parks, trails, and buffer zones still would need to be set aside on subdivision plats for open space purposes even though significant open space results from imposition of safety setbacks.

**Q. DOES THE COLORADO ENVIRONMENTAL COALITION'S EXCLUSION OF THE GWA LESSEN THE ADVERSE IMPACT?**

A. Although removing the GWA from the excessive setback proposal benefits CAHB and NAIOP members who develop in Adams and Weld counties, the increased setback would adversely affect members who develop elsewhere. CAHB and NAIOP members develop state-wide. Therefore, those members who develop outside the GWA would lose significant parcels of land to safety setbacks. CAHB and NAIOP believe that surface owners with acreages who desire increased setbacks should attempt to negotiate those with the operators in a surface use agreement.

**Q. WHAT IS CAHB'S AND NAIOP'S RECOMMENDATION TO THE COMMISSION IN RELATION TO SAFETY SETBACKS?**

A. CAHB and NAIOP propose that the safety setbacks remain unchanged and not be increased.

**Q. WHAT IS CAHB'S AND NAIOP'S POSITION REGARDING THE TRIGGERING OF WAIVERS AND THE TERMINATION OF CONSULTATION WHEN SURFACE USE AGREEMENTS EXIST?**

A. Based upon a review of prehearing statements and testimony from some industry parties, they request waiver of consultation where surface use agreements exist. The existence of

a surface use agreement should not automatically trigger any waivers. Applicants and operators are free to contact the surface owner directly for a waiver. But such waivers, if voluntarily given, should not bind subsequent owners. In addition, the subject of the consultation may not necessarily be covered in the surface use agreement. Therefore, notice to and consultation with the surface owner should be required for all permit applications and prior to entry with heavy equipment.

**Q. WHAT IS THE CAHB'S AND NAIOP'S POSITION ON THE DURATION OF APPROVED FORM 2 AND FORM 2A PERMITS?**

A. Based upon a review of the Colorado Petroleum Association's prehearing statement and testimony of Ms. Dey and Mr. Brown, they advocate three years for the effective duration of both Form 2 and Form 2A approvals. CAHB and NAIOP believe, however, that the approved permits should have a one year effective duration. CAHB and NAIOP members generally prefer mineral development to occur before surface development so that fewer surface owners are affected by oil and gas operations. Three years is an unreasonably long period of time to wait for a location to be drilled or used, and potentially could unduly delay surface development approvals.

**Q. DO CAHB AND NAIOP HAVE CONCERNS ABOUT THE POSITION OF LOCAL GOVERNMENTS ON CERTAIN RULES?**

A. Yes. Although CAHB and NAIOP members are familiar with local government regulation of surface development, the rules should not be used to enable a local government to set aside or negate the bargained for expectations and certainty on joint mineral and surface development frequently stated in surface use agreements. For example, under Rule 303(a), while local government participation in inspections as advocated by La Plata and San Miguel Counties is not opposed, the arrangements reached in surface use agreements should be preserved and not altered by local government intervention.

