

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

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

**REBUTTAL STATEMENT OF
PIONEER NATURAL RESOURCES USA, INC., LAS ANIMAS COUNTY FARM
BUREAU, LAS ANIMAS COUNTY CATTLEMAN’S ASSOCIATION, LAS ANIMAS
COUNTY LANDOWNER’S GROUP AND TRINIDAD AND LAS ANIMAS COUNTY
CHAMBER OF COMMERCE**

Pioneer Natural Resources USA, Inc. (“Pioneer”), the Las Animas County Farm Bureau (“Farm Bureau”), the Las Animas County Cattlemen’s Association (“Cattlemen’s Association”), the Las Animas County Landowner’s Group (“Landowner’s Group”), and the Trinidad and Las Animas County Chamber of Commerce (“Chamber of Commerce”) (the Las Animas County Parties known collectively as the “Las Animas County Parties” and Pioneer and the Las Animas County Parties known collectively as “Party” or “Parties”) submit this Rebuttal Statement (“Rebuttal”) in connection with the Colorado Oil and Gas Conservation Commission’s (“COGCC” or the “Commission”) consideration of changes to its rules for oil and gas development in Colorado (“Draft Rules”). This Rebuttal is also submitted in accordance with Commission Rule 529 and pursuant to the First, Second and Third Prehearing Orders in this proceeding, Cause No. 1R, Docket No. 0803-RM-02.

INTRODUCTION

Upon careful review of the Commission’s Prehearing Statements, and accompanying witness testimony and exhibits, the Parties herein remain convinced that the comprehensive rewrite of the oil and gas regulations has not been undertaken in response to a careful assessment of actual risks. It is, instead, a response to the perception that increased production ipso facto requires increased regulation. Superficial justifications, such as the one offered in support of extending stormwater regulations to oil and gas production because such regulations are used to regulate the mining industry, underscore the absence of empirical data demonstrating a specific need for the regulation. Particularly in the Raton Basin, where wildlife is abundant, produced water is generally of good quality, and clean drilling technologies are established and successful, little benefit would derive from the wholesale expansion of regulations.

Balanced against whatever need may exist for additional regulations, the Parties expected to find a careful analysis of economic impact the regulations will have on individuals, families, local communities and industry where development is occurring. We have found, instead, a conclusory and result-driven summary that does not take into account the full range of impacts the community will experience or costs the industry will incur to retool and comply with the regulations and the ripple effect these costs will have on local economies. Further, the economic analysis does not assign proper value to the benefits derived from oil and gas production activities. Here, again, the Raton Basin is unique. By way of example, its shallow coal

formations and uneven topography would make changes in drilling procedures more costly while, at the same time, the loss of usable produced water would be missed by landowners, firefighters, stock and wildlife that live in this arid region.

Ultimately, Pioneer and the Las Animas County Parties urge the Commission to return to its mandate and seek a “balance” between the need to address legitimate risks to wildlife and the environment in a way that does not extinguish or reduce the economic benefits of oil and gas development. To this end, the Parties submit 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 Hearing Officers’ and the Commission’s consideration. This Rebuttal is organized as follows:

- I. Rebuttal Statement of Las Animas Parties;
- II. The Commission should amend Draft Rule 608 to allow for basin-specific evaluations of coal bed methane produced water quality and avoid costly requirements that have no applicability to the Raton Basin;
- III. The Commission must address the significant cost and technical burdens imposed by the pit lining requirements in Draft Rule 904;
- IV. The Commission should amend the overly burdensome and conflicting stormwater requirements in Draft Rule 1002.f.;
- V. The Commission should consider less burdensome and more effective procedures for addressing wildlife issues;
- VI. The Commission should amend Draft Rule 1209.b.(16) to address the adverse operational and environmental impacts of the 300-foot setback;
- VI. Procedural and other objections

I. REBUTTAL STATEMENT OF LAS ANIMAS COUNTY PARTIES

The Las Animas County Parties remain concerned after reviewing the COGCC Prehearing Statement and Economic and Regulatory Analysis that the Commission has essentially ignored the significant adverse economic impact the proposed rule will have on our region. The COGCC Staff’s Statement of Basis, Specific Statutory Authority, and Purpose, p. 2, acknowledges the Commission’s obligation to “balance” protection of wildlife and the environment with the goal of fostering development of oil and gas resources. Yet the Commission’s only effort to balance its regulations against the economic consequences they will wreak has been to deny that the negative consequences will be significant.

The Commission’s interpretation of what is called for by an “economic analysis” differs widely from the rigorous evaluation we believe is required to truly analyze the economic impacts of the proposed rules. A true economic review would validate the significant economic concerns of Parties such as the Las Animas County Parties. Ultimately, as demonstrated by the prehearing statements, exhibits and testimony of COGA (*see* Prehearing Statement of the Colorado Oil and Gas Association) and numerous operators – who know the business of oil and gas production

better than anyone – there is no legitimate dispute that the proposed regulations will substantially increase operating costs and invariably discourage oil and gas production.

It is the residents of Las Animas County, like the citizens of other oil and gas producing basins, who will suffer these economic consequences. Paradoxically, the alleged problems that the rules are proposed to address either do not exist or are much less significant in Las Animas County. Indeed, if applied in our basin, the proposed rules would actually create impacts that are not currently experiencing. Thus, while the regulations will have a direct impact on jobs, schools, and infrastructure, we will produce few if any improvements in environmental quality and may actually undermine it.

A. Detrimental economic impacts of proposed rules on Las Animas County will be significant.

Commentators such as the Colorado Environmental Coalition, *et al.* (“CEC”) assert in their prehearing statement that the economic impacts of the proposed regulations are offset by the environmental benefits which, they contend, provide “net benefits to all Coloradans.” *See* CEC Prehearing Statement, p. 2, 6; *see generally*, Testimony of Michelle Haeefe. Even if Coloradans as a whole would enjoy a “net” benefit, the negative component of the “netting” process will fall disproportionately on the citizens of Las Animas County. It is for this reason the Las Animas County Parties requested in our Party Applications that the Commission conduct an economic analysis on a basin-by-basin and/or county-by-county basis. While the CEC expresses confidence that the economic disincentives will not cause oil and gas industry to “abandon its investment in the state,” CEC Prehearing Statement, p. 2, there will inevitably be a slowing of development while industry and the COGCC adapt to the new rules. That slow down will directly impact the citizens of the Raton Basin which, of all the basins, has heretofore already suffered perhaps the hardest economic times.

The CEC offers a checklist of “negative impacts” from oil and gas production suggesting that reduction of these impacts will offset the economic slowdown the rules will precipitate. CEC Prehearing Statement, p. 7. Yet it is the experience of the Las Animas County Parties that the identified “impacts” – at least in our region – either have not occurred or have actually been positive.

For example, as we have made clear in the testimony in support of our prehearing statements, if there actually were any significant “loss of productive land for grazing and farming” in the Raton Basin due to oil and gas development, the benefits to agriculture from the produced water and associated increased access to and ability to use other tracts of land more than offset any loss. *Id.*

Similarly, in Las Animas County, there has been no discernable reduction in “tourism and recreation visits” nor “damage to fish and wildlife species and their habitat.” *Id.* On the contrary, as noted in our consolidated prehearing statements, our robust economy is giving rise to more tourist visits, and generally increased water flows and forage for wild animals from produced water has resulted in a greater abundance of wildlife. Trophy hunting is a significant source of income (many ranchers and farmers even earn income from allowing hunting on their land and offer guided tours), and there is no evidence that hunting success has declined. On the contrary, Department of Wildlife statistics indicate that the success rate for elk hunters in Las

Animas County reached all-time highs in the years when drilling was also at its highest historic levels (success rates: 1999 = 32%, 2004 = 60%, 2007 = 48%). Curtailing the productive use of clean water by requiring forced reinjection or lined pits treated with biocides would reduce surface flows, which, in turn, would reduce wildlife, and tourist visits.

In addition, in contrast to CEC's assertion that development gives rise to "increased costs to local governments for roads, law enforcement, schools, hospitals and emergency services," the opposite is true in Las Animas County. *Id.* Las Animas County has come to rely on the tax base for running the county and improving the infrastructure, as well helping fund the schools. In fact, there has been a pronounced net improvement in our local infrastructure that will be negatively impacted if development is reduced.

Ms. Haefele testifies for the CEC that "a calculation of the net economic benefits from oil and gas extraction also must include the long-term socioeconomic costs associated with this 'boom and bust' industry" which destabilizes communities. *Id.* p. 8. Las Animas County residents recognize that there are ups and downs in the industry and have direct experience with these cycles based on the era when coal mining dominated our economy. In our experience, gas development in the Raton Basin has been more stable and predictable than coal production and has done more to encourage diversity of the local economy. For example, access to the infrastructure provided by the industry, along with the region's warm weather and geothermal resources, has attracted the attention of government as well as attention from potential alternative energy players such as solar and/or geothermal developers. In addition, as more people have moved to Trinidad to work in the industry, we have attracted more retired people interested in a warmer climate and the virtues of a small but vibrant rural community, along with families seeking vacation homes or second residences in the county. Oil and gas industry contributions have added amenities to our community ranging from a local theater troupe to a world-class golf course that attracts tourists, and our Trinidad State Junior College training center has attracted visitors and students from all over the United States.

B. Benefits of the proposed rules on the wildlife and environment in Las Animas County will be negligible and do not merit usurpation of the rights of private property owners.

As noted in our prehearing statement, problems associated with oil and gas development elsewhere, such as impacts on wildlife and managing contaminants in produced water, are far less significant in Las Animas County. Virtually none of the sensitive areas identified on the Department of Wildlife maps (*see* <http://oil-gas.state.co.us/RuleMaking/StaffDocs.cfm>) are found in the oil and gas producing regions of the Raton Basin, and the produced water is largely free of contaminants and suitable for various uses, including discharge to streams and wetlands, stock and wildlife watering, forage improvement and agricultural consumption. Illustrating the extent to which alleged problems from one area are being transported into another, the CEC urges that the "Compliance Checklist and Certification" procedure should be adopted and required for oil and gas facilities statewide. CEC Prehearing Statement, p. 14. In support of this suggestion, CEC cites several complaints from two distant basins and five counties, but *none* from the Raton Basin or Las Animas County. *Id.*

Thus, suggestions by the CEC, the Sierra Club, Rocky Mountain Chapter ("Sierra Club") and others urging expansion of pitless drilling requirements and well site location restrictions,

see CEC Prehearing Statement, p. 22; Sierra Club Prehearing Statement, pp. 4 –5, would deliver little or no benefit in the Raton Basin but would compound the injury to farmers, ranchers and other landowners who, because of the arid climate in our region, need and want continued access to this good quality water. As opposed to the “one-size-fits-all” approach, which Commissioner Neslin asserts is not the Commission’s intention, *see* COGCC Staff Prehearing Statement, Testimony of David Neslin, p. 11, the Las Animas County Parties urge continued cooperation between the landowners and the Commission and flexibility on this issue.

The Las Animas County Parties likewise urge that the Commission bring a spirit of balance to the sensitive issue of the property rights of private landowners. The extension under the proposed rules of an independent right to request hearings for Department of Public Health and Environment (“CDPHE”) and Colorado Division of Wildlife (“DOW”) already goes beyond the consulting role contemplated by the legislature. Comments by environmental groups urge expansion of this approach such as, for example, providing that “nearby surface owners” be allowed to participate in development of comprehensive drilling plans (“CDP”), CEC Prehearing Statement, pp. 15, 17, and allowing adjacent property owners a right to request a hearing on approvals of Form 2 and 2As, *Id.* at 24. *See also*, Sierra Club Prehearing Statement (recommending mandatory participation of Local Government Designees (“LGD”) in development of CDPs). The Las Animas County Parties urge the Commission to continue to allow landowners the flexibility to control the management of our own land without public or undue governmental interference. We believe CDPs should be developed by experts, *i.e.*, representatives of industry, COGCC, and by the surface owner. The process should *not* be expanded to include every potentially “affected landowner and/or LGD” because, in addition to infringing on our right to control our own land without any compensation, doing so could slow the process to a virtual halt and turn the CDP process into a popular referendum on oil and gas development rather than a technical review and approval of the drilling plans.

Other examples of suggestions by environmental groups that would unnecessarily impinge on private landowner rights without compensation include proposals that (1) “all new wells should have an onsite inspection, prior to drilling, to document baseline conditions,” Sierra Club Prehearing Statement, p. 2; (2) once drilling has commenced, routine visits should be paid by the BLM, USFS or SOGC to monitor permit compliance, *Id.*, p. 4; (3) on private residential land, COGCC should work with the affected homeowners in restricting and citing drilling locations, *Id.*; and (4) pad spacing should be selected to minimize length and location of roads and utilize existing roads, *Id.*, p. 3. While the Las Animas County Parties do not summarily oppose some of the options under the Draft Rules to seek review and consultation by outside agencies in some instances, it is imperative that we retain the freedom to work directly with operators in the first instance to decide how activities will take place on our own land. We are in the best possible position to understand our own property and must have the flexibility to mutually choose locations and length of roads, which often provide great utility to us, as well as the location and placement of wells, management of usable produced water, and other direct benefits that come with oil and gas development.

Finally, none of the explanations or testimony offered by the COGCC Staff adequately addresses our concerns about the haste with which this rulemaking process has proceeded and the lack of time that has been allowed for public input and the hearing process. It seems inevitable that significant changes will occur and will be implemented starting November 1, 2008. The Las Animas County Parties urge, based both on the legal protections afforded for

existing contracts and as a matter of good public policy, that the Commission recognize, honor, and exclude from interference by the new regulations the terms memorialized in existing leases, surface use agreements, and the like, which were negotiated under existing rules and regulations. The terms of these contracts between landowners and operators should not be undone.

II. THE COMMISSION SHOULD AMEND DRAFT RULE 608 TO ALLOW FOR BASIN-SPECIFIC EVALUATIONS OF COAL BED METHANE PRODUCED WATER QUALITY AND AVOID COSTLY REQUIREMENTS THAT HAVE NO APPLICABILITY TO THE RATON BASIN.

A. Rule 608 Ignores the Known Characteristics of CBM Wells in the Raton Basin.

Pioneer continues to have grave concerns about statewide application of CBM development rules that were previously crafted for the San Juan Basin and about the burden imposed under Rule 608 by many of the assessment and surveying requirements as conditions of CBM well operation. Extensive testimony provided by COGCC staff attempts to demonstrate the purpose of these substantial and costly monitoring requirements on tenuous grounds. COGCC Prehearing Statement, Testimony of Debbie Baldwin, pp. 3-6. For example, Baldwin concludes that the Draft Rule will not affect the industry's ability to develop CBM based on the theory that operators already collect samples from nearby water well and surface water features. *Id.* at p. 5. This reason, however, does not justify imposing extensive and potentially very costly requirements and responsibilities on operators for identifying and assessing abandoned oil and gas wells or coalmines in the vicinity that the operator never owned or operated. *See* Pioneer Prehearing Statement, p. 14 and Exhibit V thereto, and Testimony of Jerry Jacob, pp. 18-19. This testimony relies exclusively on data generated for the San Juan Basin and does not provide an adequate basis for applying onerous rules to other basins such as the Raton Basin, where the quality of the produced water is good and where CBM operators have from the beginning routinely set surface casing, cemented all casing back to surface and confirmed this with cement bond logs submitted to the COGCC's staff. Pioneer Prehearing Statement, Testimony of Adam Bedard, p. 5. Pioneer, in fact, supports the proposed cement bond log requirement in Draft Rule 317.o. COGCC also cites only isolated incidents to support the alleged need for these Draft Rules instead of a broader record of events or occurrences that justify the Draft Rules. Thus, COGCC inappropriately takes a one-size-fits-all approach without demonstrating the need for that approach.

The Commission has given little consideration to the costs deferred production, lost production and the potential for lost wells imposed by Rule 608.d requiring pressure buildup tests 2-3 months after initial production and once every three years thereafter. This Draft Rule is apparently based on the San Juan Basin where the wells have a higher pressure and the tests can be completed in a short period of time along with routine maintenance. That is not the case in the Raton Basin. The wells are low pressure and accordingly the operator must maintain continuous dewatering operations. If the well is shut-in for an extended period to establish a pressure build-up then that build-up in pressure will essentially reverse the de-watering process and re-saturate the near-wellbore coal with water. Conducting a build-up after the hydraulic fracture treatment (i.e., 2-3 months after initial production) could potentially cause the frac sand to move and flow into the wellbore upon returning the well to production, thereby requiring expensive remediation efforts or the need for re-stimulation of the well. Pioneer Prehearing

Statement, Testimony of Paul Onsager, p. 4. This regulation is silent as to the required duration of the pressure build-up tests. If the objective is to actually have the pressure build back up to the average current reservoir pressure, subsequent tests following the initial test could easily take one or more months of shut-in time to obtain. Testimony of P. Onsager, p. 4. Further, it is not clear why the Commission needs this information since in the Raton Basin, unlike the San Juan Basin, there are no spacing orders in place or request to increase density. Instead, three federal units operated by a single operator further protect the Raton Basin from the contingencies apparently present in the San Juan Basin at the time these San Juan rules were developed. Again, the application of Draft Rule 608 to CBM Wells in the Raton Basin has little merit and at a minimum the Draft Rule should be amended to address these unique issues.

B. Inappropriate Objective

It is equally clear that the objective for these Draft Rules is to provide COGCC with a convenient data collection and assessment program at no cost to COGCC, and at a considerable cost and burden to the industry. COGCC intends to use this program to ensure that impacts from improperly plugged and abandoned wells, unplugged orphan wells and abandoned coal mines are “identified *and mitigated.*” Testimony of A. Bedard, p. 3 (emphasis added). 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 retroactive orphan liability to CBM operators for abandoned wells or coal mines, and impacts to water wells. There is no statutory basis or authority in Colorado for the imposition of retroactive orphan liability on oil and gas operators, such as in the CERCLA statute, or environmental statutes in other states addressing abandoned hazardous waste sites. COGCC is taking a wholly unauthorized and very troubling direction through the proposed changes and additions in Draft Rule 608.

C. Extension to Conventional Wells

Pioneer also feels compelled to address the suggestion by La Plata County that the CBM rules in Draft Rule 608.a. and .b. should be extended to also apply 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 entire 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. To do so is itself an attempt to improperly subject current operators to retroactive liability arising from third parties’ historic operations. Moreover, the primary purpose and intent of the baseline testing in Draft Rule 608 is to ascertain if there are any impacts on surface and groundwater sources from methane seepage emanating from coal formations, operating and abandoned CBM wells, and coalmines. Application of Draft Rule 608 to conventional oil and gas wells serves no legitimate purpose, and there has been no showing by COGCC or any other proponent of the Draft Rule that the requirements imposed by Draft Rule 608 must be extended to operation of conventional oil and gas wells.

III. THE COMMISSION MUST ADDRESS THE SIGNIFICANT COST AND TECHNICAL BURDENS IMPOSED BY THE PIT LINING REQUIREMENTS IN DRAFT RULE 904.

Pioneer has significant concerns over the unnecessary costs and undue burdens that would result from the pit liner requirements contained in Draft Rule 904. This includes the costs and burden to line all pits where necessary and to demonstrate that the quality of the production pit fluid is of equal or better quality than groundwater, which requires onerous and costly groundwater sampling and analysis in order to use unlined production pits. The Draft Rule would also impose significant costs and burdens to comply with the increased liner-thickness requirements and other design specifications imposed under Draft Rule 904.b. *See* Pioneer Prehearing Statement, pp. 11-12 and 22-23. Neither COGCC nor Hazardous Materials and Waste Management Division (“HMWMD”) have shown that such onerous pit liner requirements and design specifications are warranted, except for unidentified “research” of use of clay liners in isolated cases in other states. COGCC Prehearing Statement, Testimony of Charles Johnson, p. 2. Moreover, there is no justification for extending the pit liner requirements in Rule 904.b.(4) that are applicable to centralized exploration and production (“E&P”) waste management facilities to wellsite pits which in contrast to centralized E&P facilities, do not accept different kinds of waste from multiple sources. These Draft Rules are particularly difficult to justify in the Raton Basin where the quality of produced water is high.

Johnson and Baldwin concede in their testimony that the new pit lining requirements in Draft Rule 904 will increase costs for industry. They theorize, however, that the reduction of long-term liability associated with hypothetical mitigation and remediation of soil, groundwater and surface water contamination from leaking pits will ultimately offset the increased upfront costs. Testimony of C. Johnson, p. 3; Testimony of D. Baldwin, p. 7. This theory is tenuous, especially in the Raton Basin where produced water quality is sufficiently high to ensure that soils, ground and surface water in the vicinity of the pit would not be adversely impacted by the pit contents, and the likelihood that remediation of soil and water will ever be needed is minimal.

The requirements in Draft Rule 904 for lined production pits and for increased liner thickness, synthetic liners, soil compaction and other standards are unreasonable, based on speculative need and far exceed any benefits that may be derived from the asserted “protective measures.” This is especially the case given the unlikelihood that there would be any significant impacts to the environment or public health from continued use of unlined production pits in Raton Basin CBM production. The cursory and dismissive cost impact analysis presented by Johnson and Baldwin to support their conclusion that the economic impact of these arduous liner requirements on the industry will be minimal lacks any basis.

Should the Commission choose to apply the pit liner requirements across the board, the rules should at least provide some flexibility to operators to meet the synthetic liner specification requirements in Rule 904.b, to accommodate site-specific circumstances. For example, synthetic liners cannot practically be installed and used in pits located in rocky and gravel terrain due to the risk of tears in the liner. Rather, in this situation, a combination synthetic / soil / bentonite liner may be more appropriate. COGCC should continue to be mindful of the varying conditions at different locations and provide a much needed flexibility in the pit liner requirements accordingly.

IV. THE COMMISSION SHOULD AMEND THE OVERLY BURDENSOME AND CONFLICTING STORMWATER REQUIREMENTS IN DRAFT RULE 1002.F.

A. Draft 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 the CEC Prehearing Statement all assert that the proposed stormwater control measures that would apply under Draft 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. Testimony of D. Neslin, p. 40; COGCC Prehearing Statement, Testimony of Steve Gunderson, p. 12; CEC Prehearing Statement, p. 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 Prehearing Statement, p. 2. The assertion that Draft 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 are also exempted from stormwater permitting requirements where the stormwater flows from the mine site are not contaminated by contact with onsite wastes or products.

The so-called regulatory “gap” targeted by COGCC and CEC is the exemption for oil and gas operations from industrial stormwater permitting requirements in § 402(1)(2) of the Clean Water Act (33 U.S.C. § 1302(1)(2)). This exception was adopted 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 permit issued by CDPHE (and the National Pollutant Discharge Elimination System (“NPDES”) stormwater permits issued by the Environmental Protection Agency (“EPA”)) for oil and gas operations covers stormwater runoff only if it is contaminated by contact with overburden, raw material, intermediate products, finished product, byproduct or waste products located at the site of operations. 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 in many cases at oil and gas operation sites 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.*

Draft Rule 1002.f., as proposed, would require implementation of additional BMPs to control precipitation-related runoff contacting materials, wastes, equipment and activities that only have “the potential” to cause pollution to surface water. 1002.f.(1)(A). Thus, Draft Rule 1002.f. would apply to all stormwater runoff associated with any and all aspects of 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 and improperly wipes out the federal and state exemptions granted to oil and gas operations from industrial

stormwater permitting requirements, but it 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 given. Indeed, not only has COGCC failed to cite any data that supports the need to extend these stormwater control measures to the CBM operation stage, but data compiled on the Purgatoire River shows no increase in total suspended solids (“TSS”) and, in fact, shows a decrease in TSS loading to the River as a result of CBM operations in the Raton Basin. *See Evaluation of Historic Salinity in the Purgatoire River and Trinity Lake*, Applied Hydrology International, Exhibit A-10 to Pioneer PHS.

B. Draft 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 Draft 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. Testimony of S. Gunderson, p. 12; COGCC Prehearing Statement, Testimony of Margaret A. Ash, pp. 18-19. Draft 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. Similarly, it is technically impossible to protect all materials on site “from stormwater and precipitation,” as required in Rule 906.e(2). CDPHE guidance, however, 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*, p. 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 Draft 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 the testimony 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, p. 11), Pioneer points out that unlike under Draft Rule 1002.f., construction stormwater permits issued by CDPHE 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. *See*, 5 C.C.R. 1002, § 61.3(2)(f)-61. Thus, if Draft 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,¹ may still be subject to the onerous stormwater control measures under Draft Rule 1002.f.

¹ 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

The bottom line is that, contrary to the written testimony and comments supporting COGCC's adoption of Draft Rule 1002.f., the Draft Rule is not consistent with either industrial or construction stormwater permitting requirements, and the Draft 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 stormwater permitting activities.

C. Draft Rule 1002.f. is duplicative and unnecessary.

Testimony from Gunderson and Ash and comments from CEC support the fact that Draft 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, p. 18.

In addition, Gunderson and CEC both assert that Draft Rule 1002.f. is based on many of the same elements as stormwater management plans required of operators. Testimony of S. Gunderson, p. 12, and CEC Prehearing Statement, p. 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, Pioneer 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. Pioneer Prehearing Statement, p. 10. This includes stormwater control measures implemented by Pioneer 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 Draft Rule 1002.f. would simply impose duplicate requirements on operators, and are therefore unnecessary.

V. THE COMMISSION SHOULD CONSIDER LESS BURDENSOME AND MORE EFFECTIVE PROCEDURES FOR ADDRESSING WILDLIFE ISSUES.

A. The Commission's submissions concede that many of the wildlife surveys required in Draft Rule 1202 may have little value.

Pioneer has made significant investments in wildlife research in the Raton Basin but fails to see any discernible benefits of requiring a wide range of wildlife surveys where the surveys may have little value and may never be used. Under the Draft Rules, the purpose of the survey to identify wildlife species may be negated by the timing of the filing date of an Application for Permit-to-Drill ("APD"). The Commission's Prehearing Statement acknowledges that a wildlife survey may have little or no value:

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.*

It is the intent of this section to require operators to conduct the on-site survey prior to submitting the Form 2A, *though certain survey work will be of limited value* because of seasonal implications, e.g. amphibians will not be found if the survey is conducted in January. *Applications will not be delayed or denied based on the fact that the on-the-ground survey was conducted in a season when the species is unlikely to be found.* (Emphasis added). Commission Prehearing Statement, Page 13.

Therefore, if Pioneer conducts a wildlife survey at the end of November before any timing limitations, where applicable, and after amphibians may be hibernating for the winter, the Commission will simply “check-the-box” that Pioneer has conducted the wildlife survey, will not use that information to benefit wildlife preservation, and will not delay the permitting process. By acknowledging the limited use of a wildlife survey based on when it is completed, the Commission acknowledges that there may be little or no benefit to such surveys. However, the wildlife survey presents a great burden on Pioneer in the APD process. With over 2,500 wells in the Raton Basin completed to date, and more in its business plans, Pioneer would have to expend thousands of dollars to complete wildlife surveys at each proposed location. Pioneer supports the Commission’s goal to provide for the responsible protection of wildlife, but urges the Commission to consider a more creative and flexible approach. The Bill Barrett Corporation (“BBC”) Alternative Proposal provides one example of such an approach.

B. The onus to map and track wildlife in Colorado should lie with the Colorado Division of Wildlife (“DOW”), not the oil and gas operator.

DOW, and not the oil and gas operator, has the duty to survey for certain identified wildlife. Yet Draft Rule 1202 puts the burden and expense on the oil and gas operator to conduct wildlife surveys for the benefit of the DOW. In their testimony, the Commission and the DOW concede that the purpose of the survey is to bolster the existing DOW database. For instance, in the Testimony of David Neslin, at Page 59, Acting Director Neslin admits “[the DOW] *has not mapped* all the timing limitation areas, and lacks site-specific data for some species and is based on limited site-specific data for others.” (Emphasis added). Also, Rick Kahn, Testifying for the DOW at Page 2 of this statement notes, “in an effort to minimize these potential impacts operators are required to query DOW databases and *survey certain key species* for which the DOW *does not have adequate records.*” (Emphasis added). Essentially, the Commission is arbitrarily outsourcing DOW’s survey burdens and obligations to oil and gas operators. Even some justification for such outsourcing could be identified, it would not be equitable since other industries such as homebuilders or other land developers whose activities impact wildlife are not required to share these burdens.

Moreover, the Commission does *not* set forth any justification for requiring operators to perform wildlife surveys in addition to relying on existing DOW databases other than stating that the DOW does not have adequate resources and records on certain wildlife occurrences, populations, habitats or breeding grounds. Testimony of D. Neslin, p. 43. While the protection of species because of their “current or potential listing under the Endangered Species Act or their important nature” may be vital to wildlife protection, the full burden of accounting for this vital resource as a generalized environmental benefit should not fall solely on the back of industry or, if it must, the burden should be shared by *all* industries.

C. The Commission should clearly and consistently define the durational requirements for a wildlife survey.

As outlined in Pioneer’s Prehearing Statement, the survey requirements in Draft Rule 1202 impose a difficult standard of performance on the oil and gas operator and is exacerbated by the Draft Rules’ lack of clarity. For example, Draft Rule 1202 will require an operator to perform a “survey . . . and report the occurrence of all identified wildlife species,” but nowhere does it define what time of year the survey must take place or how long the survey must last.

Thus, an operator could read the broad mandate of Draft Rule 1202 and assume the Commission may require the operator to conduct a long-term wildlife survey. Draft Rule 1202 requires operators to complete surveys “using scientifically acceptable survey techniques” and scientifically acceptable survey techniques will often require surveys of more than one day. For example, a wetland delineation study can take at least one day and often many more. The expressed non-binding intent of the Commission seems to contemplate a different scope of work. The Commission’s Prehearing Statement at Page 13 states:

It is the intent of this section to require operators to conduct the on-site survey prior to submitting the Form 2A, *though certain survey work will be of limited value because of seasonal implications*, e.g. amphibians will not be found if the survey is conducted in January. *Applications will not be delayed or denied* based on the fact that the on-the-ground survey was conducted in a season when the species is unlikely to be found. (Emphasis added).

Then, in Acting Director Neslin’s testimony at Page 43, and later at Page 56:

According to the DOW, the survey work can be done during any season of the year, provided that the area is accessible and the natural landscape is visible. *The actual survey should take only about one day to complete.* (Emphasis added).

The “*on the ground*” site survey can be conducted in one day or less, and it should therefore not have a significant adverse effect on the industry from a planning and operation perspective. (Emphasis added).

The Commission should present a clear set of Draft Rules that is based on an objective evaluation of the scope and timing of the wildlife survey.

VI. THE COMMISSION SHOULD AMEND DRAFT RULE 1209.B.(16) TO ADDRESS THE ADVERSE OPERATIONAL AND ENVIRONMENTAL IMPACTS OF THE 300-FOOT SETBACK.

A. The Commission has failed to properly analyze the potential effects of the 300-foot setback in Draft Rule 1209.b.(16)

Among all of the restricted surface occupancy (“RSOs”) areas in Draft Rule 1209, the 300-foot setback from water could potentially have the most devastating effect on Pioneer’s

operations in the Raton Basin. Pioneer initially assumed that the Commission analyzed how permits or gathering lines would be affected by the 300-foot setback; the Commission's testimony, however, shows that it completed no such analysis, and instead compared Draft Rule 1209 against existing DOW wildlife data in order to reach the following conclusion:

[The DOW has not mapped all of the RSOs, but] has mapped 13 of 20 areas, [The DOW] also has not yet been able to provide us with mapping for surface waters and wetlands. In addition, the [DOW's] maps for other species may not be complete.

[The analysis indicates that] only a very small percentage of permits in two counties would have been subject to the RSOs: Garfield County, 31 of 2483 (1%); and Moffat County, 2 of 94 (3%). These restrictions would not have applied to any of the permits issued in other counties, which include the Northern and Eastern DJ Basin, the Raton Basin, and the San Juan Basin. For the state as a whole, occupancy restrictions would have applied to 33 of 6465 permits (less than 1%).

Testimony of David Neslin, p. 61. By drawing the conclusion that the RSOs will have little effect on the permitting process in Colorado (less than 1%), the Commission has failed to analyze 1209.b.(16) and the effect on operations of one of the broadest and most general Draft Rules. It is Pioneer's position that the Commission should draw no comfort or conclusion from Acting Director Neslin's testimony, and the Commission should require that additional data be presented to consider the potential adverse effects of this Draft Rule on all operations. Pioneer is prepared during the rulemaking hearing to present demonstrative exhibits on the significant adverse environmental impacts of the 300-foot setback.

B. The Wildlife Parties' assertion that the 300-foot RSO setback is not stringent enough fails to consider the unique geographic characteristics of the Raton Basin.

Pioneer rejects the argument by the Wildlife Parties² that the 300-foot setback is not enough in certain areas. Pioneer's Prehearing Statement presents a detailed examination of the Raton Basin and Pioneer's operations. The Prehearing Statement explains that the unique geography in the Raton Basin makes the valley floors the best location for gathering lines in order to (i) maintain the visual aesthetics of the surrounding areas without any landscape degradation, and (ii) limit erosion and its effect on surrounding areas. The Wildlife Parties' proposals, while designed to protect aquatic resources, would actually degrade vistas and increase erosion by requiring operators to put gathering lines *even higher* onto mountain slopes and plateaus:

The Wildlife Parties propose that in certain locations, particularly areas of extremely steep slopes and/or highly erodible soils, the

² "Wildlife Parties" refers to the Final Prehearing Statement of Audubon Colorado, Colorado Bowhunters Association, Colorado Mule Deer Association, Colorado Trout Unlimited, Colorado Wildlife Federation and National Wildlife Federation.

300' buffer will be inadequate to avoid unacceptable impacts, and recommend amending Draft Rule 1209.b.(16) to provide for an adequate buffer when it is determined that 300' is insufficient to avoid unacceptable impacts.

Wildlife Parties Prehearing Statement, p. 10.

By placing the gathering lines in the valley floors, Pioneer is able to use a limited ten-foot wide construction easement in a topsoil-rich environment. The disturbed area can be rehabilitated in a reasonable time, thereby limiting visual and erosive impacts. Under the RSO restrictions in the Draft Rules, that same pipeline easement will be fifty feet wide in the shallow soils of mountain faces. The reclamation period will take far longer, much greater erosion will occur and the impact to the aesthetics of the landscape will be visible to a far greater area in the basin. The argument by the Wildlife Parties underscores the need for basin-specific Draft Rules and case-by-case analysis.

C. The Commission should adopt basin-specific field rules that will more accurately reflect unique aspects of the Raton Basin

Each basin has unique qualities that set it apart from other basins. The D-J Basin does not have the same wildlife issues as the Piceance Basin; the Raton Basin does not have the same water quality issues as the San Juan Basin. Yet the testimony of the DOW Staff Concerning RSO Areas, at page 41, commenting on the statewide setback for water states that: “the Rule will provide a *standardized metric* for industry use during site planning and construction phases of development, and will reduce the impacts of energy development and production activities on scarce, highly valuable aquatic habitats by creating a buffer zone.” (Emphasis added). A standardized metric is exactly the type of outcome the Commission should avoid when addressing concerns in each basin.

Part of the rationale for the proposed set back is to protect aquatic life, but in the Raton Basin there is only one perennial stream and most of the “waters” to be protected under the Draft Rule are actually dry arroyos dominated by flow from CBM discharges. This should be an important factor to consider when imposing set back rules that will force Pioneer to construct gathering lines on hillsides, which will increase erosion and create a far greater visual impact. A more tailored rule, taking into consideration the unique characteristics of the Raton Basin, would consider the local geography and weigh the visual impacts of hillside construction against the limited benefits afforded to aquatic resources. Rules designed to responsibly protect wildlife require the Commission to take a more creative and flexible approach than a statewide “standardized metric.”

VII. PROCEDURAL AND OTHER OBJECTIONS

A. The Pollution Prevention Checklist in Draft Rule 206

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. COGCC Prehearing Statement, Testimony of Martha Rudolph, p. 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 likewise does not identify any data concerning actual impacts, making only vague reference to potential impacts that might result from failure to remind operators of their regulatory requirements. Testimony of M. Rudolph, p. 2 (“damage that *may* result from the failure to comply with the regulatory requirements *may* occur”). 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 rule making, and is not consistent with long-standing requirements for development of well-tailored regulations based on empirical data showing a need for specific regulation.

Moreover, while Ms. Rudolph states that “[t]he Checklist is not intended to be used as an enforcement tool,” she goes on to explain that “failure to complete the Checklist when required or including false information could result in enforcement actions.” Testimony of M. Rudolph, p. 3. The Commission and Ms. Rudolph (who is employed by CDPHE), simply cannot have it both ways. If the Commission “does not intend” to use the Checklist as an enforcement tool, this intent should be fulfilled and made expressly clear by amending the rule so as to prohibit its use in enforcement proceedings.

The Checklist must be certified by an operator’s representative with environmental responsibilities. Such a requirement, especially given the 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 not accounted for the true cost and burden of this certification requirement in its regulatory impact analysis; instead, without data, analysis or explanation, Ms. Rudolph simply opines that costs of compliance should actually be reduced. Testimony of M. Rudolph, p. 4. Pioneer submits that the cost of annual audits for the myriad facilities in the Piceance Basin would 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.” This testimony, once again, is premised on no identified data, and no analogous checklist requirements are offered to demonstrate benefits from such a requirement. Testimony of M. Rudolph, p. 4. There is simply no foundation for the proffered testimony.

Ms. Rudolph’s final assertions regarding Draft Rule 206.b concern a comparison of the requirement to other state or federal certification requirements. Specifically, she states that other certification requirements are far more burdensome because they require “broad self-certification,” which can be “very difficult to provide.” Testimony of M. Rudolph, p. 4. Although she asserts the Checklist does not require a similar effort, a review of the sample form Checklist posted on the Commission’s website demonstrates 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 equally burdensome when applied to numerous remotely located facilities.

In sum, 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.

VIII. CONCLUSION

Consistent with its mandate to balance protection of wildlife and the environment with promotion of oil and gas development, the Commission should recognize that for many aspects of its Draft Rules – particularly in the Raton Basin – a genuine need has not been demonstrated. It should, in addition, recognize that the rules will inevitably dampen development and adversely impact industry and local economies. The Las Animas County Parties and Pioneer submit their comments confident that if the *Draft* Rules are not set in stone, and if they and the Commission approach the rules with an open mind, the requisite balance can be achieved through further dialogue and appropriate modification.

Dated this 6th day of June, 2008.

Respectfully submitted,

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CHAMBER OF COMMERCE

CERTIFICATE OF SERVICE

I hereby certify that one (1) original and fifteen (15) true and correct copies of the attached **REBUTTAL STATEMENT OF PIONEER NATURAL RESOURCES USA, INC., LAS ANIMAS COUNTY FARM BUREAU, LAS ANIMAS COUNTY CATTLEMAN'S ASSOCIATION, LAS ANIMAS COUNTY LANDOWNER'S GROUP AND TRINIDAD AND LAS ANIMAS COUNTY CHAMBER OF COMMERCE** were 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 also 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
Marc Fine at marc.fine@state.co.us
Kelly Rees at kelly.rees@state.co.us
All Parties on the COGCC Service List for Docket No. 0803-RM-02.

/s Linda Bondar
