Oil & Gas
Accountability
Project

A program of EARTHWORKS

December 18, 2007

Mr. David Neslin, Acting Director
Colorado Oil & Gas Conservation Commission
1120 Lincoln St., Ste. 801
Denver, CO 80203

Via Regular and Electronic Mail

Re: Oil & Gas Accountability Project's comments on the 11/27/2007 Stakeholder Review Draft of Proposed Rule changes

Dear Mr. Neslin,

Thank you and the staff from the various agencies for meeting with stakeholders in Denver on November 27 to walk through the narrative of proposed rule changes for the Colorado Oil and Gas Conservation Commission. We are pleased to provide these comments regarding that narrative.

In general, we believe that the narrative describes proposed rule changes that will substantially meet the legislative requirements of HB 1341. We recognize that a general narrative such as this cannot provide the level of detail and specific language that would be encompassed within an actual draft agency rule. Therefore, we direct our comments at what we believe to be the intent of the narrative. In some cases, the narrative is simply not detailed enough for us to fully understand the scope of what is being proposed. Nevertheless, we have tried to work with the proposal as best we can to provide the COGCC and the cooperating agencies with constructive feedback; feedback that we hope will be helpful as we move forward in this important process.

At the stakeholder meeting, the question of the prospective application of these rule changes was discussed. We want to highlight our concern that this issue be more fully explored in the development of these rules. We believe that there are mechanisms that can be included that will avoid issues related to retroactive application, yet will also ensure that the entire industry moves forward in ways that protect public welfare and wildlife without significant delay.

We also want to highlight a general concern that is raised by several of the specific proposed rule changes. During the course of the past legislative session, each of the major bills addressing oil and gas contained explicit language that maintained the status quo with regard to local government authority to regulate the surface impacts of oil and gas activity. We believe that, consistent with that approach, the rule changes should be neutral as to the existing balance between local government and state agency authority and should not alter what has been a contentious equilibrium. There is nothing in 1298, 1341 or 1252 that would mandate such an

alteration, and to do so, would simply open up an area of conflict that will interfere with progress on the main focus of these rule changes.

The focus of OGAP's comments is on those aspects of the narrative that address the public health and welfare rule changes. We trust that other organizations whose focus is wildlife will provide you with feedback regarding the wildlife rule changes.

Specific Comments

p. 3 – New approval process/Form 34: We think this new permit process for addressing the site-specific surface impacts to public welfare and wildlife makes sense. We would suggest that you carefully consider how to make this work in conjunction with the requirements of HB 1252. That amendment to the Oil and Gas Act requires that operators minimize adverse impacts to the surface. We recognize that HB 1252 does not directly apply to the COGCC; nevertheless, we believe that it is important that the COGCC rules do not work at cross-purposes with the requirements of HB 1252. For example, we suggest that the Form 34 process, with its focus on surface impacts, explicitly account for how it is intended to interface with the HB 1252 requirements. It would be unfortunate if permit requirements developed for Form 34 were contrary to agreements made between a surface owner and an operator.

We believe that there is considerable consistency of language between 1341, 1298 and 1252, so we do not see insurmountable issues here. We just urge that you carefully consider early in this rulemaking process how to harmonize these legislative mandates.

p. 5 – Application requirements and Appendix A: The list of required information looks to be fairly comprehensive. We suggest that two items be made explicit: that distance to groundwater be specifically ascertained and that a proposed closure plan for any drilling pits be included. This information will be necessary for discussions with surface owners and for some of the proposed requirements under the 900 series rules.

p. 5 – Notice and comment: We support the proposed posting of applications to the COGCC website. We recommend that thought be given to how to make accessing the applications 'user-friendly' for members of the public – by county, operator or some other easily identifiable aspect.

We are sensitive to the concern that the comment process does not give rise to a final agency action, etc. However, this portion of the narrative strikes us as subject to the whims of the agencies; that is, comments and issues can simply be ignored, as there is no requirement that they be acknowledged or responded to. We, therefore, urge sensitivity to how this portion of the narrative is translated into rule language.

p. 6 – Consultation: We strongly support the inclusion of consultation with surface owners, local government and adjacent property owners. We want to know, however,

how this requirement will be coordinated with local government requirements that may have differing notice/consultation requirements.

We also believe that clarification of the standing requirements will be necessary. Under the Oil and Gas Act, we are not clear that an adjacent property owner would be able to show that they were entitled to the protection of the act, unless they could show direct economic loss. Specifically, we think that clarification of "directly and adversely affected" is necessary to ensure that economic loss is not the sole basis for standing.

p. 6-7: We appreciate that the rules will be strengthened so that they represent the minimum standards for protection of the public welfare and wildlife. We would urge that this be carefully framed, in light of the common law requirements of Gerrity v. Magness.

p. 7 – Consultation with CDPHE: We support this general approach, and agree that the criteria or standards for consultation need to be more clearly defined. We believe that these standards need to be stringent enough so that the public views them as applicable before there is a health emergency. That is, they need to be used, where appropriate, and not just sit there gathering dust.

p. 8 – Consultation with Surface Owners/LGDs: As discussed earlier, we believe that careful coordination between this requirement and the mandates under HB 1252 can prevent conflicts in the future.

Furthermore, the language regarding the right to waive any of these rules requires specific clarification to emphasize that this waiver will apply only to the surface owner.

p. 9 – Approvals of Applications: We suggest that a provision be added here that mandates denial of a permit where an applicant has a significant percentage of wells that are in a non-productive status or where the applicant is in material violation of other permits or orders of the COGCC. Experience in other states has shown that such a provision quickly helps bring operators into compliance and reduces the number of wells that are most likely to be orphaned, or left to be cleaned up at public expense.

We suggest that a standard be set forth that an operator requesting an emergency order be required to meet.

Permit Duration: We believe that the 3-year duration of a Form 34 permit is too long. Particularly as it relates to surface owners, we believe that too much can change in 3 years time to justify such an extended life of the permit. We believe that 2 years should be the maximum time, with 1 year being the preferred length of time, for operations to commence without option for extension.

We strongly support the concept of the facility inventory. We believe that such an inventory is necessary for the COGCC to be able to track and properly regulate oil and gas operations.

p. 10 – Self-certification: We support this concept; however, the certification must be in the form of a sworn statement to be effective. It has been our experience that self-reporting of produced water, for example, is routinely underreported by operators. Without the sworn statement, there is no real incentive for operators to accurately report.

p. 10-12 – CDP's: We read the narrative as largely addressing wildlife issues; however, as oil and gas development intensifies in areas with higher residential concentrations, we believe that the idea of a CDP could be useful to address impacts to public welfare. We see little in the narrative to indicate that this application of a CDP has been thought through – what baseline data would be included, how would monitoring be carried out, etc., in the context of human health, for example. We are also concerned about the lack of opportunity for public participation and/or comment at this stage. We urge consideration for the opportunity for public comment to be made available considering the vast areas that may be impacted by the outcome of this process.

We also have a specific concern with the presumptive practices. For example, how does a specific surface owner challenge the practice of directional drilling of multiple wells, when the pad for these wells is to be located on his or her property? The narrative and footnote 7 indicate little in the way of an escape valve for that surface owner. We urge that a mechanism for challenging the rebuttable presumptions be provided for the surface owner within the narrative.

p. 13 – Studies: We support this concept very strongly. We urge that an advisory committee that includes potentially impacted residents be set up to help guide these studies.

In our experience, there is little Colorado specific data regarding the potential "risks" associated with long term exposure. That is why a study is needed. We also note that this portion of the narrative assumes that a risk management approach is appropriate. We have general concerns about that type of approach, but more specifically, we note that to carry out that kind of analysis will require an inventory, of sorts, of the chemicals used in the oil and gas development; that is, the potential hazards will have to be identified before any pathways and exposure levels can be determined. Our experience has been that the industry will not willingly provide the level of information necessary to determine the potential hazards. Therefore, perhaps an alternative approach should be considered.

p. 14: We believe that COGCC will have to require reporting of the data listed in the first full paragraph on this page. Otherwise, there will be no practical way to know what chemicals to monitor for, what chemicals to test for, etc. when spills, releases and emissions leave a location. This data must be made available to the public.

We support the addition of complaint procedures in the MOU between the COGCC and the CDPHE.

Definitions: While it is difficult to determine the scope of the definitions at this point, we believe that the residual materials from drilling or production pits should be included within the definition of 'solid waste'.

p. 15 – General Rules: We strongly support requiring the maintenance of a chemical, product and materials inventory by location and facility. We believe that safety and public welfare considerations make this a necessary change, so that emergency preparedness personnel can respond, or spill or accident monitoring can take place, in an efficient and meaningful manner.

300 Series: We support the inclusion of a new rule that specifies requirements for monitoring during well stimulation procedures.

p. 16 – 500 Series: Consistent with our earlier comment regarding director authority, we suggest that the rules here be amended to mandate denial of a permit application where the operator is in noncompliance with other permits, or has a significant number of wells in a non-producing status.

p. 17 – 600 Series: We support the concept of the setbacks and control equipment for production facilities. We believe that these are practical and have become industry standards.

We are willing to look at the concept of using CDPHE odor emissions regulations as a mechanism to address odorous air contaminants that move off of a location. The narrative description of this process appears to be somewhat technical, with several significant limitations on its application, so we have concerns about its practicability for most residents. Nevertheless, we appreciate that this may be a way to address complaints from surface owners or residents about localized impacts from emissions.

We strongly support the inclusion of requirements regarding green completions and look forward to working with the COGCC on establishing a workable definition of green completions.

p. 18 – Stormwater: We support inclusion in the rules of the reference to compliance with WQCD stormwater regulations and the requirement for post-construction spill and run-off control programs.

p. 19 – CBM Development: We agree that statewide application of the monitoring requirements included in some San Juan Basin orders makes sense. We suggest that the COGCC look carefully at updating or modifying these requirements during this process.

Financial Assurance: We suggest that the estimated cost for the financial assurance for a centralize facility be based upon the assumption that closure would be undertaken by a third party contractor. We appreciate the increase in assurance amounts for other facilities. We look forward to working with the COGCC to ensure that these assurance mechanisms reflect the true cost of clean-up or reclamation, so

that surface owners and the residents of Colorado do not end up subsidizing those operators who abandon their well sites.

p. 20 – 800 Series: We appreciate the inclusion of changes that will address fugitive dust. We also suggest that the COGCC look again at the issue of noise. This remains, in our experience, one of the most common complaints from adjacent residents and surface owners. If the COGCC does not want to revisit the issue of the noise standard, we suggest that the rules be amended to require quiet muffler designs for compressor engines, at a minimum.

We suggest that the COGCC confer closely with the local government stakeholders regarding the proposed aesthetic and visual requirements. This is normally a local government function and should be done in cooperation with those who know their communities best, in this regard.

900 Series: We support the shift from the Sensitive Area Determination to the use of groundwater and surface water impact potential. In this regard, we suggest that a delineation of depth to groundwater be required.

We believe that there is no justification in this day and age for the continued use of unlined pits, anywhere. Their use is simply an invitation for a release and contamination. Therefore, we suggest that all pits have liners, whether soil or synthetic.

The narrative regarding pit liners, spills and releases contains significant but incomplete detail and without more information, we cannot constructively comment. We believe that the COGCC has evidence of a significant number of contamination events in its database, many of which are related to the use of pits. We are not aware of any sampling undertaken by the COGCC that would assess the extent to which current pit construction and operation is a factor in soil and groundwater contamination. Nor are we aware of any sampling of pit contents done by the COGCC. We believe these would be important sets of data to have in hand to determine the scope and content of any changes to these rules.

In concept, we are supportive of requiring thicker, reinforced liners and time limits on the closure of pits. We suggest that the rules require a closure plan for any pit be submitted with the Form 34 application.

p. 22 – Waste Management: We are supportive of the concept of inclusion of a provision that addresses disposal of E & P waste. We suggest that such a provision should be consistent with HB 1252, and that generally, such waste should be removed to an appropriate waste facility and not buried on-site. The oil and gas industry is virtually the only one that has made a practice of burying its waste on other people's property. We do not believe that the rules governing this industry should continue to allow that as standard practice.

1000 Series: We are very supportive of the shortened time frames for reclamation, and specifically, the 3 month closure period for pits. We are also in agreement that equipment, supplies and waste material must be removed from the location.

We appreciate the opportunity to comment on this narrative and look forward to working with the COGCC and other agencies as this process moves forward.

Sincerely,

Bruce Baizel
Staff Attorney