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Colorado Oil & Gas Conservation Commission
Attn: Matt Lepore, Director
1120 Lincoln Street, Suite 801
Denver, Colorado 80203

Re: Comments to Conceptual Overview of Amended Setback Rules

Dear Director Lepore:

The Colorado Oil & Gas Association (COGA) appreciates the opportunity to provide additional feedback to the Colorado Oil and Gas Conservation Commission (COGCC or Commission) concerning proposed rule amendments to setbacks and groundwater sampling. The following comments are in response to the Conceptual Overview developed by the COGCC. The comments are intended as suggestions in support of the COGCC's stated goals of enhanced communication and implementation of mitigation measures while providing the appropriate flexibility to foster the responsible development of Colorado's oil and natural gas resources.

There are many relevant property rights holders for whom setback distances affect the value of and access to their property. As such, COGA believes that the existing 150-foot setback distance in Rule 603.a. or the 350-foot setback distance in Rule 603.e. are the appropriate minimum distances, and a change to the existing setbacks is unnecessary at this point in time. We do concur that there is an opportunity for industry to improve notice and engagement opportunities with affected stakeholders such as surface owners, adjacent Building Unit owners, and the local government designees (LGD).

Based on COGA's initial point that a change to the existing setbacks is unnecessary, please consider the following comments and recommendations as the Commission staff continues to analyze and prepare a draft setback rule. We look forward to continued discussions on this topic.

Setbacks from Occupied Building Units

Standing

Granting "consent" power to surface owners, much less adjacent surface owners and Building Unit Owners, is beyond the Commission's statutory authority. This is supported by the following points of law:

1. §34-60-114 of the Colorado Oil and Gas Conservation Act (Act) qualifies the property right possessed by mineral owners and lessees to enter upon property by requiring that *notice* is to be provided to the surface owner, as defined in the Act, and the local government representative. The Commission is not empowered to further qualify the exercise of the operator's mineral property right by granting consent.

2. §34-60-127 of the Act provides that an operator is required to accommodate the surface owner to the maximum extent. This Section of the Act is incompatible with providing rights to adjacent owners to object to Surface Use Agreements or other agreements regarding the location of a well, tanks, and production facilities.

3. §34-60-127 of the Act also reserves and recognizes the common law right of the lessee to enter upon the surface and make reasonable use thereon even under the accommodation obligation. This means that any requirement for surface owner consent, much less Building Unit owners or adjacent owners, is also outside the authority of the Commission.

4. 4. Any express consent provision changes the common law. The Commission does not hold this power as the courts and General assembly have plenary power to change common law.

5. 5. Any proposed rule that allows a surface owner or Building Unit owner to cause a delay, or ultimate denial, of an application for permit to drill (APD) due to lack of consent or failure to "certify" that a good faith consultation contradicts existing Colorado law. See *Gerrity Oil & Gas Corporation v. Magness*, 946 P.2d 913, 927 (Colo. 1997).

As such, the requirements set forth in the Conceptual Overview for the operator to obtain express consent of surface owners and Building Unit owners, as well as conduct mandatory good faith consultations, that could ultimately result in the denial of an Application for Permit to Drill (APD). These requirements are beyond the Commission's authority and should not be included in any proposed rule.

Zone Concept

The Conceptual Overview contains three zones (1, 2, and 3) that set forth various types of notice requirements that are confusing, burdensome, and unnecessary. There are ways that the Commission can reach its goal of requiring community involvement without using the zone concept. The primary way to reach the COGCC's goal of industry having more community involvement is to utilize the existing LGD process. The LGDs should aim to work closely with the COGCC Oil and Gas Location Assessment (OGLA) staff and the LGD residents to provide legitimate comments to the proposed well and production facilities. The LGD process can be utilized for notice, public meetings, and organizing Building Unit owner comments to any given APD. Some fundamental concepts of placing more responsibility on the LGD for all APDs submitted for approval, regardless of the "zone" or setback area are: (1) working directly with the COGCC Oil and Gas Location Assessment (OGLA) staff to develop mitigation measures appropriate for well locations, (2) organizing and holding public meetings in high density area to accept comments on APDs, and (3) working with the operator to development a consistent approach to educating the community on its operations in certain areas.

Written Consent

The requirement for written consent in the Conceptual Overview could result in the denial of a Form 2 or 2A when a party (who historically did not have standing) withholds its consent to the well or production facility. As previously indicated, an alternative approach may be to consider adopting a modified notice procedure, which COGA understands has been set forth in certain Operator comments to the Conceptual Overview, and fully utilizing the local government designee (LGD) process to obtain community comments and/or concerns with the well or production facility location and exempting any good faith consultation with Building Unit Owners. Although statements have been made by COGCC that a written consent variance would be available, the continued pursuit of written consent is overly burdensome as is the requirement to "certify" that good faith consultations were held. Additionally, pursuing a variance from the written consent requirement may result in a Commission hearing, which is an added burden.

Good Faith Consultation

The requirement for a good faith consultation as set forth in the Conceptual Overview, again, could result in the denial or delay of an Form 2 or 2A when a party (who historically did not have standing) cannot be found for such consent or refuses to meet with the operator for a consultation on the well or production facility. Further, the proposed requirement for good faith consultation for all affected parties more than 700 feet, but less than 1200 feet from a wellhead or production facility is just as onerous as the proposed requirements for affected parties located more than 350 feet but less than 700 feet. This concept leads to an unintended result that the further away a well is from a

Building Unit (i.e. 1200' versus 700'), the *further* the consultation obligation extends (i.e. more parties).

A different approach may be to consider removing any good faith consultation requirement as set forth above and utilizing a radius-based notice process. Any further requirements would be redundant. The COGCC can then use the existing Form 2A process and LGD consultation, and an enhanced LGD process, to engage in a discussion of site-specific activities. COGA understands that a radius based notice approach has been proposed by certain operators and looks forward to hearing COGCC's response to such approach.

Public Meeting

The proposed requirement to hold a public meeting for all affected parties more than 700 feet, but less than 1200 feet from a wellhead or production facility is more onerous than the provisions for affected parties within closer proximity. An alternative approach is to remove the proposed public meeting requirement and allow the LGD to hold public informational meetings at their discretion.

Measurements from Surface Property or Building Units

Proposed requirements for measurement of distances from both owners of Surface Property and Building Units are unworkable. Instead we recommend that the setback distance apply to permanent, occupied, and existing Building Units. That said, the definition of Building Units in the 100 Series of the Rules should be changed to reflect that Building Units are permanent, occupied, and existing structures. How an Operator should conduct the measurement for determining a setback is unclear and should be defined in the rules. COGA proposes that any measurements should be from the well head to the actual Building Unit and not the owner's property line, or any other appurtenances such as driveways, patios, gazebos, parking lots, or swimming pools.

Existing Well Pads and Production Facilities

COGA believes that it is important that any new rule articulate specific provisions regarding its applicability to existing well pads and production facilities. If an operator has obtained COGCC approval or has a negotiated understanding with an affected party under the governing rules at the time, those approvals must not be compromised and should not be subject to any new setback rule. Also, any new rules must not prevent drilling new wells, adding surface equipment or bringing in larger rigs to existing well pads, especially where other types of development are already encroaching on such existing well pads.

An approach to address approved well pads, production facilities and encroachment would be to provide explicit language grandfathering in existing development, such as: "All operations conducted on drill sites or drilling pads approved by the COGCC when

initially constructed, including operations conducted within 50 feet thereof and the production facilities located thereon are hereby exempt from the setbacks zones."

Additionally, oil and gas locations subject to surface use agreements, platted development plans or other material "contractual" documents approved prior to the effective date of the new setback rules should be provided an exception to the new rule provisions.

Mitigation Measures

Mitigation measures must be site-specific and flexible. The initial listing of mitigation measures is problematic since it would require operators to address a list of items that may or may not be a concern for an affected Building Unit Owner. Also, the measures list includes items that are addressed by existing COGCC and Colorado Department of Public Health and Environment (CDPHE) rules, policies and regulations.

A different approach may be to consider educating surface owners and LGDs on the existing standards in COGCC Rules such as 303, 604, 323, 324, 903, 904, 905, 1003 and 902 for pits, 802 for noise, 803 for lighting, 804 for visual impacts, and 805 for odors and dust. Also, consider relying on existing CDPHE regulations under Code of Colorado Regulations, 1000 series, for air, water, and waste.

Recognizing that the goal is to engage in a discussion of mitigation measures where surface owners and LGDs, perhaps the Commission should consider developing a policy, rather than a rule, that identifies a potential list of discussion items and articulates existing rules in those areas.
To provide clarification, please review the following comments to the list of mitigation measures offered in the Conceptual Overview:

- *Restrictions on Operating Hours*
  Proposed listing of restrictions on operating hours in a list of mitigation measures is problematic as many activities, such as drilling, require continuous 24 hour activity or access. Safety, emergency or environmental reasons may necessitate round the clock operations. An alternative approach may be to consider allowing limitations, if any, to be brought forward by individual owners on a case by case basis and specify that safety, emergency or environmental activities are exempt from consideration. If, however, the COGCC retains the provision, COGA suggests any restrictions on operating hours must be limited to non-essential activities (e.g., liquid hauling, deliveries etc.) and expressly exempt other activities (e.g., drilling, completion, emergency onsite activities).

- *Restrictions on, or Prohibitions of Pits*
  COGCC rules currently provide for the construction, operation and closure of pits under Series 800, 900 and 1000 Rules. If the COGCC is looking for all pits

within a certain distance from an occupied structure to have a pitless loop system, then these site specific mitigation measures should be addressed in each APD.

- *Restrictions on Allowable Noise Levels*
  Rule 802 covers noise abatement. A stakeholder group convened in 2005 worked months on achieving a rule which represented their views. Colorado has the most restrictive noise regulation for oil and gas in the country. Operations involving pipeline or gas facility installation or maintenance, the use of a drilling rig, completion rig, workover rig, or stimulation is subject to the maximum permissible noise levels for industrial zones. Yet, residential noise level should be attained at the building location during night time hours (not including occasional noise spikes) utilizing structural controls.

- *Development of Traffic Plan*
  This has historically been worked out with a surface use agreement (SUA) or separate right of way with a private landowner for non-country roads and with the County for county roads. COGCC does not regulate road use.

- *Green Completions Requirements.*
  Green completions are covered by COGCC Rule 805.b and will be further regulated by CDPHE under the Environmental Protection Agency's (EPA) new oil and gas regulations (NSPS OOOO). Green completions cannot be used in every case. These work only where infrastructure is in place, such as an existing pipeline, allows flowback gas from the test separator in to the pipeline. There are also other technical limitations.

- *Emissions Control Device Requirements*
  Many stakeholders are not aware that oil and gas air emissions are extensively regulated by CDPHE under EPA rules. Proposed listing of emissions control devices is confusing because this insinuates that emissions controls are in the COGCC jurisdiction. The COGCC should rely on existing CDPHE regulations under Code of Colorado Regulations, 1000 Series, for air, water, and waste. This would prevent confusion for commenters thinking that emissions abatement is part of the COGCC permitting process.

- *Operations and Facilities Consolidated where Possible*
  Facilities must be consolidated whenever possible and should be located outside of 150' of a Building Unit whenever possible.

- *Blowout Preventers*
  Blowout preventers are already required under Rule 317.a.; 603.e.(4)&(5); 603.i.

High Occupancy Building Units

The proposed requirements for High Occupancy Building are problematic because they conflict with the current language of Rule 603. Rule 603 is a long standing rule which is the acceptable approach that has been utilized by operators for several years. COGA recognizes that certain operators have submitted comments on the requirements for High Occupancy Building Units and looks forward to hearing COGCC's response to such approach. An alternative approach is to consider relying on existing Rule 603 for High Density Areas.

Other Setbacks

The proposed requirements for setbacks from buildings, public roads, major above ground utility lines or railroads are problematic because there are no definitions for these terms. This may be better addressed through an exception articulated below, simply stating that surface use agreements approved prior to the effective date of the new setback rules are not subject to new rule provisions.

Extension of Comment Period

COGA requests that the current comment period of 20 days remain unchanged. If the COGCC determines a modification is warranted, then COGA proposes that a maximum 40 day comment period be applied. The 40 days, however, should only be utilized when an LGD requests an extension to the 20 day comment period. If no comments from the notice recipients or the LGD are received by an Operator or COGCC OGLA staff within the 20 day or 40 day extended period, then the APD process should continue as it currently works and any late comments should be deemed waived.

Need for Variance, Waiver or Exception

It is our understanding that any proposed regulation will include a provision that allows operators to seek a waiver, exception, or variance based on the specific circumstances relating to the well or production facility. This is imperative where there are mandatory consents and consultations that, if not received, will result in the delay or ultimate denial of an APD. For example, in the situation where drilling or construction trailers are located at an oil or gas location, they are not building units and are therefore not subject to the setback rules.

Groundwater Sampling and Monitoring

COGA's statewide Voluntary Baseline Water Sampling Program must be addressed if the groundwater sampling and monitoring provisions are going to be memorialized by Commission Rule. The following are some of COGA's concerns related to COGCC's groundwater sampling proposal.

The proposed requirement to require initial sampling prior to construction of location is problematic because no well activity has occurred. A different approach would be to require sampling prior to spudding a well.

The proposed requirement to collect water samples from water wells within 1 mile is problematic because it is not reasonable to assume any contamination within 1 mile would be due to an oil and gas well. Contamination possibilities out to 1 mile would be out of the control of an operator. The collected samples should only be required for those water wells, springs or surface water features located one-half (½) mile from the proposed location. The proposed 1 mile radius exceeds current COGCC special rules, infill orders and Rule 608 without science or engineering justification.

The proposed requirement to conduct a follow-up sample not less than 12 months, nor more than 18 months following an initial sampling event is problematic because the follow-up samples of well water in the absence of activity would serve no purpose. A different approach would be to base the follow up sample "post completion" or 12 months after a well has gone to production. Additionally, the requirement to conduct a follow-up sample at the time of final reclamation is unreasonable and should be removed.

Any requirement that mandates post-reclamation water well sampling is unreasonable and unworkable. The life of an oil and gas well can continue for many years. It is unreasonable to require post-reclamation water testing on water wells that may have been subject to contamination unrelated to any oil and gas production.

The constituents to be tested for should match the COGA program constituents. The proposed provision to include a component list based on future determinations is problematic because it does not give operators notice or rationale of component consideration. COGA requests an advance listing of components prior to drafting proposed regulations.

The requirement that "analytical data and surveyed well locations will be publicly available through the COGCC website database" is concerning. Water well owners may not allow operators on the property to test the water well and may object to the results being made public. A way COGCC could address this concern is through built in exceptions and a clearly defined waiver process.

The proposed provisions do not specify applicability. Regulation 608 and LPC Order 156 and 157 remain intact and just expand the existing CBM rules to conventional wells, with the exception of constituent list of components. This will need to be clarified in further discussion.

COGA appreciates the opportunity to provide these comments. Please don't hesitate to call us if you have any questions at (303)861-0362.

Best Regards,

Andrew Casper
Regulatory Counsel