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## MEMORANDUM

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**To:** Chairman McFarlin and Members of Planning Commission

**From:** Chris Cramer, Interim Community Development Director

**Date:** April 25, 2012

**Subject:** Attachment #1 - Oil and Gas Regulatory Background

*\*The following report was created by the City of Longmont to be presented to their City Council.*

The following is an overview and background of the regulations and rules that serve as a backdrop for potential Commerce City rules and regulations of oil and gas operations.

### **Oil and Gas Conservation Act**

The Oil and Gas Conservation Act was adopted in 1951 and has regulated many aspects of oil and gas development and production in Colorado under Section 34-60-101, C.R.S., et seq. The purpose of the act is to promote the development and production of oil and gas, prevent waste, and protect the property rights of oil and gas owners and producers.

Provisions of the Oil and Gas Conservation Act that address surface owner, health, safety, and welfare and environmental and wildlife protections include:

§34-60-102 – Legislative Intent – "It is declared to be in the public interest to foster the responsible, balanced development, production, and utilization of the natural resources of oil and gas in the state of Colorado in a manner consistent with protection of public health, safety, and welfare, including protection of the environment and wildlife resources (§34-60102(1)(a)(I));...plan and manage oil and gas operations in a manner that balances development with wildlife conservation in recognition of the state's obligation to protect wildlife resources and the hunting, fishing, and recreation traditions they support, which are an important part of Colorado's economy and culture." (§34-60-102(1)(a)(IV)) "It is not the intent nor the purpose of this article to require or permit the proration or distribution of the production of the oil and gas among the fields and pools of

Colorado on the basis of market demand. It is the intent and purpose of this article to permit each oil and gas pool in Colorado to produce up to its maximum efficient rate of production, subject to the prevention of waste, consistent with the protection of public health, safety, and welfare, including the protection of the environment and wildlife resources..." (§34-60-102(1)(b))

§34-60-106 – The COGCC has the authority to regulate "Oil and gas operations so as to prevent and mitigate significant adverse environmental impacts on any air, water, soil, or biological resource resulting from oil and gas operations to the extent necessary to protect public health, safety, and welfare, including protection of the environment and wildlife resources, taking into consideration cost-effectiveness and technical feasibility." (§34-60-106(2)(d))

§ 34-60-127 – Reasonable Accommodation – The "Reasonable Accommodation" provision of the Oil and Gas Conservation Act requires that oil and gas operations be conducted in a manner that accommodates surface owners and minimizes intrusion upon and damage to surface lands. This can be achieved by selecting alternative locations for wells, roads, pipelines, and production facilities, or employing alternative means of operations, where such alternatives are technologically sound, economically practicable, and reasonably available to the operator.

§ 34-60-124 – Oil and Gas Conservation and Environmental Response Fund – The Oil and Gas Conservation Act created the Conservation and Environmental Response Fund to "investigate, prevent, monitor, or mitigate conditions that threaten to cause, or that actually cause, a significant environmental impact on any air, water, soil, or biological resource; to gather background or baseline data on any air, water, soil, or biological resource that the commission determines may be so impacted by the conduct of oil and gas operations; and to investigate alleged violations...that threaten to cause or actually cause a significant adverse environmental impact."

§ 34-60-128 – Colorado Habitat Stewardship Act of 2007– The Habitat Stewardship Act was enacted "to minimize adverse impacts to wildlife resources affected by oil and gas operations." The Act requires oil and gas operators to complete timely consultations with the wildlife commission, the division of wildlife, and affected surface owners prior to beginning operations, and it requires the implementation, "whenever reasonably practicable," of "best management practices and other reasonable measures to conserve wildlife resources."

The Habitat Stewardship Act charged the COGCC to promulgate rules by July 1, 2008 to establish standards for minimizing adverse impacts to wildlife resources and to ensure proper reclamation of habitats during and following oil and gas operations. The Act requires the rules, at a minimum, to address: developing a timely and efficient consultation process with the division of wildlife governing notification and decision making for minimizing adverse impacts and other issues related to wildlife encouraging operators to utilize comprehensive drilling plans and geographic area analysis strategies to provide for orderly development of oil and gas fields minimizing surface disturbance and fragmentation in important wildlife habitat areas by incorporating appropriate best management practices.

## **Colorado Oil and Gas Conservation Commission**

In conjunction with the Oil and Gas Conservation Act, the Colorado Oil and Gas Conservation Commission (COGCC) was formed and authorized to promulgate state-wide rules regarding the processing and development of oil and gas operations and facilities within the state. The COGCC is a division of the Department of Natural Resources (DNR).

The mission statement of the COGCC is to foster the responsible development of Colorado's oil and gas natural resources. Responsible development results in:

- The efficient exploration and production of oil and gas resources in a manner consistent with the protection of public health, safety and welfare
- The prevention of waste
- The protection of mineral owners' correlative rights
- The prevention and mitigation of adverse environmental impacts

The COGCC seeks to serve, solicit participation from, and maintain working relationships with all those having an interest in Colorado's oil and gas natural resources.

The COGCC, which is a nine-member board, has land-use powers that have been traditionally exercised by local governments. While the Oil and Gas Conservation Act allows the commission to regulate many aspects of oil and gas development and production, the Colorado Supreme Court determined in *County Commissioners v. Bowen/Edwards Assoc. and Voss v. Lundvall Bros, Inc.* that the act does not preempt all aspects of local government's authority to regulate oil and gas development and production facilities.

Additional information about the COGCC, including current rules regarding oil and gas operations, can be found at the COGCC website at <http://cogcc.state.co.us/>

Most environmental impacts of production fall under the purview of the Colorado Department of Public Health and Environment. The Air Pollution Control Division (APCD) of the Department of Health and Environment administers air emissions regulations. The Water Quality Control Division (WQCD) requires permits for stormwater discharges from construction activity associated with oil and gas sites.

## **Preemption Doctrine as Applied to Local Government Regulation of Oil and Gas Activities**

The purpose of the preemption doctrine is to establish a priority between potentially conflicting laws enacted by various levels of government. In the case of an oil and gas ordinance adopted by a home rule city such as Longmont that conflicts with state law, Colorado courts apply a three-step preemption analysis: First, the court must determine if the General Assembly either expressly or impliedly intended for the state statute to preempt local regulation. If not, the court will then determine if the issue is a matter of local or statewide concern, or mixed. Finally, if the matter is of mixed concern, the court will determine whether the state's interest is sufficient to justify preempting a conflicting home rule ordinance. The primary state statute that governs oil and gas activities in Colorado is the Oil and Gas Conservation Act, Colorado Revised Statute 34-60-101 et seq. With respect to the first step of the preemption analysis, Colorado case law is well

established that the legislative intent of the Oil and Gas Conservation Act does not expressly or impliedly preempt local legislation. Courts have also consistently found that that the regulation of oil and gas activities is a mix of local and statewide concerns: local governments have an interest in land-use control within their jurisdiction, while the state has an interest in the efficient production and utilization of the natural resources in the state. In applying the last step of the preemption analysis, courts have developed and applied the following test in cases of operational or technical conflicts between state and local regulation of oil and gas activities: **state law preempts local regulation where the local regulation materially impedes, frustrates or destroys the state interest in oil and gas activities.** (*Voss v. Lundvall Bros., Inc.*, 830 P.2d 1061 (Colo. 1992); *Bd. of County Com'rs, La Plata County v. Bowen/Edwards Associates, Inc.*, 830 P.2d 1045 (Colo. 1992); *Bd. of County Com'rs of Gunnison County v. BDS Int'l, LLC.*, 159 P.3d 773 (Colo. Ct. App. 2006); *Town of Frederick v. N. Am. Res. Co.*, 60 P.3d 758 (Colo. Ct. App. 2002); see also Office of the Attorney General comment letters on various counties' proposed oil and gas regulations attached to this communication.)

This test has been applied in a limited number of reported appellate cases, and while specific regulations must be evaluated on a case by case basis regarding the extent of the conflict, the holdings of these cases may be generalized as follows: to the extent they conflict with state law, local regulations are preempted that relate to a total ban on drilling, financial requirements, inspection of records, setbacks, noise abatement, visual impacts, fines, and local enforcement of state regulations. The relevant excerpts from some of those cases are summarized below, and these cases are binding on Colorado courts ruling on the same issue unless and until overruled by the Colorado Supreme Court.

*Bd. of County Com'rs, La Plata County v. Bowen/Edwards Associates, Inc.*, 830 P.2d 1045, (Colo. 1992)

- Holds that the Oil and Gas Conservation Act does not expressly or impliedly preempt a county's authority to enact land-use regulations applicable to oil and gas development and operational activities within the county. *Id.* at 1058-59.
- "We last consider whether La Plata County's oil and gas regulations have been partially preempted because the operational effect of the county regulations conflicts with the application of the state statute or state regulations. State preemption by reason of operational conflict can arise where the effectuation of a local interest would materially impede or destroy the state interest. Under such circumstances, local regulations may be partially or totally preempted to the extent that they conflict with the achievement of the state interest." *Id.*
- "We hasten to add that there may be instances where the county's regulatory scheme conflicts in operation with the state statutory or regulatory scheme. For example, the operational effect of the county regulations might be to impose technical conditions on the drilling or pumping of wells under circumstances where no such conditions are imposed under the state statutory or regulatory scheme, or to impose safety regulations or land restoration requirements contrary to those required by state law or regulation. To the extent that such operational conflicts might exist, the county regulations must yield to the state interest. Any determination that there exists an operational conflict between the county regulations and the state statute or regulatory scheme, however, must be resolved on an ad-hoc basis under a fully developed evidentiary record. Due to the trial

court's dismissal of the complaint on the pleadings, such a record is not before us in this case.” Id. at 1060.

Voss v. Lundvall Bros., Inc., 830 P.2d 1061 (Colo. 1992)

- “We hold that the state's interest in efficient development and production of oil and gas in a manner preventative of waste and protective of the correlative rights of common-source owners and producers to a fair share of production profits preempts a home-rule city from totally excluding all drilling operations within the city limits.” Id. at 1069.
- “If a home-rule city, instead of imposing a total ban on all drilling within the city, enacts land-use regulations applicable to various aspects of oil and gas development and operations within the city, and if such regulations do not frustrate and can be harmonized with the development and production of oil and gas in a manner consistent with the stated goals of the Oil and Gas Conservation Act, the city's regulations should be given effect.” Id. at 1068-69.

Bd. of County Com'rs of Gunnison County v. BDS Int'l, LLC., 159 P.3d 773 (Colo. Ct. App. 2006)

- “County Regulations ... impose financial requirements upon operators and allow the County to set the amount required by a security agreement that is ‘no less than 125 percent of the estimated cost of the conditions to be performed, and payable on demand to the County.’ We conclude these County Regulations impose financial requirements on the oil and gas operator that are inconsistent with the state regulation's financial caps. Furthermore, the County cannot reserve the right to determine financial requirements where the COGCC has reserved for itself the sole authority to impose fines on oil and gas operations. Thus, the trial court properly concluded these County Regulations are preempted.” Id. at 779.
- “As to access to records, § 34–60–106(1)(e), C.R.S.2006, provides that the oil and gas operators must keep records for five \*780 years and keep the records “available for examination by the [COGCC], or its agents.” COGCC Rule 205 creates a similar requirement. County Regulation § 1–107M, Access to Records, requires that oil and gas operators keep appropriate books and records and keep those records available for inspection by the County for at least five years. We conclude the state statute and rule exclude the County by omission as an entity authorized to inspect the records. *Zab, Inc. v. Berenergy Corp.*, 136 P.3d 252, 261 (Colo.2006) (*expressio unius est exclusio alterius*). Therefore, the County Regulation is inconsistent with the state regulatory scheme. Accordingly, the trial court properly concluded this regulation is preempted by state law.” Id. at 779-80.
- “The County argues the trial court erred in invalidating, without an evidentiary hearing, County Regulations pertaining to water quality, soil erosion, wildlife, vegetation, and livestock based on preemption by § 34–60–106(2)(d), C.R.S.2006, and certain COGCC rules. The County also argues the trial court erred in invalidating County Regulations pertaining to cultural and historic resources, geologic hazards, wildfire protection, recreation impacts, and permit duration based on preemption by § 34–60–106(11), C.R.S.2006, and certain other COGCC rules. We agree with the County that an evidentiary hearing is required with respect to these regulations to determine whether operational conflicts exist.” Id. at 780.

Town of Frederick v. N. Am. Res. Co., 60 P.3d 758 (Colo. Ct. App. 2002)

- Court recognizes that C.R.S § 34-60-106(15) explicitly authorizes local governments to “charge a reasonable and nondiscriminatory fee for inspection and monitoring for road damage and compliance with local fire codes, land use permit conditions, and local building codes.” Id. at 763.
- “[The oil and gas operator] concedes that a local government may have a permitting process if it is limited to local land use concerns, and acknowledges that the Town's ordinance provisions requiring an operator to obtain building permits for above-ground structures, maintain access roads, submit emergency response and fire protection plans, and regulate the distances that buildings must be set back from existing wells are matters that a local government may legitimately regulate pursuant to its land use authority.” Id. at 766.
- “The operational conflicts test announced in *Bowen/Edwards* and *Voss* controls here. Under that test, the local imposition of technical conditions on well drilling where no such conditions are imposed under state regulations, as well as the imposition of safety regulations or land restoration requirements contrary to those required by state law, gives rise to operational conflicts and requires that the local regulations yield to the state interest. *Bowen/Edwards*, *supra*, 830 P.2d at 1060. Such is the case with the setback, noise abatement, and visual impact provisions invalidated by the trial court here. Thus, the ordinance sections that the trial court invalidated are preempted on the basis of operational conflict.” Id. at 765.
- “We are likewise unpersuaded by the Town's argument that its enforcement of COGCC rules does not conflict with state law .... Further, the imposition by the Town of a fine of up to \$1,000 per day conflicts, at least in part, with the COGCC's schedule of fines for violation of its rules. See COGCC Rule 523. Finally, § 34-60-106(15) expressly states that the COGCC may not assign its enforcement authority and that ‘[n]o local government may charge a tax or fee to conduct inspections or monitoring of oil and gas operations with regard to matters that are subject to rule, regulation, order, or permit condition administered by the [COGCC].’ In our view, this statute demonstrates that the General Assembly did not contemplate that local governments could assess fees for violations of COGCC rules.” Id. at 765-66.

Recent litigation in *SG Interests I, LTD v. Bd. of County Com'rs of Gunnison County*, Case No. 11CV127, has addressed certain discrete issues related to oil and gas activity. These cases are not binding on a district court ruling on the same issue, but represent persuasive legal authority that may inform the City of Longmont's consideration of similar issues.

- The Court upholds Gunnison County's recovery of technical or expert fees for review of technical permit applications. Id. January 3, 2012, Order.
- With respect to local inspection of excavated pit construction and liners, “The Court concludes that the conditions for approval by the County. a. Relate to the technical aspects of operations of the oil and gas operations; b. Conflict with the role, responsibility and determination of the COGCC; and c. Such duties have not been delegated by COGCC to Gunnison County ... [T]he Court concludes that they go to the operations and technical aspects of the oil and gas permit, not land use .... The Court grants Plaintiff's Motion for Partial Summary Judgment as to the Fourth Claim for Relief on the grounds of operational conflict preemption.” Id. September 16, 2011, Order.

### **Oil and Gas Impacts and Development in Sensitive and Urban Areas**

Oil and gas exploration and production can potentially have substantial impacts on surrounding residents, wildlife and the environment. Impacts include nuisance issues associated with noise, lighting and traffic; visual impacts associated with construction activities, traffic and materials storage; and environmental impacts associated with air and water quality and wildlife and habitat.

In response to growing concern about potential safety, environmental and wildlife impact issues in sensitive and urbanized areas, the Colorado legislature has adopted new laws related to oil and gas and the COGCC has adopted ancillary requirements to the state's regulations for oil and gas production. These rules were adopted in part due to the growth and the proximity of oil and gas production and population in cities statewide. However, as growth in oil and gas development has increased in sensitive and urban areas, residents have asked that their local governments take a more active role in protecting residents, properties, wildlife and the environment from the potential impacts associated with oil and gas development.

### **Other Jurisdiction Existing Regulations**

There is substantial variation of how other jurisdictions address (or don't address) oil and gas facilities. Some communities, such as Loveland for example, currently don't address oil and gas development. This appears to be typical of many municipalities where there has not been a history of oil and gas development. Weld County, which has experienced extensive oil and gas activity, has a review process for oil and gas proposals but has a limited number of standards related to oil and gas development other than the COGCC and other state agency rules and regulations. Boulder County's review process for oil and gas development is primarily administrative and their regulations, focus primarily on compliance with state and federal requirements, along some local areas of concern, such as visual impacts and land disturbance, transportation, and wildlife disturbance.

Saguache, Rio Grande, La Plata and Gunnison Counties, in southern and western Colorado, are considered to have more restrictive existing oil and gas regulations and standards. Saguache and Rio Grande are rural counties and have not experienced much pressure for oil and gas exploration and development. Their oil and gas regulations, while robust, have not been tested in terms of their validity based state interests associated with oil and gas development and prior case law.

Staff has not run across examples of municipalities that have adopted regulations to the extent that the counties referenced above have adopted. For example, Greeley and Frederick, both subject to prior court rulings on oil and gas development and both with substantial numbers of oil and gas wells within their jurisdiction, have oil and gas regulations that are similar to Longmont's existing regulations. Broomfield is another nearby jurisdiction with oil and gas activity and their regulations are also similar to Longmont's regulations.

### **Jurisdictions Considering Draft Regulations**

A number of county and municipal jurisdictions are exploring whether to consider new regulations governing oil and gas exploration and production. Jurisdictions include Arapahoe, Douglas, El Paso, Elbert, Routt, and Boulder Counties, as well as Colorado Springs, Commerce City, Aurora, Castle Rock and Longmont municipalities. Arapahoe,

Douglas, El Paso and Elbert Counties released draft regulations in 2011. Castle Rock is currently working on draft regulations. Colorado Springs and Commerce City have formed working groups to discuss issues around oil and gas development and to provide recommendations to their city councils on whether their regulations should be updated.

### **COGCC and Attorney General's Office Responses to Draft Regulations**

In response to the draft regulations released by Arapahoe, Douglas, El Paso and Elbert Counties, the COGCC or Attorney General's Office has provided letters to each of the jurisdictions outlining their concerns with the proposed regulations and areas where the proposed regulations conflict with state regulations and statutes and prior case law. Each of the letters are attached.

On January 3, 2012, the Arapahoe Board of County Commissioners voted 3-2 to not adopt the proposed regulations, with the majority citing concerns expressed in the Attorney General's Office letter and deciding instead to focus on areas the state does not regulate, including transportation and other types of infrastructure. The commissioners also voted to work with state agencies on issues surrounding hydraulic fracturing, or fracking. A committee will be created to help the county craft future rules.

On January 31, 2012 the El Paso Board of County Commissioners voted 3-2 to approve a substantially scaled back version of the regulations that had been recommended by the Planning Commission in early January. Based on concerns from County Commissioners and the letter from the Attorney General's Office, County staff had revised the draft regulations and the commissioners considered both the original and the new proposals in their discussions. The Attorney General's Office letter of January 10th argued that the proposed county regulations would conflict with the COGCC's regulations and authority with regard to setbacks, a ban on excavated pits, water quality, wildlife impacts, visual and noise impacts and the overall permitting process.

After a lengthy hearing, the Commissioners ultimately decided to adopt only the portions of the regulations dealing with transportation impacts, emergency response, noxious weeds management, and water quality monitoring. Applications would be reviewed through the special use process that allows the Development Services Director to send applications through the public hearing review process based on potential impacts of the proposal. The Commissioners recommended that staff, through the Local Government Designee process with the COGCC, work with the Attorney General's Office to develop a memorandum of understanding and intergovernmental agreement to address other areas of concern that were not adopted as part of the regulations.

Douglas County has had an extensive public comment period on their draft regulations after they were released in October. Hearings with the Planning Commission and Board of County Commissioners are planned for early 2012, but dates have not yet been specified. Elbert County's draft regulations were reviewed by the Planning Commission on January 26, 2012 and are scheduled for review by the Board of County Commissioners on February 15, 2012.