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January 24, 2012

Richard L. Miller, AICP
Director – Community & Development Services
County of Elbert
215 Comanche St.
VIA EMAIL: Richard.Miller@elbert.co.gov

RE: *Elbert County's proposed oil and gas regulations*

Dear Mr. Miller:

I am writing to express the Colorado Oil and Gas Conservation Commission's ("COGCC") concerns regarding Elbert County's proposed oil and gas regulations. The COGCC believes many aspects of the County's proposed regulations are in operational conflict with the COGCC's regulatory regime and are therefore preempted by the Colorado Oil and Gas Conservation Act. The COGCC encourages the County to reject conflicting and redundant regulations and requests the County work cooperatively with the COGCC to address local issues through the COGCC's existing state program.

I. The COGCC's Statutory Charge

Under the Colorado Oil and Gas Conservation Act ("Act"), the General Assembly charged the COGCC with fostering the responsible development of Colorado's oil and gas resources in a manner consistent with the protection of public health, safety and welfare, including protection of the environment and wildlife. C.R.S. § 34-60-102. The COGCC has broad powers to further the state's interest in oil and gas development, including the power to pass regulations governing all aspects of development. The Commission Rules of Practice and Procedure, 2 CCR 404-1, are available at <http://cogcc.state.co.us/>. Any person can petition the Commission at any time to modify its regulations. See Commission Rule 529.a.

II. Local Land Use Regulations Affecting Oil and Gas Operations

- A. State Preemption Under *County Comm'rs v. Bowen/Edwards Assocs., Inc.*, 830 P.2d 1045 (Colo. 1992) and *Voss v. Lundvall Bros., Inc.*, 830 P.2d 1061 (Colo. 1992).**

In 1992, the Colorado Supreme Court issued two decisions on the same day addressing state preemption of local oil and gas regulations.

In *County Comm'rs v. Bowen/Edwards Assocs., Inc.*, 830 P.2d 1045 (Colo. 1992), the Colorado Supreme Court explained that “[t]he purpose of the preemption doctrine is to establish a priority between potentially conflicting laws enacted by various levels of government.” *Id.* at 1055. The court further explained that local regulation may be expressly or impliedly preempted by state law, and that local regulations may also be preempted by virtue of being in operational conflict with state regulations. The court held that operational conflicts arise where a local rule, if enforced, “would materially impede or destroy a state interest.” *Id.* at 1059. The court further held that the state’s interest in responsible resource development supports the uniform regulation of all technical aspects of oil and gas operations and that conflicting county regulations create operational conflicts and must yield to the state’s interest:

There is no question that the efficient and equitable development and production of oil and gas resources within the state requires uniform regulation of the technical aspects of drilling, pumping, plugging, waste prevention, safety precautions, and environmental restoration. Oil and gas production is closely tied to well location, with the result that the need for uniform regulation extends also to the location and spacing of wells....

[T]here 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.

Bowen/Edwards Assocs., at 1059-1060.

In the companion case of *Voss v. Lundvall Bros., Inc.*, 830 P.2d 1061 (Colo. 1992), the Colorado Supreme Court applied the analysis set forth in *Bowen/Edwards* and invalidated a city ordinance imposing a total ban on drilling of any oil or gas wells within the City of Greeley. In doing so, the court analyzed the COGCC’s powers and obligations under the 1992 version of the Oil and Gas Conservation Act and noted that “the regulation of oil and gas development and production has traditionally been a matter of state rather than local control.” *Id.* at 1068.

In 2002, the Colorado Court of Appeals applied *Bowen/Edwards* and invalidated various local ordinances geared toward oil and gas development. In *Town of Frederick v. North Amer. Res. Co.*, 60 P.3d 758 (Colo. App. 2002), the Court of Appeals held, as a matter of law, that the Town of Frederick’s attempt to pass more stringent setback, noise abatement and visual impact rules conflicted, on their face, with the COGCC’s regulatory regime and were therefore preempted. The Court of Appeals rejected the town’s argument that it was entitled to “go farther” than the rules and regulations passed by the COGCC because “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.” *Id.* at 766. Further, the Court of Appeals observed that operational conflict preemption can occur where state and local governments attempt to regulate the “same subject” irrespective of whether the activity concerns purely technical aspects of development:

Certain provisions of the Town’s ordinance do regulate technical aspects of drilling and related activities and thus could not be enforced. However, other provisions of the ordinance, such as those governing access roads and fire protection plans, do not purport to regulate technical aspects of oil and gas operations, even though they may give rise to operational conflicts with a state regulation addressing the same subject and thus be preempted for that reason.

Id. at 764.

In 2006, the Court of Appeals again applied *Bowen/Edwards* and invalidated various local ordinances geared toward oil and gas development. In *Board of County Comm’rs of Gunnison County v. BDS Int’l LLC*, 159 P.3d 773 (Colo. App. 2006), the Court of Appeals held, as a matter of law, that Gunnison County’s regulations concerning financial assurance, fines and examination of records conflicted, on their face, with the COGCC’s regulatory regime and were therefore preempted. The Court of Appeals also ordered that an evidentiary hearing was necessary to determine whether numerous other county rules, which touched on the same subjects as COGCC regulations, were preempted. *Id.* at 779. The evidentiary hearing contemplated by the Court of Appeals’ opinion never occurred and the case was dismissed.

In 2009, the Colorado Supreme Court again applied *Bowen/Edwards* and invalidated a local ordinance geared toward mining. In *Colorado Mining Assoc. v. Bd. of County Comm’rs of Summit County*, 199 P.3d 718 (Colo. 2009), the Supreme Court held, as a matter of law, that a Summit County ordinance banning the use toxic or acidic chemicals in mining conflicted with the Mined Land Reclamation Act (“MLRA”). In *Colorado Mining*, the Supreme Court observed that “a local regulation and a state regulatory statute impermissibly conflict if they contain either express or implied conditions which are inconsistent and irreconcilable with each other.” *Id.* at 725. The Supreme Court further stated that “courts examine with particular scrutiny those zoning ordinances that ban certain land uses or activities instead of delineating appropriate areas for those uses or activities.” *Id.* at 730.

B. Post 1992 Statutory Amendments Expanding the COGCC’s Jurisdiction

The Supreme Court has not addressed state preemption of local oil and gas regulations since the *Bowen/Edwards* and *Voss* decisions in 1992. In the intervening years, the General Assembly has dramatically increased the scope of COGCC’s statutory mandate. After each statutory change, the COGCC promulgated extensive regulations dealing with oil and gas operations.

i. 1994 Amendments to the Act

In 1992, in *Bowen/Edwards*, the Supreme Court held that § 34-60-106(4) and (11) of the Act did not manifest a legislative intent to regulate all phases of oil and gas activity. Section 34-60-106(11), in its then-existing version, directed the COGCC to “promulgate rules and regulations to protect the health, safety, and welfare of the general public in the drilling, completion, and operation of oil and gas wells and production facilities.”

In 1994, the General Assembly amended § 34-60-106(11) via Senate Bill 94-177. The final phrase of § 34-60-106(11) now reads “in the conduct of oil and gas operations,” rather than “in the drilling, completion, and operation of oil and gas wells and production facilities.” In addition, a broad definition of “oil and gas operations” was added to the Act:

‘Oil and gas operations’ means exploration for oil and gas, including the conduct of seismic operations and the drilling of test bores; the siting, drilling, deepening, recompletion, reworking, or abandonment of an oil and gas well, underground injection well, or gas storage well; production operations related to any such well including the installation of flow lines and gathering systems; the generation, transportation, storage, treatment, or disposal of exploration and production wastes; and any construction, site preparation, or reclamation activities associated with such operations.

C.R.S. § 34-60-103(6.5).

The 1994 amendments to the Act broadened the state’s interest and authority beyond what they were when *Bowen/Edwards* and *Voss* were decided. Additionally, following the passage of Senate Bill 94-177, the COGCC promulgated extensive regulations dealing with oil and gas operations.¹

ii. 1996 Amendments to the Act

In 1996, the General Assembly amended C.R.S. § 34-60-106(15), which addresses the powers of the COGCC, by adding the following language:

No 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 commission. Nothing in this sub-section (15) shall affect the ability of a local government to charge a reasonable and nondiscriminatory fee for

¹ The 1994 amendments to the Act, as well as the 1996 and 2007 amendments discussed below, contain statements to the effect that the amendments should not be construed to affect the existing land use authority of local governmental entities. Nonetheless, the Court of Appeals has recognized that the “expanded regulations” resulting from these statutory amendments “may give rise to additional areas of operational conflict with analogous local regulations.” *Town of Frederick*, at 763.

inspection and monitoring for road damage and compliance with local fire codes, land use permit conditions, and local building codes.

In doing so, the General Assembly drew a distinction between local government land use permits and Commission rules, orders, and permit conditions, allowing local governments to assess a fee for inspections and monitoring associated with the former, but not the latter.

iii. 2007 Amendments to the Act

In 2007, the General Assembly passed House Bills 07-1298 and 07-1341, codified at C.R.S. §§ 34-60-106 and 34-60-128 (collectively, the “2007 Amendments”). The 2007 Amendments required the COGCC to pass new regulations to establish a timely and efficient procedure for reviewing drilling permit and spacing order applications, to protect public health, safety, and welfare and to minimize adverse impacts to wildlife resources. A major reason the General Assembly required such a rulemaking was to address concerns created by the recent increase in the permitting and production of oil and gas in Colorado. The 2007 Amendments also require the COGCC to consult with the Colorado Department of Health and Environment and the Colorado Division of Parks and Wildlife during the permitting process in appropriate cases.

Following the passage of the 2007 Amendments, the COGCC comprehensively updated its regulations. In adopting the new rules and amendments, the Commission conducted a lengthy rulemaking proceeding. The rulemaking record included thousands of pages of public comment, written testimony, and exhibits and 12 days of public and party testimony. The Commission spent another 12 days deliberating on the rules before taking final action. The resulting regulations have been heralded as a national model, balancing both conservation and responsible development. As with prior COGCC regulations promulgated in response to new statutory directives, “these expanded regulations may give rise to additional areas of operational conflict with analogous local regulations.” *Town of Frederick*, at 763.

III. Elbert County’s Proposed Regulations

The COGCC has no objection to many of Elbert County’s proposed regulations. However, other aspects of Elbert County’s proposed oil and gas regulations create operational conflicts with the COGCC’s regulations. The most significant conflicts are discussed below.

A. The County’s Proposed Setback Rules

The County’s proposed setback rules conflict with state law. Proposed County Rules 26.4(N) and 26.4(F), if adopted, would require 600-foot setbacks between a wellhead and the nearest residential structure or platted building envelope. “Setbacks between a Major Oil & Gas Facility structure boundary and the closest existing residential, commercial or industrial building or property lot line shall be determined on a site specific basis.” Rule 26.4(F) provides that the “entire pad site with the Oil and Gas Facility shall be located a minimum of one-thousand feet (1,000) feet from the normal high-water mark of any water body....”

In contrast, COGCC Rule 603.a. provides that “the wellhead shall be located a distance of one hundred fifty (150) feet or one and one-half (1-1/2) times the height of the derrick, whichever is

greater, from any building unit, public road, major above ground utility line, or railroad.” In high density areas, COGCC Rule 603.e. extends setbacks to 350 feet. Proposed County Rules 26.4(N) and 26.4(F), on their face, give rise to operational conflicts under *Town of Frederick*.

B. The County’s Ban on Excavated Pits

The County’s ban on excavated pits conflicts with state law. Proposed County Rule 26.4(F)(10) categorically bans the use of excavated storage pits in favor of closed-loop drilling systems. However, the COGCC authorizes such pits in appropriate circumstances and subject to stringent requirements. An outright ban gives rise to an operational conflict because “the local imposition of technical conditions on well drilling where no such conditions are imposed under state regulations ... gives rise to operational conflicts and requires that the local regulations yield to the state interest.” *Town of Frederick*, 60 P.3d at 766. *See also Colo. Mining Assoc. v. Bd. of County Comm’rs of Summit County*, 199 P.3d 718 (Colo. 2009) (holding state’s regulation of mining chemicals prohibited county from banning their use and observing that “courts examine with particular scrutiny those zoning ordinances that ban certain land uses or activities instead of delineating appropriate areas for those uses or activities.”). *Id.* at 730.

C. The County’s Chemical Disclosure Rule

The County’s proposed chemical disclosure rule conflicts with state law. Proposed County Rule 26.4(H)(13) states “Full disclosure, including Material Safety Data Sheets, of all hazardous materials that will be transported on any public or private roadway within the County for the Oil & Gas Facility / Operation must be provided to the Elbert County Office of Emergency Management. This information will be held in strictest confidence and shared with other emergency response personnel only on a ‘need to know’ basis.”

Proposed County Rule 26.4(H)(13) conflicts with C.R.S. § 34-60-106(1)(e) and COGCC Rules 205 and 205A. Under C.R.S. § 34-60-106(1)(e), the COGCC has the sole and exclusive statutory authority to require operators to maintain certain books and records, has the sole authority to inspect those records and has the sole authority to require operators to make “reasonable reports” to the COGCC concerning oil and gas operations. Under COGCC Rules 205 and 205A, operators are required to compile MSDS sheets and chemical inventories for any chemical products brought to a well site for use downhole during drilling, completion, and workover operations and are required to report chemicals used in hydraulic fracturing operations. COGCC Rules 205 and 205A also authorize the COGCC to immediately obtain any information from vendors, suppliers and operators necessary to respond to a spill, release or complaint. COGCC Rules 205 and 205A also provide protections for trade secrets.

In *BDS Int’l*, the Court of Appeals invalidated county regulations requiring operators “to keep appropriate books and records and keep those records available for inspection by the County.” 159 P.3d at 780. The Court of Appeals held C.R.S. § 34-60-106(1)(e) and COGCC Rule 205 “exclude the County by omission as an entity authorized to inspect the records.”

Proposed County Rule 26.4(H)(13)’s reporting requirement, like the inspection requirement invalidated in *BDS Int’l*, is preempted because C.R.S. § 34-60-106(1)(e) excludes the County by omission as an entity authorized to require such reports. As a result, the County’s effort to

impose data reporting requirements on operators is in operational conflict with the COGCC's comprehensive record-keeping, inspection and reporting regime.

Moreover, new COGCC Rule 205A (Hydraulic Fracturing Chemical Disclosure) was not in existence when *BDS Int'l* was decided and provides an additional basis for finding that Proposed Rule 26.4(H)(13) is preempted. See *Town of Frederick*, at 763 ("expanded regulations" from the COGCC "may give rise to additional areas of operational conflict with analogous local regulations."). COGCC Rule 205A provides appropriate protections for information claimed to be a trade secret, but the proposed County rule does not.

D. Proposed Water Quality and Water Testing Regulations

Proposed Rule 26.4(F) imposes numerous technical requirements on operators in order to ensure that an approved facility will "not pose any significant risk nor cause any degradation in quality or quantity" of Elbert County's freshwater sources. Proposed Rule 26.4(F) states that the six-pages of COGCC Rules 324 and 325 shall, "at a minimum," apply to any approved facility, yet goes on to impose 10 additional technical rules. Elbert County's attempt to impose more stringent or conflicting water quality and water testing regulations on operators is untenable under *Town of Frederick*:

The Town argues that, in striking down certain provisions of its ordinance, the trial court ignored the requirement of *Bowen/Edwards* and *Voss* that courts should attempt to harmonize and give effect to local regulations if possible. Citing *Ray v. City & County of Denver*, 109 Colo. 74, 121 P.2d 886 (1942), for the proposition that there is no conflict between an ordinance and a statute where the ordinance simply goes further in its prohibition than the statute, the Town contends that the fact that its ordinance goes further than the state regulations in some areas did not give rise to an irreconcilable operational conflict. Similarly, the Town relies on *National Advertising Co. v. Department of Highways*, 751 P.2d 632 (Colo.1988), for the proposition that there is no operational conflict here because its ordinance does not authorize any act that the state prohibits.

The Town's reliance on *Ray* and *National Advertising* for these propositions is misplaced. 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.

Town of Frederick, 60 P.3d 765.

The technical matters Elbert County seeks to regulate through proposed Rule 26.4(F) are comprehensively regulated by the COGCC. By statute, the COGCC is required 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.” C.R.S. § 34-60-106(2)(d). In order to carry out its statutory responsibility, the COGCC has passed numerous regulations for the protection of water. In addition to technical regulations meant to ensure wellbore integrity and proper waste management, COGCC Rule 317B provides six pages of additional regulations concerning “Public Water System Protection” and COGCC Rule 324A requires that any operation shall not degrade air, water, soil or biological resources.

The COGCC also has an extensive ground and surface water monitoring program. Various COGCC regulations (e.g., COGCC Rules 317B, 318, and 608) and orders (e.g., Causes 112-138, 112-156, and 112-157) require operators to collect baseline water samples in certain areas and for certain types of wells; the COGCC can and does add special permit conditions to require such sampling on a well-by-well basis; and the COGCC itself has sampled dozens of water wells in Elbert County. In addition, the COGCC has worked with the oil and gas industry on a new initiative, through which oil and gas operators who drill new wells will collect groundwater samples before and after drilling and hydraulic fracturing. The data will be provided to the COGCC, who will manage it in a central database.

Under the circumstances, Elbert County’s attempt to regulate the technical aspects of water quality protection incident to oil and gas operations is preempted. *Oborne v. Board of County Comm’rs of Douglas County*, 764 P.2d 397, 401 (Colo.App. 1988) (“The Act grants to the Commission specific jurisdiction to prevent pollution of water supplies.... To the extent that plaintiffs’ drilling operations may present problems in these areas, the General Assembly has determined that it is the Commission, and not the counties, that should address those problems.”); *Bowen/Edwards Assocs.*, at 1060 n7 (reaffirming *Oborne*). Although the “[p]rotection of public water supplies is a matter of both state and local concern and may be regulated by local governments,” *Bd. of County Comm’rs of Gunnison County v. B.D.S. Int’l, LLC*, 159 P.3d 773, 780 (Colo. App. 2006), proposed Rule 26.4(F) nonetheless gives rise to operational conflicts under *Oborne* and *Bowen/Edwards*.

E. The County’s Proposed Wildlife Management Rules

Proposed Rule 26.4(E) requires applicants to conduct wildlife surveys and forward completed surveys to the Colorado Department of Wildlife and Colorado Natural Heritage Program. The County “may consider the comments of Colorado Department of Wildlife and shall rely on any of the standard operating procedures in the creation of conditions of approval to address site-specific wildlife mitigation for an Oil and Gas Facility.”

The County's proposed rules conflict with or are redundant of state law. The 2007 Amendments required the COGCC to pass comprehensive regulations to minimize adverse impacts to wildlife resources. In response, the COGCC developed five pages of new regulations in collaboration with Colorado Division of Parks and Wildlife ("CDPW"). These regulations impose special operating requirements in all areas (Rule 1204), apply additional operating requirements in sensitive wildlife habitat and restricted surface occupancy areas (Rule 1203), mandate consultation with the CDPW in sensitive wildlife habitat (Rule 1202), and require operators to avoid restricted surface occupancy areas where feasible (Rule 1205). As a result of these new regulations, the COGCC consults with the CDPW where appropriate. *See* COGCC Rule 306.c. (Consultation with CDPW). The County's attempt to impose additional requirements for the protection of wildlife is unnecessary and the proposed rules conflict with COGCC requirements.

F. The County's Proposed Noise Emission Rules

Proposed Rule 26.4(A) addresses noise emission and, in particular, Rule 26.4(A)(5) states that "sound emissions shall *at a minimum* be in accordance with the standards, as adopted, and amended from time to time by Colorado Oil and Gas Commission." As stated above, *Town of Frederick* prevents the County from passing more stringent noise emission regulations than those passed by the COGCC. Likewise, C.R.S. § 30-15-401(1)(m)(II)(B) prevents Elbert County from passing such regulations. *See id.* ("Ordinances enacted to regulate noise on public and private property pursuant to subparagraph (I) of this paragraph (m) shall not apply to ... oil and gas production subject to the provisions of article 60 of title 34, C.R.S."). Thus, the noise levels permitted under proposed Rule 26.4(8) conflict with COGCC Rule 802.c. and are void. Other provisions of Rule 26.4(A) are either redundant of or in potential conflict with COGCC Rule 802 (Noise Abatement).

In order to avoid or minimize some of these conflicts, Elbert County could avail itself of COGCC Rule 801. By doing so, Elbert County could pass its own aesthetic and noise control regulations so long as such regulations could be harmonized with the COGCC's regulatory regime and C.R.S. § 30-15-401(1)(m)(II)(B).

G. The County's Proposed Financial Assurance Requirements

Proposed Rule 26.3(I) (Performance Security) requires operators to provide security "to ensure compliance with mitigation requirements set forth in" the proposed rules. The rule states, among other things, that "[i]f the installation of plant and landscape materials is required as mitigation measures under this section, the performance security shall remain in place for two (2) years after installation or until the site meets all County requirements."

Proposed Rule 26.3(I) gives rise to operational conflicts with the COGCC's 700-Series Financial Assurance Rules pertaining to performance bonds for the protection of surface owners. Although Rule 26.3(I)(3) recites that the County's financial assurance requirements are not meant to conflict with state law, such a recital is unavailing under *BDS Int'l*:

County Regulations §§ 1-107L, Impact Mitigation Costs, and 1-1070, Financial Guarantees, 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.

BDS, Int'l, 159 P.3d at 779.

Proposed Rule 26.3(I) gives rise to operational conflicts under *BDS, Int'l* and *Bowen/Edwards*.

H. The County's Proposed Waste Management and Produced Water Rules

Proposed Rule 26.4(I) (Waste Management Plan) requires operators to provide "a written management plan for waste minimization through the beneficial reuse and recycling of exploration and production waste." "The plan shall describe the proposed use of the waste and the methodology for recycling the majority of the exploration and production waste for reuse in the fracking process at the original well site and / or at other well sites within the County, method of waste treatment, method of storing drilling fluids, fracking fluids, and salt water in battery tanks or other acceptable containers." Proposed Rule 26.4(I)(5).

Proposed Rule 26.4(J) (Control and Disposal of Produced Water) requires, among other things, operators "incorporate on-site treatment of" "produced and back-flow waters to reduce the volume of water used in the drilling process." The rule also requires operators to "use reasonable efforts to transport produced water by pipeline, to a central water purification site or transport to an Environmental Protection Agency approved facility." "[T]he disposal method [for produced water] will be determined in consultation with" the COGCC and Colorado Department of Health and Environment "in accordance with relevant regulatory agency requirements and industry best management practices." Although it is unclear from the proposed rule, it appears the County will determine how produced water is disposed.

Proposed Rules 26.4(I) and 26.4(J) are redundant of or preempted by the COGCC's comprehensive regulatory regime, including 22 pages of COGCC rules governing E & P waste (COGCC 900-Series, E & P Waste Management) and 3 pages of additional COGCC rules governing storage tanks and on-site containment (COGCC Rule 604, Oil and Gas Facilities). Moreover, the County has no authority to regulate these technical aspects of oil and gas operations. Although "there are 'non-technical aspects' that may be subject to local regulation, *Town of Frederick*, 60 P.3d at 764, Proposed Rules 26.4(I) and 26.4(J) purport to regulate numerous, highly technical matters presently regulated by the COGCC and are therefore beyond the County's ability to regulate.

I. The County's Operational Conflict Waiver is Ineffective

At least one Colorado trial court has invalidated an operational conflict waiver mechanism such as the one set forth in Elbert County's proposed Rule 26.2(I). In *BDS Int'l*, the trial court held that such a waiver mechanism was ineffective and ruled:

The framework in the County's [operational conflict waiver mechanism] vests ultimate determination in the county as to whether a conflict exists and, further, places additional requirements on the applicant where an operational conflict exists instead of simply precluding County regulation. [The waiver mechanism] 'off ramp' does not avoid the operation conflicts which otherwise exist.

The "off ramp" provision of the county rules at issue in *BDS Int'l* was not subsequently addressed by the Court of Appeals and the trial court's decision is persuasive authority that Elbert County's waiver mechanism is invalid.

J. The County's Proposed Permitting Process

Some aspects of the County's proposed permitting process conflict with state law. Under the Act, the General Assembly charged the COGCC with the responsibility to implement timely and efficient procedures for the review of applications for permits to drill. C.R.S. § 34-60-106(11)(a)(I)(A). Elbert County's proposed regulations will materially impair the state's interest in the timely and efficient approval of drilling permits because the process requires compliance with the problematic provisions discussed above.

IV. A Patchwork of County-Level Regulation Will Inhibit what the General Assembly has Recognized as a Necessary Activity and Would Impede the Orderly Development Of Colorado's Mineral Resources

The COGCC is cognizant of Elbert County's general powers under the Local Government Land Use Control Enabling Act and similar legislation. However, the regulations of concern must yield to the statewide public interest codified in the COGCC's specific statutory charge to "[f]oster 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." 34-60-102(1)(a)(I).

The COGCC's charge to promote the development of Colorado's oil and gas resources in a responsible manner is similar to the Mined Land Reclamation Board's ("MLRB") charge under the Mined Land Reclamation Act, which requires the MLRB to promote the orderly development of mineral resources in Colorado. Given the MLRB's statutory charge, the Colorado Supreme Court held that conflicting local regulations bearing on mineral development must yield to state interest and held:

We recognize common themes in *Bowen/Edwards* and *Voss*: (1) the state has a significant interest in both mineral development and in human health and environmental protection, and (2) the exercise of local land

use authority complements the exercise of state authority but cannot negate a more specifically drawn statutory provision the General Assembly has enacted. ...

A patchwork of county-level bans on certain mining extraction methods would inhibit what the General Assembly has recognized as a necessary activity and would impede the orderly development of Colorado's mineral resources.

Colorado Mining Assoc. v. Bd. of County Comm'rs, 199 P.3d 718, 730-31 (Colo. 2009).

Colorado Mining provides strong support for the conclusion that the regulations of concern are preempted, particularly the County's outright ban on excavated pits. *See id.* at 730 ("Courts examine with particular scrutiny those zoning ordinances that ban certain activities instead of delineating appropriate areas for those uses or activities.").

CONCLUSION

The County should reject the regulations of concern as being in operational conflict with the COGCC's regulatory regime. The County should reject the regulations of concern for the additional reason that exhaustive local regulations are unnecessary. Elbert County can accomplish its objectives through the COGCC's Local Governmental Designee program, through which the COGCC can impose permit-specific conditions of approval. *See* COGCC 305.d. ("[T]he Director may attach technically feasible and economically practicable conditions of approval to the Form 2 or Form 2A as the Director deems necessary to implement the provisions of the Act or these rules pursuant to Commission staff analysis or to respond to legitimate concerns expressed during the comment period.").

Additionally, the COGCC encourages Elbert County to consider whether a Memorandum of Understanding would be beneficial. Gunnison County and the COGCC recently entered into a MOU. As specified in the MOU, the COGCC and Gunnison County intend to enter into an intergovernmental agreement pursuant to C.R.S. §34-60-106(15) whereby the COGCC will assign its facilities inspection function to Gunnison County. Gunnison County believes that such an assignment will promote public confidence and increase transparency concerning oil and gas development in the county. The COGCC can also address local concerns through area specific orders under COGCC Rule 503 and geographic area plans under COGCC Rule 513. In addition, the COGCC has recently announced that it will be conducting a public stakeholder process to review the setback issue.

Sincerely,

FOR THE ATTORNEY GENERAL

A handwritten signature in black ink that reads "JAKE MATTER". The signature is written in a cursive style with a checkmark-like flourish at the beginning.

JAKE MATTER
Assistant Attorney General
Natural Resources & Environment

cc: David Neslin, Director COGCC
Curtis.carlson@elbertcounty-co.gov