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

IN THE MATTER OF CHANGES TO THE RULES AND REGULATIONS OF THE OIL AND GAS CONSERVATION COMMISSION OF THE STATE OF COLORADO STATEWIDE WATER SAMPLING & MONITORING	)))))	CAUSE NO. 1R DOCKET No. 1211-RM-03

REBUTTAL STATEMENT
OF
COLORADO ENVIRONMENTAL COALITION, ET AL.

Colorado Environmental Coalition, Colorado Conservation Voters, Earthworks Oil & Gas Accountability Project, High Country Citizens Alliance, Natural Resources Defense Council, and San Juan Citizens Alliance (the "Conservation Groups") file this Rebuttal Statement.

I. The Commission Should Adopt Rules That are at Least as Protective as the Shell EDF Proposal

Only one proposal before the Commission has the support of both environmental and industry stakeholders. The Commission should adopt the rule jointly proposed by Shell Oil Company and the Environmental Defense Fund subject to the improvements described below. The Shell EDF proposal best achieves the goal of this rulemaking. It is the only science-based proposal that could be considered a national model for a groundwater protection rule encompassing baseline testing and follow-up monitoring.

Staff largely ignored broad support for the Shell EDF proposal in the revised staff proposal released at 8:07 p.m. on December 7, 2012. Because the December 10 hearing was held the first business day after the eleventh hour staff proposal, most parties at the hearing were not yet able to state a formal, informed position on the new staff draft. The staff draft falls far short of assuring a comprehensive baseline testing and monitoring program because it proposes to:

- Limit testing to a maximum of four sources;
- Exclude the Greater Wattenberg Area, effectively capitulating to requests to "protect" some of the least responsible operators in the state at the expense of the public interest and Colorado's most precious natural resource;
- Include only wells in the scope of the program, although tanks and other oil and gas locations present significant and documented threats to water quality;
- Ignore the potential for subsurface operations to pollute groundwater, by focusing exclusively on testing within ½ mile radius of the surface location of the well and disregarding the fact that chemicals are often injected into underground formations a mile or more from the surface facilities;

- Restrict testing and monitoring to locations within ½ mile of surface locations, even where an adequate number of sources to be tested are not available in that radius.

Finally, to the extent operators seek relief from testing eligible sources, the rule must impose a rebuttable presumption of liability for contamination detected subsequent to oil and gas operations, for the purposes of proceedings before this Commission.

II. The Commission should require testing of sources above subsurface operations along directional or horizontal bores.

The Commission should address the potential for contamination of aquifers from subsurface operations along horizontal and directional wellbores, instead of just aquifers and drinking water wells within the testing radius for the surface pad location. As thoroughly explained in the Conservation Groups' Final Prehearing Statement, this principle is supported by COGCC orders and policies. *See also* Conservation Groups' Exhibit 7. The final rule needs to include testing sources which may be impacted by subsurface operations, which can occur more than ½ mile from the surface facilities.

III. The proposed Wattenberg exclusion default to Rule 318A is unsupported by the record and would be bad public policy

The record suggests that the Greater Wattenberg Area may be among the *highest priority* geographic locations within Colorado for mandatory groundwater testing. Staff's Revised Proposed Rule 609(a)(2), to exclude the Wattenberg Area from statewide mandatory testing, ignores the interests of many thousands of residents who rely aquifers in this area to supply their homes and businesses.

As described in the Conservation Groups' Final Prehearing Statement, on average there were more than 150 spill incidents annually in Weld County alone from January 3, 2008 through January 5, 2012. *See also* Exhibit 5 at 1. Of these spills, 43% had contaminated groundwater, and 2.8% of spills contaminated surface water. Id. Within the Greater Wattenberg Area, significant numbers of qualifying testing locations are often available. The existence of high densities of sources establishes the importance of baseline testing and monitoring being available to interested landowners. Rule 609(b)(1) of the EDF-Shell proposal allows operators to request alternative sampling programs when there are an unusually large number of available sources, to improve the efficacy of the program.

The record lacks support for the Revised Staff Rule proposal to exclude the Greater Wattenberg. Indeed, the exclusion would undermine the purpose of Rule 609. Unlike Rule 608 for coalbed methane wells, there is neither 1) a consensus among affected stakeholders that the Wattenberg should be excluded from Rule 609, or 2) that existing Wattenberg policies are adequate to safeguard groundwater quality and achieve the purpose of Rule 609.

Parties seeking to exclude the Wattenberg from Rule 609 erroneously claim that oil and gas has not impacted groundwater. Such claims are contradicted by facts introduced at the hearing, including COGCC databases establishing a long history of groundwater contamination, and instances of aquifer contamination. Only this week, additional scientific evidence emerged to further document the need for a comprehensive program to protect groundwater quality threatened by oil and gas operations, including hydraulic fracturing .

As summarized by media coverage, "[l]eaked fracking fluid has contaminated groundwater after a 'serious' incident at a well site near Grande Prairie in September 2011, according to an investigation by the Energy Resources Conservation Board which regulates the energy industry." Supplemental Exhibit 10. This incident in Alberta is documenting by ERCB Investigation Report: Caltex Energy Inc., Hydraulic Fracturing Incident, 16-27-068-10W6M, September 22, 2011 (report date December 20, 2012). Supplemental Exhibit 11.[1]

At the December 10 hearing, Boulder County indicated that it would oppose the proposal to exclude the Wattenberg field from the new rule, but the County was unable to state a formal position on an eleventh hour Staff Proposal that was not discussed with affected jurisdictions. Many other impacted local government units are not parties to this rulemaking, so are not in a position to protect their water and constituents from an unexpected proposal to exclude approximately 40% of oil and gas operations in the state from the new "statewide" program.

Science, fairness, common sense, and good public policy require applying Rule 609 statewide, except for coalbed methane operations. The record tends to establish that the greatest threat to groundwater comes from a small minority of Wattenberg operators who are responsible for a disproportionately high percentage of documented cases of water pollution. Capitulating to these irresponsible operators by excluding the Wattenberg would be a miscarriage of justice. In addition, expert testimony established that more data is helpful to reaching informed conclusions regarding departures from baseline conditions, and assessing whether and the extent to which oil and gas operations contributed to measured contamination.

All groundwater users should be covered by the Rule 609, not just those lucky enough to live where the oil and gas operator is willing to invest in a scientifically defensible program of baseline testing and monitoring. It is in the best interests of the industry overall, and especially responsible companies, to operate under a strong rule of general applicability across Colorado.

IV. The Commission should adopt a rebuttable presumption of liability for pollution of water supplies following oil and gas operations in close proximity.

States with significant oil and gas development have adopted rebuttable presumptions of liability for water pollution in close proximity of oil & gas operations. The Pennsylvania Oil and Gas Act provides heightened protections worthy of consideration in Colorado. Subject to specified defenses,

> It shall be presumed that a well operator is responsible for pollution of a water supply if:

[1] The Commission can take official notice of this official government document.

(1) except as set forth in paragraph (2) [enumerated defenses to rebut the presumption of liability]:

(i) the water supply is within 1,000 feet of an oil or gas well; and

(ii) the pollution occurred within six months after completion of drilling or alteration of the oil or gas well; or

(2) in the case of an unconventional well:

(i) the water supply is within 2,500 feet of the unconventional vertical well bore; and

(ii) the pollution occurred within 12 months of the later of completion, drilling, stimulation or alteration of the unconventional well.

58 P.S. § 3218(c).

Similarly, West Virginia law creates a presumption of liability for well owners and operators within 1,000 feet of a drilling site. As stated by a local practitioner who represents the regulated community:

> West Virginia's oil and gas law, W. Va. Code §§ 22-6-1 *et seq.*, provides for a civil action against an owner or operator for contamination or deprivation of a fresh water source or supply within one thousand feet of the drilling site for an oil and gas well. Significantly, the statute also establishes a rebuttable presumption that the oil and gas activity is the proximate cause any contamination or deprivation of a water source or supply.

M. Katherine Crockett, *Water Supplies: Defending Against a Presumption of Liability* (Spillman Thomas & Battle, PLLC, Oct. 30, 2011) (recommending pre-drilling tests of all relevant water supplies, beyond statutory and regulatory minimums, to protect the operators' interests).[2]

Where operators in Colorado decline to test wells where the landowner desires monitoring, the presumptive liability approach will protect our citizens and water -- and allocate risk where it belongs. Landowners cannot be expected to incur the costs of testing to protect their ability to recover if their groundwater is contaminated. Those costs are properly placed on the company pursuing drilling and fracking operations that threaten water quality.

Various industry parties chose argue for less testing on cost-benefit grounds. The rebuttable presumption would ensure that operators bear the risk of liability where testing is not preformed. First, prudent operators such as Shell understand that the benefits of testing all sources exceed the costs. Numerous other prudent operators already conduct comprehensive testing to guard against the potential costs of liability judgments.

Second, it is widely acknowledged that a relatively small number of operators are responsible for a disproportionate percentage of spills, releases and accidents that contaminate groundwater. In the Greater Wattenberg, it has been suggested that less than 10% of the operators are responsible for more than 50% of releases. These are generally the same 10% of operators who currently do

[2] *Available at* http://www.spilmanlaw.com.

not participate in COGA's voluntary testing program. Operators who decline to participate in a scientifically sound testing program cannot be allowed to escape responsibility where landowners experience contamination after fracking and other oil and gas operations.

VI. Conclusion

Current Greater Wattenberg protocols fall far short of meeting the rulemaking's purpose of collecting adequate data to ensure protection of Colorado's groundwater. Similarly, the lack of required testing and monitoring of aquifers overlying subsurface hydraulic fracturing operations fails to assure adequate data collection, or protection for groundwater resources directly threatened by oil and gas operations employing contaminants.

The Commission should adopt the Shell EDF proposal, modified by the recommendations stated above, and those of other parties advocating a comprehensive program to protect water quality and restore public confidence in the State's regulatory framework. The current staff proposal falls far short of achieving the purpose of the rulemaking -- to the detriment of citizens, water users, and the State's groundwater.

Approving a comprehensive rule as proposed by the Conservation Groups, including the rebuttable presumption standard already applied by other states, is especially urgent given new documentation of groundwater contamination resulting from hydraulic fracturing.

Respectfully submitted on December 21, 2012,

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SUPPLEMENTAL EXHIBITS

Exhibit 10 Sheila Pratt, Leaked fracking fluid contaminated groundwater near Grande Prairie: ERCB; Edmonton Journal, December 20, 2012 http://www.edmontonjournal.com/health/Leaked+fracking+fluid+contaminated+groundwater+near/7728972/story.html

Exhibit 11 Energy Resources Conservation Board, ERCB Investigation Report: Caltex Energy Inc., Hydraulic Fracturing Incident, 16-27-068-10W6M, September 22, 2011 (report date December 20, 2012) http://www.ercb.ca/reports/IR_20121220_Caltex.pdf

CERTIFICATE OF SERVICE

I certify that on December 21, 2012, I emailed an electronic copy of the REBUTTAL STATEMENT OF CEC, ET AL in portable document format (pdf) to DNR_COGCC.Rulemaking@state.co.us.

I also certify that on December 26, 2012, I will ensure hand-delivery of one original with 13 true and correct copies of the REBUTTAL STATEMENT to:

Robert J. Frick, Hearing Manager
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