

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

IN THE MATTER OF CHANGES TO THE ) CAUSE NO. 1R  
RULES AND REGULATIONS OF THE OIL )  
& GAS CONSERVATION COMMISSION ) DOCKET NO. 200600155  
OF THE STATE OF COLORADO )  
) TYPE: RULEMAKING

**AFFILIATED LOCAL GOVERNMENT COALITION’S and GUNNISON COUNTY’S  
RESPONSE TO 1200 SERIES PRE-HEARING STATEMENTS**

Boulder County, the City of Lafayette, the City and County of Broomfield, the Town of Erie, the City of Fort Collins, the City of Longmont and the Northwest Colorado Council of Governments by and through its Water Quality/Quantity Committee (NWCCOG/QQ), participating as the Affiliated Local Government Coalition (the “ALGC”), together with Gunnison County, a separate party, by the undersigned, submit their Response to 1200 Series Pre-Hearing Statements for the above-captioned proceeding (“Mission Change Rulemaking.”).

In addition to the comments and suggested redlines in the ALGC’s and Gunnison County’s Pre-Hearing Statement, and in response to the pre-hearing statements of other parties, the ALGC and Gunnison County assert the following.

**A. Local and state governments may regulate aspects of oil and gas development on federal lands.**

Several parties incorrectly claim that the state permitting process does not apply on federal land.<sup>1</sup> This is legally incorrect, as it is well-settled in the US Supreme Court<sup>2</sup> and Colorado

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<sup>1</sup> See, e.g., Pre-Hearing Statements of Kinder Morgan and the Small Operators Society.

<sup>2</sup> *Cal. Coastal Comm’n vs. Granite Rock*, 480 U.S. 572 (1987).

appellate courts<sup>3</sup> that the state and local governments have authority over aspects of development on federal lands, including oil and gas development. This includes the authority to deny a permit for failure to satisfy standards. The COGCC should retain the authority appropriately outlined in its draft rules.

**B. Consultation is an imperative initial step in this regulatory scheme and solves many of the concerns from industry on how CPW consultation and Alternative Location Analyses could work.**

The ALGC continues to emphasize the importance of consultation that includes Relevant and Proximate Local Governments and surface owners.<sup>4</sup> Sufficient and early consultation will resolve potential wildlife and land use conflicts at the beginning of the process, and will solve many of the concerns brought up in party prehearing statements.

Consultation is needed for all activities involving heavy machinery, on existing and new sites, and without exception for small operators. In many instances the consultation may be brief, but as wildlife needs shift constantly and unpredictably, this step cannot be left out.

Wild animals do not follow the patterns and cycles we expect for them. For example, the City and County of Broomfield observed a population of Burrowing Owls, one of which stayed in the same nesting site for the winters of 2017/2018, 2018/2019 and 2019/2020 rather than migrating to new locations in the fall as expected. Nests or habitats that appear unused or abandoned one day may be in use the next. Many species, and especially species of special concern, are vulnerable to stress and displacement from any amount of truck traffic or heavy equipment use. Therefore, wildlife protection cannot exempt massive “maintenance” or

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<sup>3</sup>*Board of County Comm'rs of Gunnison County vs. BDS Intn'l*, 159 P.3d 773 (2006).

<sup>4</sup> See ALGC's and Gunnison County's Pre-Hearing Statement at 2.

workover activities on an existing site, or the operations of a small company that are, nonetheless, massive and could have potential impacts on wildlife.

Where projects are less likely to produce adverse impacts because the equipment and activities involved are not large, or where a small-scale project is not likely to impact wildlife resources, the consultation with relevant agencies may be brief. But because the parties to the consultation may have or discover information about affected wildlife resources that others may not have, the consultation step must not be eliminated. Rule 1202.c(2)B should remain as written.

**C. COGCC has an independent duty to protect wildlife.**

Some parties suggest the COGCC should defer absolutely to CPW's determination on whether oil and gas development will impact wildlife. We disagree. COGCC has the mandate from S.B. 19-181 to regulate in a manner that protects wildlife.<sup>5</sup> CPW is one trusted source of information about impacts to wildlife, and the role given to CPW in the current draft rules is appropriate, but COGCC has an independent duty, as well as the clear authority, to make determinations respecting the protection of wildlife.

**D. ALA is appropriate – and necessary – in all locations in and near High Priority Habitat.**

API continues its argument from the 200-600 Series that ALA is only authorized with respect to populated areas. In response, we incorporate our responsive argument that S.B. 19-181 should be read, giving all of its provisions effect, to say that ALA is required for any proposed development too close to *any* sensitive feature encompassed in “public health, safety, and welfare, and the environment and wildlife resources.

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<sup>5</sup> C.R.S. § 34-60-102.

**E. S.B. 19-181 does not leave room for considerations of “feasibility” over protection of wildlife.**

API suggests that Rule 1202.c(1) should only prohibit development in HPH “to the extent feasible.” While this phrase appears in the FAQs prepared for the 1200 Series rules by COGCC and CPW, it has no place in COGCC’s new mission under S.B. 19-181. COGCC’s new mission is simple: to regulate in a manner that protects wildlife resources. Feasibility, whether economic or technical, is not part of that mission. The rules contain provisions for variances from their requirements and other ways in which extenuating circumstances can be considered. Protection of HPH and wildlife resources must be the primary concern.

**F. High Priority Habitat requires full protection; timing restrictions and “inactive” or “historical” designations will not protect wildlife.**

Several parties argued that exclusions from the High Priority Habitat (HPH) areas described in Rule 1202.c are too extreme and, instead, only restrictions on timing of development should be attached to the identified sensitive areas. In addition, industry parties argue that the HPH should be divided up and designated as “historical” or “inactive.” These suggestions conflict with the S.B. 19-181 directives.

As noted above, wild animals do not strictly comply with the seasonal patterns we expect. Moreover, it can be difficult for even experts to determine whether a structure is an active nest, a nest that may be used again in the near future, or even if it is a nest at all. Timing restrictions can be very useful mitigation measures in areas where wildlife use patterns are well known and detectable. They may be appropriate conditions of approval *in addition to* the HPH protections built into the rules. They are not sufficient for all of the resources listed in 1202.c.

### **G. We support the comments of several other parties on the 1200 Series.**

The ALGC and Gunnison County generally support the suggestions and comments in the pre-hearing statements submitted by the National Audubon Society and Audubon Rockies, La Plata and San Miguel Counties, and the Wildlife, Hunting, and Angling Groups.

### **H. Additional points.**

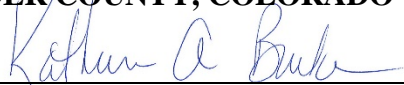
1. Industry parties agree with ALGC, San Miguel, and La Plata that CPW's most comprehensive list of HPH should be used in the Rule 1202.
2. Several industry parties request two high priority habitats be removed from 1202.c.(1): Native Aquatic Species Conservation Waters and Sportfish Management Waters. We disagree; these waters should be maintained. These are exactly the types of habitats for native wildlife that are sensitive to ground movement, grading, and other impacts to habitat.
3. Several parties agree with us that the newly-defined HPH Areas in Rule 1202.d. are confusing and unnecessary. We carry forward our recommendation to eliminate the definition in Rule 1202.d. in favor of the definition in Rule 1202.c(1).
4. The ALGC disagrees with WSCOGA and COGA's idea that consultation with the Surface Owner in Rule 309.e.(2) should only occur if a Surface Use Agreement is not in place. Often, a SUA does not consider wildlife impacts; its existence alone does not mean wildlife resources will be adequately protected. The ALGC recommends the Surface Owner and Relevant and Proximate Local Governments be included in early consultation with the COGCC and operator.
5. Several parties request that COGCC adopt HPH Areas through rulemaking and revise at least biennially. This is unnecessary and inefficient. Not only would this unnecessarily delay the adoption of updated HPH information from CPW, governments regularly incorporate guidance documents into regulations and incorporate the most up-to-date version by reference.
6. We recognize that routine activities that present no threat of adverse impacts to wildlife resources should not be overburdened. However, many activities, such as workovers and plugging, which some parties want to be classified as routine maintenance, involve significant amounts of traffic and use of heavy machinery. This degree of activity can cause adverse impacts to wildlife resources. We suggest that the cutoff for exceptions from 1202.c be based on the type and volume of equipment needed for the task, rather than its classification as "routine."

**IV. WITNESS LIST**


1. Therese Glowacki, Manager, Resource Management Division, Boulder County Parks and Open Space. Ms. Glowacki will testify to specific protections necessary for wildlife resources.
2. Kristan Pritz, Director of Open Space and Trails, City and County of Broomfield. Ms. Pritz will testify to land use and practical considerations necessary to the protection of wildlife resources.

**RESPECTFULLY SUBMITTED** this 25th day of September, 2020.

**BOULDER COUNTY, COLORADO**

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**CITY OF LONGMONT**

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**NORTHWEST COLORADO COUNCIL  
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**GUNNISON COUNTY**

By:     /s/ David Baumgarten

David Baumgarten  
Gunnison County Attorney

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **AFFILIATED LOCAL GOVERNMENT COALITION'S and GUNNISON COUNTY'S RESPONSE TO 1200 SERIES PRE-HEARING STATEMENTS** was served electronically, this 25th day of September, 2020, to the following:

[DNR\\_COGCC.Rulemaking@state.co.us](mailto:DNR_COGCC.Rulemaking@state.co.us)

\_\_\_\_\_/s/ *Kate Burke*