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Dennis L. Coombs
City of Longmont
350 Kimbark Street
Longmont, CO 80501

Submitted VIA Email

RE: CITY OF LONGMONT DRAFT OIL AND GAS REGULATIONS

Dear Mayor Coombs and Members of the City Council:

The Colorado Oil & Gas Association (COGA) is a nationally recognized trade association whose purpose is to foster and promote the beneficial, efficient, responsible and environmentally sound development, production and use of Colorado oil and natural gas. COGA is writing to express our concerns to the City of Longmont's oil and gas regulations and have attached specific comments for the City's consideration.

Many COGA members are engaged in exploration, development, production, and transportation activities across Colorado. In their current form, the proposed regulations are likely to impact existing and planned oil and natural gas projects by delaying approvals for new projects and slowing the development of existing oil and gas assets.

COGA believes Longmont's proposed rules are unnecessary and overreaching. Colorado already has some of the most comprehensive oil and gas regulations in the country and provide for meaningful local involvement. This process ensures community interests are accounted for while providing a predictable regulatory environment so that we may attract investment and jobs to Colorado.

Accordingly, we encourage the City of Longmont to reject the proposed regulations and make the appropriate revisions to comport with the state's regulatory framework.

Sincerely,

Andrew Casper, Esq.
Regulatory Counsel

COMMENTS ON CITY OF LONGMONT DRAFT OIL AND GAS REGULATIONS

Local regulatory activity regarding oil and gas development occurs in the context of a unique property rights regime, and must respect the primary regulatory authority vested in the Colorado Oil & Gas Conservation Commission (“COGCC” or “Commission”). The COGCC administratively approves some 5,000-6,000 well permits per year. This translates into over 2,000 wells being drilled each year in Colorado. If each well approved by the state is also forced into a months-long local permitting process, the number of wells annually drilled in Colorado would plummet, along with tax revenues, economic activity and jobs.

Accordingly, local land use approval should generally proceed within the same 30-45 day permitting timeframe as that utilized by the COGCC. This can be achieved in two ways. The preferred approach from the industry standpoint is for local governments to rely on the COGCC “local government designee” process for input to its permitting decisions. This process includes: notice of pending applications for permits to drill; an opportunity to comment and request conditions of approval; the option to consult on COGCC permit review, including with the assistance of the Colorado Department of Health and Environment; and, standing to suspend permit issuance and take the matter to a hearing of the Commission if unsatisfied with the outcome.

To the extent that Longmont desires to maintain its own land use approval process for oil and gas activity, it must conform to the directive of the Colorado Supreme Court in the seminal preemption case:

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.*¹

Longmont’s proposed regulation fails to accord with this division of authority regarding oil and gas development in several respects.

Page 1

Applicability: Longmont proposes to exercise jurisdiction over horizontal well laterals under the City, where well head is outside of the City. Clearly, any underground drilling operations are technical matters "requiring uniform regulation" under *Bowen/Edwards* and are outside the scope of City authority.

Exceptions: Pre-existing facilities may operate without a new permit unless certain activities, including "reworking" occur. Reworking (e.g. hot oiling, swabbing, cleaning out sand covering perf's) is normal well maintenance and should not require new permitting.

Page 2

Prohibitions: The City may not prohibit an injection well permitted by the State. There is no more fundamental example of an “operational conflict” than where the local government denies that which the state permits.

Applications subject to public hearing review: The City does not have authority to establish "designated outside activity areas" (as provided at the top of page 3). This is an exclusive COGCC function pursuant to its rules. City may apply to COGCC for a designation.

Page 3

Other notices: COGCC has a spill reporting threshold (5 bbl or any spill impacting water, residences or public byways) that City must respect.

Review criteria: This paragraph imposes other general review criteria found in Section 15.02.090 (E)(3) and variance standards (F)(5). With regard to oil and gas development, traditional land use notions of compatibility with surrounding uses are not appropriate considerations. Oil and gas resources must be developed where they occur, generally from the overlying surface. The surface use is necessary, but incidental to the resource extraction and access to the surface is guaranteed by law.² Unlike surface development options (e.g. residential, commercial, industrial), alternative subsurface uses are not available, and denying the ability to develop the underlying oil and gas confiscates all of its economic value, thereby effecting a taking of property.³

Page 4

Variations and Operational Conflicts Special Exceptions: The determination of operational conflict preemption is a legal issue for the courts, not the City Council. The definition of "operational conflict" in #4 should incorporate the state interest in a timely, efficient and equitable regulatory system.

Further, paragraph 8 (page 5) provides that “any interested party” may bring judicial action to appeal a decision of the City to grant a variance based on an operational conflict special exception. This opens the door to delay and litigation expense from citizens or groups who oppose oil and gas development under any circumstances.

Page 5

Third Party Technical Review: The City should not retain a "technical consultant" at industry expense to review technical aspects of drilling and operating wells that "require uniform regulation" under the *Bowen/Edwards* standard.

Approval Period: Should track COGCC 2 year APD term

Pages 7-9

All of the "General Development Standards" involve technical aspects of drilling and operating wells that require "uniform regulation" (except Emergency Preparedness, p. 9)

Page 10

Indemnity provision (2nd to last sentence) requires operator to indemnify City *against its own negligence*. This is unacceptable.

Pages 11-17

These are preempted technical standards, including setbacks to occupied buildings or platted lots, visual and noise mitigation, water protection, setback to water bodies, water quality monitoring; waste management; closed loop requirement, frac fluid composition, etc. The City may request conditions of approval addressing these matters via the LGD process.⁴

In conclusion, the scope of allowable local regulation of oil and gas development is constrained by the reach of COGCC rules, orders and permit conditions. The City's first concern in considering the adoption of its proposed regulatory ordinance must be whether such rules will be consistent with the state's policy mandating an timely, efficient and equitable regulatory regime for oil and gas development in Colorado. Making otherwise preempted technical standards "optional" in the guise of an expedited approval "carrot" does not change the fact that these problematic standards would be part of Longmont's land development code.

¹ *Board of County Commissioners, La Plata County v. Bowen/Edwards Associates, Inc.*, 830 P.2d 1045, 1058 (Colo. 1992), emphasis supplied

² *Frankfort Oil Co. v. Abrams*, 413 P.2d 190 (Colo. 1966)

³ "We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992), emphasis in the original.

⁴ "Following the passage of S.B. 94-177, the COGCC promulgated extensive regulations dealing with oil and gas operations these expanded regulations may give rise to additional areas of operational conflict with analogous local regulations"*Town of Frederick v. North American Resources Company*, 60 P.3d 758, 764 (Colo. App. 2002)