DISTRICT COURT, BOULDER COUNTY, COLORADO Boulder Justice Center 1777 Sixth Street Boulder, CO 80302 Phone: (303) 441-3750 Fax: (303) 441-4750	
PLAINTIFF: COLORADO OIL AND GAS CONSERVATION COMMISSION, v. **DEFENDANT:** CITY OF LONGMONT, COLORADO.	▲ **COURT USE ONLY** ▲
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COMPLAINT FOR DECLARATORY RELIEF	

The Colorado Oil and Gas Conservation Commission, by and through the Office of the Attorney General, files this Complaint for Declaratory Relief and states:

INTRODUCTION

The Colorado Oil and Gas Conservation Commission ("Commission") seeks a declaratory order invalidating portions of City of Longmont ("City") Ordinance O-2012-25 ("Ordinance") as preempted by the Colorado Oil and Gas Conservation Act ("Act") and implementing regulations.

The development of oil and gas resources is a matter of statewide concern. Recent amendments to the Act and its implementing regulations preempt the City from regulating certain aspects of oil and gas operations. Further, the disputed provisions of the Ordinance are superseded by procedural and substantive standards supplied by the Commission's comprehensive regulatory structure.

The Ordinance states that the disputed provisions relate to "land use" and are properly subject to local regulation. The Commission disagrees and views the disputed provisions as relating to the regulation of oil and gas operations which, if countenanced, will undermine the Commission's statutory charge to foster the responsible development of Colorado's oil and gas resources in a manner consistent with protection of public health, safety, and welfare, including protection of the environment and wildlife resources. Accordingly, the Commission requests the Court enter an order invalidating the disputed provisions of the Ordinance as preempted.

PARTIES

1. The Commission is the primary state agency responsible for regulating oil and gas operations in Colorado. The Commission's office is located at 1120 Lincoln Street, Suite 801, Denver, Colorado 80203.

2. The City is a home rule city situated within the Greater Wattenberg Area as defined by the Rules of Practice and Procedure before the Colorado Oil and Gas Conservation Commission, 2 Code Colo. Regs. 404-1 ("Commission Rules"). The City's office is located at 385 Kimbark St., Longmont, Colorado 80501.

JURISDICTION AND VENUE

3. This Court has subject matter jurisdiction because the events complained of occurred in Colorado and the resolution of this dispute requires the application of Colorado law.

4. Venue is proper pursuant to C.R.CIV.P. 98(c) because the City is a resident of Boulder County.

GENERAL ALLEGATIONS

A. The Commission, its Powers and Duties

5. The Commission is a nine-member citizen body charged with implementing the Act, the General Assembly's detailed legislative scheme for regulating and administering oil and gas operations in the state.

6. Seven of the nine Commissioners are volunteer citizens, appointed by the Governor, with the consent of the Senate, and selected for their educational and professional expertise as well as geographic considerations. The Executive Directors of the Colorado Department of Natural Resources ("DNR") and the Colorado Department of Public Health and Environment ("CDPHE") fill the other two seats on the Commission. § 34-60-104(2)(a)(I), C.R.S.

7. The Commission conducts hearings on rules, regulations and orders at public meetings approximately once a month. The director and a professional staff of approximately 45 employees carry out day-to-day administration of the Act.

8. The Commission has jurisdiction over all persons and property, public and private, necessary to enforce the provisions of the Act, and has the power to make and enforce rules, regulations, and orders pursuant to the Act, as well as to do whatever may reasonably be necessary to carry out the provisions of the Act. §34-60-105, 106, C.R.S.

9. The General Assembly has declared it to be in the public interest to foster, encourage, and promote the development, production, and utilization of oil and gas resources in the state consistent with the protection of public health, safety, and welfare, including protection of the environment and wildlife resources; to protect the public and private interests against waste of these natural resources; and to safeguard the coequal and correlative rights of owners and producers of oil and gas. § 34-60-102, C.R.S.

10. It is the express intent of the General Assembly to "[p]ermit each oil and gas pool in Colorado to produce up to its maximum efficient rate of production…." § 34-60-102(1)(b), C.R.S. Further, it is the state policy to encourage, by every appropriate means, the full development of the state's natural resources. § 24-33-103, C.R.S.

B. The Greater Wattenberg Area

11. With the exception of approximately one square mile on the western edge of the City, Longmont is situated in an oil and gas field designated by the Commission as the Greater Wattenberg Area of the Denver Julesburg Basin ("GWA").

12. The GWA is located in northeast Colorado, primarily in Weld County, but extends into Adams, Boulder, Broomfield and Larimer Counties. The field is approximately fifty miles long and fifty miles wide covering 2,916 square miles.

13. The GWA is Colorado's most productive oil and gas field, accounting for roughly 60% of the state's oil production and 14% of the state's natural gas production annually. The GWA is also Colorado's most heavily-regulated field.

14. Pursuant to its rulemaking authority under the Act and the State Administrative Procedures Act, the Commission has enacted field-wide rules applicable to the GWA. These specific rules pertain to, among other things, baseline water sampling, well location, spacing and unit designation. *See* Commission Rule 318A(I) attached as **Exhibit A**.

15. "Since the initial Wattenberg Field discovery in 1970, oil and gas development has continued to increase, with significant ancillary economic benefits. Commission Rule 318A was initially adopted in April 1998. The rule, also referred to as The Greater Wattenberg Area Rule ["GWA Rule"], was promulgated in order to facilitate location of wells, and operator access to all Cretaceous age formations, without need to routinely secure Commission approval. … The GWA Rule was driven by intense interest in hydrocarbon development in the GWA, the complex nature of the tight sands of the GWA, and the need to mitigate conflicts between mineral rights developers and surface owners with predictable and reasonably protective rules." *Statement of Basis, Specific Statutory Authority, and Purpose for August 2011 Amendments to Commission Rule 318A* (available at http://cogcc.state.co.us/).

16. Effective September 2011, the Commission enacted amendments to the GWA Rule to address new technologies and practices that promote the responsible development of oil and gas resources in the GWA. Among other things, the intent of the recent amendments was to conduct water sampling in the GWA.

17. Many of the Ordinance provisions irreconcilably conflict with the Commission Rules generally, and the GWA Rule specifically. Provisions of the Ordinance usurp the Commission's authority and harm its institutional interests by impairing its ability to fulfill its statutory mandate.

C. 2007 Amendments to the Act

18. The Act was originally passed in 1951 and has been amended several times. Most recently, the Act was amended in 2007, by House Bills 07-1298 and 07-1341, codified at §§ 34-60-106 and 34-60-128, C.R.S. (collectively, the "2007 Amendments").

19. Under revised Section 106 of the Act, the Commission was required to, among other things:

> a. "Promulgate rules to establish a timely and efficient procedure for the review of applications for a permit to drill and applications for an order establishing or amending a drilling and spacing unit." § 34-60-106(11)(a)(I)(A).
>
> b. "Promulgate rules, in consultation with the department of public health and environment, to protect the health, safety, and welfare of the general public in the conduct of oil and gas operations. The rules shall provide a timely and efficient procedure in which the department has an opportunity to provide comments during the commission's decision-making process." § 34-60-106(11)(a)(II).

20. Under revised Section 128 of the Act, which is known as the Colorado Habitat Stewardship Act of 2007, the Commission was required to, among other things:

> a. "[A]dminister [the Act] so as to minimize adverse impacts to wildlife resources affected by oil and gas operations." § 34-60-128(2), C.R.S.
>
> b. "Establish a timely and efficient procedure for consultation with the wildlife commission and division of wildlife on decision-making that impacts wildlife resources." § 34-60-128(3)(a), C.R.S.

c. "Implement, whenever reasonably practicable, best management practices and other reasonable measures to conserve wildlife resources." § 34-60-128(3)(c), C.R.S.

d. "Promulgate rules by July 16, 2008, in consultation with the wildlife commission, to establish standards for minimizing adverse impacts to wildlife resources affected by oil and gas operations and to ensure the proper reclamation of wildlife habitat during and following such operations." § 34-60-128(3)(d), C.R.S.

21. The 2007 Amendments preempt conflicting local regulations and provide additional procedural and substantive requirements for the regulation of oil and gas operations in Colorado. Such statutory amendments demonstrate the General Assembly's intent that certain aspects of oil and gas regulation are to be regulated solely by the Commission.

D. The Commission's 2008 Rulemaking

22. By passing the 2007 Amendments, the General Assembly directed the Commission to comprehensively update the Commission Rules pursuant to the State Administrative Procedures Act to specifically protect the environment and wildlife resources. §§ 34-60-102(1)(a)(I), 128(3)(d), C.R.S.

23. By passing the 2007 Amendments, the General Assembly also directed the Commission to "[p]romulgate rules, in consultation with the department of public health and environment, to protect the health, safety, and welfare of the general public in the conduct of oil and gas operations." § 34-60-106(11)(a)(II) ("2008 Rulemaking").

24. "A major reason for [2008 Rulemaking] was to address concerns created by the unprecedented increase in the permitting and production of oil and gas in Colorado in the past few years." *Statement of Basis, Specific Statutory Authority, and Purpose for 2008 Amendments to Commission Rules,* p. 1.

25. During the 2008 Rulemaking, the Commission developed new regulations in collaboration with CDPHE to protect water resources and prevent degradation of the environment. *See* Commission Rules 317B and 324A.

26. The Commission also developed extensive new regulations in collaboration with Colorado Parks and Wildlife ("CPW"). These regulations

impose special operating requirements in all areas, apply additional operating requirements in sensitive wildlife habitat and restricted surface occupancy areas, mandate consultation with the CPW in sensitive wildlife habitat, and require operators to avoid restricted surface occupancy areas where feasible. As a result of these new regulations, the Commission consults with the CPW where appropriate. *See* Commission Rules 1202-1206 and Commission 1000 Series Rules.

27. Eleven counties and two cities were formal parties to the 2008 Rulemaking. The City did not participate.

28. The 2008 amendments to the Commission Rules preempt conflicting local regulations and provide additional procedural and substantive requirements for the regulation of oil and gas operations in Colorado. These rules expand the preemptive effect of the Commission's regulatory structure and displace conflicting local regulations.

E. The City's Regulation of Oil and Gas Operations

29. On December 20, 2011, the City imposed a 120 day moratorium on accepting applications for City oil and gas well permits. The moratorium was set to expire April 17, 2012, but was extended to June 16, 2012.

30. On February 10, 2012, the City released the first draft of its oil and gas regulations. Shortly thereafter, the director and other members of the Commission staff met with the City to express the Commission's concern that some of the draft regulations were preempted, to explain the Commission's regulatory structure and to explore ways in which the Commission could address the City's concerns through the Commission's existing regulatory program.

31. The City and the Commission discussed opportunities for the City's Local Governmental Designee ("LGD") to influence the Commission's decision making by collaborating in the development of Comprehensive Drilling Plans, receiving advance notice of permit applications submitted to the Commission by an operator, and requesting "technically feasible and economically practicable conditions of approval" to Commission permits. Commission Rule 216, 305.b. and 305.d.

32. In the context of a particular application, if the Commission staff refuses to impose a condition of approval requested by an LGD, then the LGD

has a right to petition the entire nine-member Commission to attach the desired condition of approval under Commission Rule 503.b.(7).C.

33. The City issued numerous drafts of its proposed regulations and, on each occasion, the Commission expressed its concern that some of the proposed rules, if adopted, would be preempted.

34. On April 27, 2012, the Commission, through counsel, submitted written comments on the City's proposed regulations. Specifically, the Commission expressed concern that the rules at issue in this complaint were preempted, including:

a. The City's claimed right to assess the "appropriateness" of certain technical oil and gas operation practices and impose additional conditions as required conditions of approval, including the use of multi-well sites, directional and horizontal drilling techniques, and relocating facilities.

b. The City's *per se* ban on surface oil and gas operations and facilities in residential zoning districts.

c. The City's claimed right to impose water sampling requirements on GWA operators above and beyond those required by the Commission's applicable rule, which requires baseline water sampling in the GWA. Commission Rule 318A(I).a.(4).

d. The City's imposition of riparian setbacks on oil and gas operations which are above and beyond Commission Rules to protect water resources.

e. The City's requirement that operators comply with the habitat and species protection provisions of the Longmont Municipal Code, even where the code imposes a higher or more restrictive standard than that imposed by the Commission Rules.

35. The Commission's concerns were not addressed in the City's final draft of its regulations, and on May 8, 2012, the City conditionally approved its amended oil and gas regulations through a first reading.

36. The second and final reading of the Ordinance was to occur on May 22, 2012. However, on May 21, 2012, the Executive Director of DNR, Mike King,

wrote a letter to the City stating that a patchwork of local oil and gas regulations was contrary to the statewide public interest as expressed by the General Assembly, and that the parties should continue to work together to coordinate their regulatory efforts and collaborate on ways to ensure that oil and gas development in the City proceeds in a responsible manner. In response to Mr. King's letter, the City delayed the passage of its oil and gas regulations and extended its moratorium for an additional 45 days.

37. The Ordinance was tabled and the City moratorium extended to allow time for City staff to meet with the Commission, the Colorado Oil and Gas Association and TOP Operating Company ("TOP") to discuss state permitting procedures and to negotiate agreements between the City and TOP regarding potential drilling locations on City owned properties as well as TOP's agreement to utilize various operating standards desired by the City. The City and TOP subsequently entered into such agreements which were approved by City Council on July 17, 2012.

38. On July 17, 2012, the City Council also approved the Ordinance, attached as **Exhibit B**, over the Commission's objection.

39. No possible construction of the disputed provisions of the Ordinance can be harmonized with the state regulatory regime, and the Ordinance is superseded by procedural and substantive standards supplied by the Commission's comprehensive regulatory process. *See* Local Government Land Use Control Enabling Act of 1974, § 29-20-107, C.R.S.

40. All necessary parties are before the Court pursuant to C.R.CIV.P. 57(j), and an actual and justiciable controversy exists between the Commission and the City regarding the parties' respective rights to regulate oil and gas operations.

41. Pursuant to § 13-51-101, C.R.S. *et seq.*, and C.R.CIV.P. 57, this Court may declare the parties' respective rights, status and other legal relations.

FIRST CLAIM FOR DECLARATORY RELIEF

The City's Claimed Right to Determine When the Use of Multi-Well Sites and Directional and Horizontal Drilling Techniques are "Possible or Appropriate" is Preempted

42. The Commission incorporates the foregoing allegations by reference.

43. The Ordinance infringes on the Commission's authority to regulate technical aspects of oil and gas operations by vesting the City with authority to assess the appropriateness of certain technical oil and gas operations practices and by imposing such conditions as required conditions of approval, including the use of multi-well sites, and directional and horizontal drilling techniques:

> Multi Well Sites and Directional/Horizontal Drilling: Oil and gas well operations and facilities will be consolidated on multi well sites and directional and horizontal drilling techniques will be used whenever possible and appropriate. In determining appropriateness, the benefits of consolidation and the use of directional and horizontal drilling, such as drilling from outside of a prohibited zoning district, minimizing surface disturbance and traffic impacts and increasing setbacks, will be weighed against the potential impacts of consolidated drilling and production activities on surrounding properties, wildlife and the environment.

Ordinance, pp. 12-13.

44. Pursuant to its rulemaking authority under the Act, the Commission has promulgated a comprehensive set of regulations governing directional drilling and multi-well sites. Commission Rules 303.c.(3), 318A(I).e, 321, 508.b.(2).B.(v) and 1002.d.

45. Because a Commission permit to drill is a prerequisite to obtaining a City oil and gas well permit, Ordinance, pp. 9-10, the City's claimed right to assess "the benefits of consolidation and the use of directional and horizontal drilling" undermines the General Assembly's directive for the Commission to "[p]romulgate rules to establish a timely and efficient procedure for the review of applications for a permit to drill and applications for an order establishing or amending a drilling and spacing unit," by requiring operators to reengineer

operations previously analyzed and approved by the Commission's permitting staff. § 34-60-106(11)(a)(I)(A), C.R.S.

46. The City has no authority to assess "the benefits of consolidation and the use of directional and horizontal drilling" or relocate a well previously permitted by the Commission because 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, environmental restoration and location and spacing of wells.

47. The City's claimed right to assess "the benefits of consolidation and the use of directional and horizontal drilling" usurps the Commission's statutory authority to, among other things, assess and "[i]mplement, whenever reasonably practicable, best management practices and other reasonable measures to conserve wildlife resources." § 34-60-128(3)(c), C.R.S.

48. The City's claimed right to assess "the benefits of consolidation and the use of directional and horizontal drilling" is preempted.

49. The City's claimed right to assess "the benefits of consolidation and the use of directional and horizontal drilling" is superseded by the procedural and substantive requirements of the Act and the Commission Rules.

SECOND CLAIM FOR DECLARATORY RELIEF

The City's Setback Rules are Preempted

50. The Commission incorporates the foregoing allegations by reference.

51. Efficient and equitable oil and gas production is closely tied to well location and spacing. Non-uniform or irregular setback rules affect well location and spacing, and hence, oil and gas production.

52. Oil and gas are found in subterranean pools, the boundaries of which do not conform to any jurisdictional pattern. As a result, scientific drilling methods are necessary for the productive recovery of these resources. It is necessary to drill wells in a pattern dictated by the pressure characteristics of the pool, and because each well will only drain a portion of the pool, an irregular drilling pattern will result in less than optimal recovery and a corresponding waste of oil and gas.

53. Pursuant to its rulemaking authority under the Act, the Commission has promulgated a comprehensive set of regulations governing the location and spacing of wells and setbacks. *See* Commission Rules 318, 318A, and 603.

54. The Commission's well location, spacing and setback rules are central to the Commission's statutory mandate to "[p]rotect the public and private interests against waste in the production and utilization of oil and gas" and "[s]afeguard, protect, and enforce the coequal and correlative rights of owners and producers in a common source or pool of oil and gas." §§ 34-60-102(1)(a)(II) and (III), C.R.S.

55. The Commission's well location, spacing and setback rules also further the state interest to permit "each oil and gas pool in Colorado to produce up to its maximum efficient rate of production…." § 34-60-102(1)(b), C.R.S.

56. Non-uniform or irregular location, spacing and setback rules undermine the Commission's statutory mandate by resulting in the inefficient and improper use or dissipation of reservoir energy, the reduction in quantity of oil or gas ultimately recoverable from a pool, and the abuse of correlative rights.

57. The City's setback for water bodies incorporates the Longmont Municipal Code ("LMC") by reference and imposes a "minimum" setback of 150' from certain specific stream corridors and riparian areas and imposes a 100' setback in all other instances. Ordinance, p. 22. The LMC vests the City with authority to depart from these stated minimum setbacks.

58. The City's setback for wildlife and wildlife habitat also incorporates the LMC by reference and imposes an unspecified "development setback from any important wildlife habitat area, riparian area, or plant species area." Ordinance, p. 26.

59. The Commission's well location, spacing and setback rules further the Commission's statutory mandate 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), C.R.S.

60. The Commission Rules do not impose riparian or wildlife setbacks or buffers in all instances. The Commission has passed numerous regulations

for the protection of water resources. In addition to the Commission's technical regulations meant to ensure wellbore integrity and proper waste management, Commission Rule 317B provides extensive requirements concerning "Public Water System Protection" and Commission Rule 324A requires that any operation shall not degrade air, water, soil or biological resources.

61. During the 2008 Rulemaking, the Commission considered adopting setbacks for riparian areas, but decided not to because the Commission Rules already "require operators to reduce adverse impacts on wildlife resources by using directional drilling where feasible and to avoid or minimize wetland and riparian impacts and consolidate facilities and rights-of-way to the extent practicable." *Statement of Basis, Specific Statutory Authority, and Purpose for 2008 Amendments to Commission Rules,* p. 71.

62. The City's setbacks for water bodies and setbacks for wildlife and wildlife habitat are preempted.

63. The City's setbacks for water bodies and setbacks for wildlife and wildlife habitat are superseded by the procedural and substantive requirements of the Act and the Commission Rules.

THIRD CLAIM FOR DECLARATORY RELIEF

The City's Wildlife Habitat and Species Protection Rules are Preempted

64. The Commission incorporates the foregoing allegations by reference.

65. The Ordinance infringes on the Commission's authority 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.

66. The Ordinance requires operators seeking to conduct oil and gas operations in the City to not only comply with the Commission's wildlife and habitat protection rules, but also comply with the City's municipal code pertaining to habitat and species protection:

> Oil and gas facilities shall comply with federal and state requirements regarding the protection of wildlife and habitat, including the COGCC

wildlife resource protection rules, and the provisions of LMC section 15.035.030, 'Habitat and Species Protection.'

Ordinance, p. 26.

67. Pursuant to its rulemaking authority under the Act, the Commission has promulgated a comprehensive set of regulations governing the protection of wildlife and wildlife habitat. *See, e.g.,* Commission Rule 1200-Series, Protection of Wildlife Resources.

68. LMC § 15.035.030 is intended to go farther than applicable Commission Rules and expressly states that "[w]hen this section imposes a higher or more restrictive standard, this section shall apply."

69. LMC § 15.035.030 imposes extensive additional regulations on operators seeking to conduct oil and gas operations in the City and provides, among other things, that:

a. The City planning director shall determine whether the proposed oil and gas operations are located in an area of "important plant or wildlife species or important wildlife habitat areas." In doing so, the City planning director is required to consult "Colorado Division of Wildlife habitat maps for Boulder and Weld Counties, as amended from time to time [and] [o]ther maps or surveys completed by Boulder or Weld Counties, such as the 'map of wildlife and plant habitats, natural landmarks and natural areas' included in Boulder County's comprehensive plan, as amended from time to time."

b. "All development shall provide a development setback from any important wildlife habitat area, riparian area, or plant species area, identified according to this chapter."

c. "On any site containing important wildlife habitat area [as determined by the City planning director], the applicant shall retain a qualified professional to recommend native and adapted plant species that may be introduced."

d. "The applicant shall retain a qualified person with demonstrated expertise in the field and who is acceptable to the planning director to prepare a species or habitat conservation plan required by this section."

70. The City's wildlife habitat and species protection rules are preempted.

71. The City's wildlife habitat and species protection rules are superseded by the procedural and substantive requirements of the Act and the Commission Rules.

FOURTH CLAIM FOR DECLARATORY RELIEF

The City's Residential Surface Facilities and Operations Ban Is Preempted

72. The Commission incorporates the foregoing allegations by reference.

73. The Ordinance provides that "City oil and gas well permits may be issued for sites within the City excluding oil and gas well surface operations and facilities in residential zoning districts." Ordinance, p. 3. The Ordinance does not define "surface operations and facilities," but broadly defines "oil and gas well facility" and "oil and gas well operations." *Id*., pp. 31-32.

74. For purposes of the City's ban, residential zoning includes not only current residential areas, but also areas of "planned residential uses." *Id*., p. 3.

75. In order to facilitate the location of wells, insure operator access to oil and gas resources, and minimize surface disturbance, the Commission has established predetermined GWA "drilling windows." Commission Rule 318A(I).a. The City's ban conflicts with these pre-established windows.

76. The City's prohibition is preempted because it impairs the Commission's statutory mandate to "[p]rotect the public and private interests against waste in the production and utilization of oil and gas" and "[s]afeguard, protect, and enforce the coequal and correlative rights of owners and producers in a common source or pool of oil and gas." §§ 34-60-102(1)(a)(II) and (III), C.R.S.

77. The City's prohibition is preempted because it undermines the state interest to permit "each oil and gas pool in Colorado to produce up to its maximum efficient rate of production…." § 34-60-102(1)(b), C.R.S.

78. The City's prohibition will have an extraterritorial effect on the development and production of oil and gas. The City' ban affects the ability of

owners of oil and gas in pools that underlie both the City's residential areas, including "planned" residential areas, and land outside the City to obtain an equitable share of production profits in contravention of the Act.

79. The City's residential surface facilities and operations ban is preempted.

80. The City's residential surface facilities and operations ban is superseded by the procedural and substantive requirements of the Act and the Commission Rules.

FIFTH CLAIM FOR DECLARATORY RELIEF

The City's Chemical Reporting Rule is Preempted

81. The Commission incorporates the foregoing allegations by reference.

82. The Ordinance infringes on the Commission's authority 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.

83. The Ordinance requires operators to provide "full disclosure" of all hazardous materials that will be transported on any roadway in the City. Such reports shall be made to the City hazards prevention office and will be "treated as confidential and will be shared by other emergency response personnel only on an as needed basis." Ordinance, pp. 14-15.

84. The City's chemical reporting rule conflicts with § 34-60-106(1)(e), C.R.S. and Commission Rules 205 and 205A. Pursuant to the Act, the Commission has exclusive statutory authority to require operators to maintain certain books and records, to inspect those records and to require operators to make "reasonable reports" to the Commission concerning oil and gas operations. Section 34-60-106(1)(e), C.R.S. excludes the City by omission as an entity authorized to require reports of oil and gas operations.

85. Under Commission Rules 205 and 205A, operators are required to compile Materials Safety Data Sheets and chemical inventories for any chemical products brought to a well site for use downhole during drilling, completion, and

work-over operations and are required to report chemicals used in hydraulic fracturing operations.

86. Commission Rules 205 and 205A also authorize the Commission to immediately obtain any information from vendors, suppliers and operators necessary to respond to a spill, release or complaint. Commission Rules 205 and 205A also provide protections for information claimed to be a trade secret.

87. Commission Rule 205A, concerning the disclosure and reporting of chemicals used in hydraulic fracturing operations, was enacted in December 2012 and has been heralded as a national model.

88. The City's chemical reporting rule is preempted.

89. The City's chemical reporting rule is superseded by the procedural and substantive requirements of the Act and the Commission Rules.

SIXTH CLAIM FOR DECLARATORY RELIEF

The City Visual Mitigation Methods are Preempted

90. The Commission incorporates the foregoing allegations by reference.

91. The Ordinance claims to vest the City with authority to condition approval of a City oil and gas well permit on an operator's use of "low profile tanks [and/or a] minor relocation of the facility to a less visible location…." Ordinance, pp. 19-20 ("City Visual Mitigation Methods").

92. The City Visual Mitigation Methods pertain to oil and gas operations, not land use, and are comprehensively regulated by the Commission Rules. *See, e.g.,* Commission Rule 804 (Visual Impact Mitigation).

93. The City has no authority to condition the issuance of a City oil and gas well permit on its imposition of the City Visual Mitigation Methods.

94. The City Visual Mitigation Methods are preempted because they impair the Commission's statutory mandate to "[p]rotect the public and private interests against waste in the production and utilization of oil and gas" and "[s]afeguard, protect, and enforce the coequal and correlative rights of owners and producers in a common source or pool of oil and gas." §§ 34-60-102(1)(a)(II) and (III), C.R.S.

95. The City Visual Mitigation Methods are preempted because they undermine the state interest to permit "each oil and gas pool in Colorado to produce up to its maximum efficient rate of production…." § 34-60-102(1)(b), C.R.S.

96. The City Visual Mitigation Methods are preempted.

97. The City Visual Mitigation Methods are superseded by the procedural and substantive requirements of the Act and the Commission Rules.

SEVENTH CLAIM FOR DECLARATORY RELIEF

The City's Water Quality Testing and Monitoring Rule is Preempted

98. The Commission incorporates the foregoing allegations by reference.

99. The Ordinance infringes on the Commission's authority 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.

100. The Ordinance provides that operators seeking to conduct oil and gas operations in the City shall comply with the Commission Rules governing water well testing procedures and requirements. Ordinance, pp. 22-23.

101. The Commission Rule governing water well testing procedures and requirements in the GWA, and therefore all but one square mile of the City, is Commission Rule 318A(I).a.(4), which requires baseline water sampling "prior to the first well proposed within a governmental section" and provides general requirements for the selection of the well to be tested and laboratory testing criteria (the "GWA Water Sampling Rule").

102. In addition to incorporating the GWA Water Sampling Rule by reference, the Ordinance goes farther than the applicable Commission Rule by vesting the City with authority to require, in its sole discretion, additional water sampling above and beyond the requirements of the GWA Water Sampling Rule.

103. Under the City's water quality testing and monitoring regime, an operator must "submit a water quality monitoring plan to the City for review and approval." Ordinance, p. 23 ("City Plan").

104. The City Plan, at a minimum, must identify the number of wells needed to establish baseline groundwater quality up-gradient and down-gradient of the proposed oil and gas operations; constituents to be sampled for; frequency of sampling; analytical methods to be used; and, proposed frequency of reporting results to the City and the Commission. Ordinance, p. 23.

105. "Oil and gas well operators shall fund the development and implementation of the [City Plan] and program for the duration of operations on the site and for a minimum of five (5) years following completion of operations and abandonment of the well(s)." Ordinance, p. 23.

106. The City Plan is preempted.

107. The City Plan is superseded by the procedural and substantive requirements of the Act and the Commission Rules.

EIGHTH CLAIM FOR DECLARATORY RELIEF

The City has no Authority to Adjudicate Operational Conflicts

108. The Commission incorporates the foregoing allegations by reference.

109. The Ordinance requires operators to comply with the disputed provisions discussed above and claims to enable the City to attach additional preempted conditions of approval to a City oil and gas well permit even though an operator is required to have already obtained a Commission permit to drill "prior to issuance of a City oil and gas well permit." Ordinance, pp. 9-10.

110. Therefore, in an effort to avoid operational conflicts arising out of the City's successive permitting regime, the City has included an "operational conflicts special exception" waiver process in the Ordinance. Ordinance, pp. 7-8.

111. Under the City's waiver process, the City shall decide whether an "operational conflict between the requirements of [the Ordinance] and the State's interest in oil and gas development [exists] in the context of a specific application." Ordinance, p. 7.

112. If the City "finds, based upon competent evidence in the record, that compliance with the requirements of [the Ordinance] shall result in an operational conflict with the state statutory and regulatory scheme, a special exception to this section **may** be granted, in whole or in part, but only to the

extent necessary to remedy the operational conflict." Ordinance, p. 7 (emphasis added).

113. The resolution of such a dispute, in the first instance, is for the District Courts of Colorado, not the City's "decision making body." Ordinance, pp. 7-8. Moreover, if an operational conflict is present, the City regulation **must** yield to the state interest.

114. The City's waiver process vests the ultimate determination in the City as to whether a conflict exists and, further, places additional requirements on the applicant where an operational conflict exists instead of simply precluding the City regulation.

115. Moreover, the Commission Rules provide an extensive LGD process to address local concerns and avoid such conflicts. Commission Rules 305, 306, 503.b.(7).

116. The City's attempt to use the waiver process if it determines there is an operational conflict does not shield the disputed provisions from being preempted. The waiver is illusory because the City has no authority to determine whether an operational conflict exists.

PRAYER FOR RELIEF

WHEREFORE, the Commission respectfully requests this Court to declare that the foregoing disputed provisions of the Ordinance are preempted by the Colorado Oil and Gas Conservation Act and its implementing regulations and are therefore invalid, and enter judgment in favor of the Commission and against the City on all claims, and granting such further relief as this Court deems just and appropriate.

Dated this July 30, 2012

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