

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

IN THE MATTER OF THE APPLICATION OF  
CRESTONE PEAK RESOURCES  
OPERATING LLC FOR AN ORDER TO: (1)  
ESTABLISH AND APPROVE A RULE 216  
COMPREHENSIVE DRILLING PLAN FOR  
SECTIONS 1, 2, 3, 10, 11 AND 12,  
TOWNSHIP 1 NORTH, RANGE 69 WEST, 6<sup>th</sup>  
P.M. AND SECTIONS 25, 26, 27, 34, 35 AND  
36, TOWNSHIP 2 NORTH, RANGE 69 WEST,  
6TH P.M. FOR THE COMPREHENSIVE  
DEVELOPMENT AND OPERATION OF THE  
CODELL AND NIOBRARA FORMATIONS,  
WATTENBERG FIELD, BOULDER COUNTY,  
COLORADO, AND (2) TO APPROVE A RULE  
502.b. VARIANCE TO COMMISSION RULE 303.

CAUSE NO.

DOCKET NO. 170500189

TYPE: CPD

KENOSHA RPO'S PREHEARING BRIEF

The Kenosha Road Property Owners (the "Kenosha RPO"), by and through their undersigned counsel, submit the following Prehearing Brief for the Commission's hearing on May 1, 2017.

INTRODUCTION

The Kenosha RPO is a group of eight property owners owning four parcels of land totaling approximately 60 acres located in Sections 11 and 12, in the southeastern portion of the Crestone Comprehensive Drilling Plan ("CDP") area. In September 2013, this area was severely impacted by flooding, when almost three feet of water covered the entire area with no advance warning. Several of the property owners (including Kendra Carberry, the Kenosha RPO's named witness) lost everything, including their homes. These owners were only able to move back in to their reconstructed homes in February of 2017, three and one-half years after the flood. In learning about the Crestone proposal to access the minerals under their neighborhood, the embattled Kenosha Road residents felt they had to protect their rural neighborhood and property from excessive industrial oil and gas activity. It is for this reason that the Kenosha RPO has intervened in this case.

At the present time, the Kenosha RPO supports Crestone's CDP application and the associated variance request for both legal and policy reasons. However, the Kenosha RPO reserves the right to object to the CDP application at a later time, when surface locations and other details are identified.

## ARGUMENT

### 1. THE HEARING OFFICER'S DECISION ALLOWING KENOSHA RPO'S INTERVENTION SHOULD BE UPHOLD BECAUSE THE INTERVENTION IS IN THE PUBLIC INTEREST.

At the April 20, 2017 preliminary hearing, both 8 North, LLC and Kerr-McGee opposed the Kenosha RPO's Motion to Intervene (the "Motion"). While the Hearing Officer granted the Motion at the hearing, counsel for both 8 North and Kerr-McGee stated that they would further challenge the Kenosha RPO's standing at the May 1<sup>st</sup> hearing. As such, the Kenosha RPO feels compelled to further address these issues in this Prehearing Brief.

The Kenosha RPO are interested parties and therefore should be allowed to intervene in this proceeding. § 34-60-108(2), C.R.S.2009 ("any interested person shall be entitled to be heard" in hearings on rules or orders). Members of Kenosha RPO property interests will be affected by the placement of the well pads, pipelines, and transportation routes that are likely to be decided through the Comprehensive Drilling Plan process. *Rocky Mountain Animal Defense v. Colorado Division of Wildlife*, 100 P.3d 508, 513 (Colo.App.2004) (the risk of environmental injuries to places used by a plaintiff can establish standing.)

As noted above, the members of the Kenosha RPO are surface owners in the CDP area. As such, pursuant to Rule 216.d.(2), the members of the Kenosha RPO must be invited to participate in the development of the CDP. In fact, by written notice from Crestone dated March 22, 2017, the members of the Kenosha RPO were so invited.

COGCC Rule 509.a(2)C allows permissive intervention if the involvement of the intervenor is in the public interest. Granting of the intervention shall be at the Commission's sole discretion. *Id.* The Kenosha RPO argued that the public interest will be served by allowing affected landowners to participate as a party in decisions that would be made through Crestone's CDP application process. COGCC Hearing Officer Rouse agreed and added that the landowners should be allowed to participate in respect to basic principles of fairness.

At the April 20<sup>th</sup> hearing, counsel for 8 North and Kerr-McGee stated that they are not objecting to the Kenosha RPO's participation in the CDP overall, and instead, they object to the Kenosha RPO participating in the decision regarding Crestone's requested variance. Counsel repeatedly stated that the Kenosha RPO would not be affected by the variance. This could not be further from the truth – if the variance is not granted, then the entire purpose of the CDP will be undermined because multiple competing applications could be filed in the CDP area. Comprehensive planning can only occur if all affected parties collaborate. If the COGCC denies the variance, thereby allowing multiple competing applications in the CDP area, the Kenosha RPO and the local environment could be impacted by the unplanned and disorderly placement of the well pads and transportation routes throughout the proposed CDP area.

### 2. THE CDP APPLICATION AND REQUESTED VARIANCE COULD BENEFIT ALL STAKEHOLDERS AND SHOULD BE SUPPORTED BY THE COMMISSION

The Kenosha RPO supports the Crestone request for the CDP and the Rule 502.b. variance to Commission Rule 303. The “time-out” provided by the variance is critical for the success of the CDP. A CDP would not be able to occur if the Commission allows competing spacing and drilling applications that have become common in Colorado.

A. THE CDP AND REQUESTED VARIANCE ARE AUTHORIZED BY THE OIL AND GAS CONSERVATION ACT.

Crestone’s proposed CDP process and its request for a Rule 502.b. variance to Commission Rule 303 are authorized by the Oil and Gas Conservation Act. CDPs are currently an under-utilized tool that could help the COGCC achieve its mission to foster oil and gas development while protecting public health, safety and welfare. Upon information and belief, this is the first CDP application on the Front Range and the second CDP application since the COGCC rules allowing CDPs were adopted in 2008.

The mission of the COGCC is 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. (emphasis added); *Martinez v. Colorado Oil & Gas Conservation Comm’n*, 37, ¶ 16, Colo. COA 2017.<sup>1</sup>

The changes to the COGCC mission highlighted above were passed in 2007 in concert with HB 07-1298 that amended the Oil and Gas Conservation Act to authorize the use of Comprehensive Drilling Plans. § 34-60-128(3)(d)(II) C.R.S. requires the COGCC to write rules that encourage operators “to utilize comprehensive drilling plans and geographic area analysis strategies to provide for *orderly development* of oil and gas fields”. (Emphasis added).

Encouraging the use of CDPs as a means to protect public health, safety welfare and the environment and to “provide for orderly development” would be impossible if the COGCC allowed competing Form 2s and 2As while an operator was working in good faith with the public, local governments, and state agencies to complete a CDP. As has been stated in recent COGCC hearings, COGCC’s current policy is to approve the spacing applications (and Form 2s and 2As) on a first-come-first-served-basis. Little or no consideration is given to whether an application enjoys the support of the community or the relevant local government – only if it is first in time. This has led to hurried applications being submitted throughout the Greater Wattenberg that have little or no local government or community support when they are submitted.

Protestants’ arguments that the drilling locations should be decided prior to beginning a

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<sup>1</sup> As held in *Martinez*, protection of public health, safety and welfare is not *balanced* with fostering oil and gas development but is meant to be a check on “unfettered oil and gas development” *Martinez* at ¶ 30. Oil and gas development cannot occur if public health, safety, and welfare cannot be protected.

CDP process misunderstand the purpose of the CDP. The best way to achieve the COGCC mission of fostering oil and gas development “in a manner consistent with protection of public health, safety, welfare, and the environment” is to use the CDP stakeholder process to identify drilling locations that would minimize adverse impacts. Allowing the community and local governments to participate in siting decisions should allow for better planning to identify locations that will minimize adverse impacts to the communities and will therefore have more community support.

**B. CDPs ARE MEANT TO ALLOW FOR EARLY, COLLABORATIVE PLANNING TO MINIMIZE IMPACTS**

The COGCC intended CDPs to allow for early collaborative planning with stakeholders prior to submitting a final plan. The COGCC rules encourage the operator to meet with other stakeholders and early in the process to develop “joint Comprehensive Drilling Plans” (Rule 216.b) with other operators where appropriate and the “most detailed information practicable” in the CDP shall be decided upon in consultation with other participants. Rule 216.c. The statement of Basis and Purpose emphasizes that CDPs are to facilitate “early and collaborative review” to aggregate and expedite regulatory approvals. *See* 2008 Statement of Purpose, p. 6; Kenosha RPO Exhibit 1.

Both 8 North and Kerr-McGee have objected to the CDP on the basis that it does not provide enough detailed information. However, based on the Statement of Purpose, the CDP is intended to provide "early" review. Further, Rule 216 expressly states that the purpose of a CDP is "to identify foreseeable oil and gas activities in a defined geographic area, facilitate discussions about potential impacts, and identify measures to minimize adverse impacts to public health, safety, welfare, and the environment, including wildlife resources, from such activities." Rule 216.a. (emphasis added). These terms indicate future action, supporting the idea that details will be developed during the CDP process, not before the CDP application is filed.

A CDP could lead to fewer storage tanks within the CDP area. As the Commission has stated in the past, tank batteries are one of the biggest impacts of multi-well horizontal development on surrounding communities.<sup>2</sup> Eliminating or reducing storage tanks is only possible through the use of pipelines. Pipelines are only possible through careful planning of locations and sufficient development to warrant the expense of constructing a pipeline.

While the Crestone CDP does not yet include detailed information about drilling locations or pipelines, the Kenosha RPO hopes that, through a collaborative process, the details will be developed and the interests of all surface owners will be adequately protected.

**C. THE PROPOSED VARIANCE ALLOWS FOR A “TIME-OUT” NECESSARY FOR THE CDP TO HAVE A POSSIBILITY TO SUCCEED.**

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<sup>2</sup> Director Lepore has stated that by eliminating tanks, “you eliminate visual impacts, you eliminate air emissions, you eliminate noise, you reduce truck traffic and you take away one of the things that gives rise to the greatest amount of discomfort to the neighbors, the fear of that tank.” COGCC Audio Recording of July 19, 2016 Hearing in Glenwood Springs at 3 hours 11 minutes.

The Kenosha RPO supports the variance request filed by Crestone in its CDP application. In today's highly competitive environment, the only way public conversations about oil and gas spacing units are possible is if the operators take a "time-out" on competing spacing and drilling applications.

CDPs are meant to provide flexibility to the planning and permitting process. The 2008 Statement of Basis and Purpose describes the reasoning behind the CDP rules:

"Thus, the Commission intends CDPs to be a *flexible planning and permitting tool*, which operators can tailor to their needs and circumstances. In this way, the Commission seeks to encourage landscape level planning and regulatory review as contemplated by HB 07-1298 and supported by a number of parties. This should help to better address cumulative effects, promote efficiently, and facilitate more win-win situations. It is the opposite of a one-size-fits-all approach." 2008 Statement of Purpose, pp. 20-21; Kenosha RPO Exhibit 1 (emphasis added).

The Crestone variance application is a request for flexibility anticipated in the 2008 rules. Comprehensive planning will be impossible if competing applications are being submitted, and approved, on a first-come-first-served basis.

Crestone's application meets the requirements of a variance pursuant to COGCC Rules 502.b.(1) because Crestone has 1) "made a good faith effort to comply, or is unable to comply with the specific requirements contained in the rules, regulations, or orders, from which it seeks a variance," and 2) "the requested variance will not violate the basic intent of the Oil and Gas Conservation Act." As discussed above, the purpose of the CDP, as described in the Oil and Gas Conservation Act, would be thwarted if the variance was not allowed.

Kerr-McGee argues that the variance is improper, because it will prejudice Kerr-McGee. Kerr-McGee also states that Rule 216 "contemplates the submission of multiple CDPs from more than one operator for operations covering the same lands." Kerr-McGee Protest p. 3. If this is true, the solution is to include Kerr-McGee in this CPD process, not to allow Kerr-McGee to file competing applications for the same lands. In fact, the Kenosha RPO would encourage all operators in the CDP area to be involved in the collaborative CDP process contemplated by Rule 216.

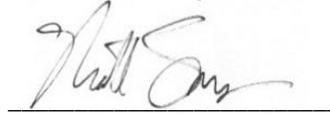
The Kenosha RPO supports the Crestone request for the Rule 502.b. variance to Commission Rule 303. This "time-out" to allow for the CDP to proceed is critical. A CDP would not be able to occur if the Commission allows competing spacing and drilling applications that have become common in Colorado.

## CONCLUSION

The COGCC has had few if any CDPs come before it. Crestone has proposed a collaborative approach that will involve affected landowners, the relevant local governments, state agencies and other operators. Crestone's willingness to try to accomplish a CDP, something that

has eluded the COGCC for the past nine years, should be commended and encouraged. Kenosha RPO respectfully requests the COGCC to support Crestone's requested variance.

Respectfully submitted, this 24<sup>th</sup> day of April, 2017.



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**CERTIFICATE OF SERVICE**

I hereby certify that on this 24<sup>th</sup> day of April, 2017, a true and correct copy of the foregoing was served by email on the following parties.

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