

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

IN THE MATTER OF THE APPLICATION OF) CAUSE NO. 1
CRESTONE RESOURCES OPERATING LLC FOR)
AN ORDER TO: 1) ESTABLISH AND APPROVE A)
RULE 216 COMPREHENSIVE DRILLING PLAN) DOCKET NO. 170500189
FOR SECTIONS 1, 2, 3, 10, 11 AND 12, TOWNSHIP)
1 NORTH, RANGE 69 WEST, 6TH P.M. AND)
SECTIONS 25, 26, 27, 34, 35 AND 36, TOWNSHIP) TYPE: GENERAL
2 NORTH, RANGE 69 WEST, 6TH P.M. FOR THE) ADMINISTRATIVE
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.)

BOULDER COUNTY’S COMMENTS TO FIFTH DRAFT COMPREHENSIVE
DRILLING PLAN

The following comments are submitted on behalf of Boulder County by County staff members. For ease of reference, staff submitting these comments will be referred to below as “the County.” However, these comments are not the result of a full review of any kind, including a review under the Boulder County Land Use Code (“the Code”) by the Board of County Commissioners, which will be required even if the Comprehensive Drilling Plan (“CDP”) is approved by the COGCC. For purposes of the CDP process only, staff has compiled the following comments on Crestone Peak Resources Operating LLC’s Final Comprehensive Drilling Plan (“Fifth Draft”). The County incorporates all of its comments on prior drafts into these comments and further reserves the right to supplement or amend them at any time.

- I. The Commission lacks sufficient criteria or standards by which it can assess a final CDP for approval or denial.

The Fifth Draft, which is intended to be the final CDP, cannot be properly analyzed because there are no criteria or standards provided in COGCC rules by which it can be assessed. Rule 216 and the COGCC’s CDP Plan Elements document require certain information from a CDP applicant. When the complete Fifth Draft was posted to the COGCC website on June 22, it appeared to meet the baseline requirements of Rule 216 and the Plan Elements. Nonetheless, nothing in COGCC’s rules provide a framework for determining the adequacy of the information provided or the

appropriateness of the development proposed. In the absence of adequate criteria, any Commission determination may be considered arbitrary and capricious. *See, e.g., Farmer v. Colorado Parks & Wildlife Comm'n*, 2016 COA 120, ¶¶ 25-26 (“Everyone would agree that an administrative agency cannot validly engage in quasi-judicial decision-making without sufficient standards.”).

For example, while Rule 216 and the CDP Plan Elements require submission of a “list of all proposed oil and gas facilities to be installed within the area” and a “plan for management of exploration and production waste,” along with 10 other outlined sets of information, the rule does not indicate what content or expected outcomes would make that list and that plan adequate for approval. “Sufficient standards are ‘necessary to give fair notice of the criteria to be used so that a case may be prepared, to ensure that all decision makers are using uniform criteria, and to provide a meaningful basis for judicial review.’” *State Farm Mut. Auto. Ins. Co. v. City of Lakewood*, 788 P.2d 808, 816 (Colo. 1990); *see also Moya v. Colorado Ltd. Gaming Control Comm’n*, 870 P.2d 620, 622 (Colo. App. 1994) (first part of analysis under Administrative Procedures Act is whether the controlling rules are “sufficient to insure that administrative action will be rational and consistent in the first instance and that subsequent judicial review of the action is available and will be effective”). Proper standards for agency decision-making “protect against unnecessary and uncontrolled exercise of discretionary power.” *Cottrell v. City & County of Denver*, 636 P.2d 703, 709 (Colo. 1981).

There is no statutory provision governing a CDP; it is a creation of COGCC Rule 216. That rule provides no standards that meet the *State Farm* or *Cottrell* test: there are no criteria or standards by which the COGCC staff of Commission can approve or deny Crestone’s submissions with proper exercise of discretion, no standards by which the County or other parties can analyze and respond to the submissions, and no standards by which a reviewing court would be able to consider an appeal of an approval or denial. In its previous comments, and in meetings, the County has urged COGCC staff to develop and impose criteria and standards for the information submitted by Crestone with which it would determine the sufficiency and appropriateness of the proposed plan. No such criteria have been provided. Nonetheless, according to the CDP timeline, by July 27, the Director will request final determination by the Commission if the CDP “is satisfactory to COGCC Staff.” That determination by staff, and any ensuing determination by the Commission, cannot meet the due process and controlled discretion standards of the Administrative Procedures Act and case law such as that cited above. The CDP should be tabled until the COGCC has developed appropriate criteria for approval.

- II. Contractual issues may preclude Crestone’s right to some or all of the authorizations it seeks.

Where contractual issues affect the parties' legal rights to obtain the Commission approval they seek, the Commission can take notice of those disputes and table dockets or otherwise conserve its resources until those issues are resolved.

The land on which the multi-well pads are proposed in Sections 35 and 36 are encumbered by conservation easements owned by the County. The proposed properties in Sections 3 and 1 are owned by the County in fee, including the minerals, which are subject to leases that pre-existed the County's ownership. In all instances, significant contract or lease issues exist that affect the Commission's ability to approve the CDP.

The County has asked COGCC and Crestone since before the First Draft of the CDP was submitted to provide proof of the mineral rights Crestone asserts underlie its proposed CDP development. Not only is that proof necessary to demonstrate the validity of Crestone's claims to develop the CDP area, but the lease documents often contain limitations or other terms that affect Crestone's rights. When it became clear that Crestone would not provide documentation and COGCC would not require Crestone to do so, the County engaged in its own due diligence search and analysis. Contrary to Crestone's assertion that all necessary information is easily accessible by the public, the County has dedicated numerous professional hours to seeking and analyzing information regarding existing leases, conveyances of lease rights, well production records and the effects of non-production. Outside consultation proved necessary to understand these materials. On the basis of its work, the County has determined that Crestone likely does not have the contractual right to establish the drilling and spacing units proposed for the CDP or to propose or conduct the development described in the CDP.

At its April 30-May 1, 2018, hearing, the Commission tabled its determination on Docket Nos. 1712000857, 1712000858, 1712000859, and 1712000860. In that combined hearing, it became apparent to the Commissioners that the parties had a core contractual dispute over the rights to receive the relief they requested. In consideration of the issue, Director Murphy stated that COGCC staff tries "not to dig into the merits of legal documents," disputes about which are "best decided by the district court." Commissioner Jolley stated that such a contract dispute "needs to be settled in court." Commissioner Holton said the issue was "a contractual problem" that "shouldn't be in front of this Commission." Commissioner Overturf said the parties' disagreement over contractual terms was "better resolved not by us" and Commissioner Boigon said the issue was only in front of the Commission due to the contractual disagreement and it was "embroiling us potentially in a contractual matter" that was "not ripe [and] not appropriate."

The County and Crestone disagree about the meaning of two sets of contracts—the County's conservation easements and several oil and gas leases. The conservation easements prohibit surface development but make exceptions for pre-existing lease rights. However, that exception is limited to the rights existing in the pre-existing leases

and the County asserts that the leases at issue do not allow for the establishment of two-square-mile or four-square-mile drilling and spacing units or for placement of 28 or 56 well pads on single parcels. Additionally, other leases to which the County is the successor lessor contain limitations on the size of drilling and spacing units that can be established over those parcels and the uses to which the attendant surface areas can be put. Therefore, the County disputes Crestone's statement that the CDP as proposed is allowable under the conservation easements and disputes that Crestone has the necessary lease rights to implement its plans.

The County is aware that the COGCC does not interpret or enforce leases. However, the parties have not come to any agreement and no court has determined the scope of their contractual rights under the conservation easements and leases. These disputed issues demonstrate that the CDP cannot be approved as proposed because Crestone may not have the right to conduct the development it proposes under the contracts.

III. A new location should not be proposed in a "final" plan.

In what is purported to be its final plan, Crestone proposes an alternative site in Section 36 for placement of 56 wells that has not previously been put forward. COGCC staff has not received comments on this new site, stakeholders including the County have not had an opportunity to analyze the impacts of the new proposed site, and Crestone has not had the opportunity to make changes to the new proposed site based on comments and consultation. Instead, the new site is offered to COGCC "as is" if COGCC finds it preferable to the Section 1 site. This is inappropriate for what is meant to be a final plan.

Because the proffered alternative site may respond to significant flood risk concerns with other sites, it should be given due consideration but substantial additional information would be required. For example, the alternative site locates 56 wells very close to the 28 wells proposed in Section 35, creating essentially an unprecedented 84-well site, the impacts of which must be carefully considered. The Section 36 site is wholly within the ½-mile buffer from the existing bald eagle nest and closer to the riparian habitat around Panama Reservoir, posing potential adverse wildlife impacts for which the CDP proposes no timing accommodations or other mitigation. Moreover, Section 1 and Section 36 are not the only two possible sites from which the proposed drilling and spacing unit can be developed. The Colorado Department of Public Health and Environment submitted its comments to the Fifth Draft early. CDPHE stated that the County's routine designation process "forced" Crestone to consider the alternative location. In fact, Crestone announced that it had reached agreements giving it control of the minerals along the north side of Highway 52 shortly after the Fourth Draft was posted, opening up that entire area for consideration. The County urged due consideration of that area in the interests of truly comprehensive planning. The County

shares CDPHE's concerns with the alternative site, arguing again that it is not the only alternative to the Section 1 site. While the County urged Crestone to review possible sites north of Highway 52, the alternative site on Section 36 is not necessarily the best option for numerous reasons, and should not be approved without significant analysis, none of which has been provided in the Fifth Draft.

IV. Floodway designation process corrections.

Crestone accuses the County of only "recent disclosures" of an alleged "attempt to obstruct oil and gas development" through an "attempt to re-designate" lands in the CDP area as floodway. Bypassing the rhetoric, the County clarifies, as it has several times to both Crestone and COGCC staff, that it has disclosed floodway concerns beginning with its comments to the CDP First Draft on November 10, 2017 ("The Plan proposes a pad site in Section 11 [sic] which is wholly within the properly measured floodway (as opposed to floodplain)."). All of the County's repetitions and elaborations of its floodway concerns in its CDP comments are cited in the County's comments to the Fourth Draft and need not be repeated here.

As to the County's alleged "attempt to re-designate" lands in the CDP area, the County is requesting designation from CWCB per statutory procedures that anticipate designation of floodplain and floodway data and mapping by the Colorado Water Conservation Board ("CWCB"). See § 37-60-106(1)(c), C.R.S. (it is CWCB's "duty" to "designate and approve storm or floodwater runoff channels or basins").

The current re-modeling and re-mapping of floodplains and floodways in the County began in 2015 with the passage of S.B. 15-245 that created the Colorado Hazard Mapping Program, or CHAMP, within the CWCB. Earlier in the CHAMP process, at the end of 2016, CWCB completed updated hydraulic modeling and resultant maps of the floodplain on the Lower Boulder Creek reach, which were submitted to the County and then to FEMA for review. CWCB and its contractor AECOM, not the County, chose to use more complex 2D hydraulic modeling due to the complexity and split-flow pattern of Lower Boulder Creek. The 2D floodplain data has been designated by CWCB.

Between January and May 2017, CWCB and AECOM drafted a memorandum defining a methodology to analyze certain floodways, including Lower Boulder Creek in Boulder County, with 2D technology. The 2D methodology was related to and necessitated by CWCB's and AECOM's earlier choice to create a 2D floodplain model. The technical memo was submitted to FEMA for review and the CWCB/AECOM proposed methods was approved by FEMA in May 2017. CWCB then provided the County with 2D floodway models and mapping on the Lower Boulder Creek reach in March 2018 and sent the updated modeling and mapping to FEMA for its review in May 2018. FEMA returned review comments to CWCB on the mapping on June 4, 2018.

Additional FEMA comments on the floodway modeling analysis are expected at any time. The County then requested designation of the new data on June 13, 2018, pursuant to § 37-60-106(1)(c), C.R.S., § 30-28-11, C.R.S., and 2 C.C.R. § 408-1. A more detailed timeline of these events is attached as Addendum 1.

The only consideration for CWCB designation is whether the data submitted meet CWCB's technical standards. *See* 2 C.C.R. § 408-14 (designation defined as "certification by formal action of the Board that technical information developed through scientific study using accepted engineering methods is suitable for local governments making land use decisions"). The data created by CWCB and presented for designation by the County are the best data available from state analysis, were prepared in accordance with applicable technical standards and with FEMA-approved methodology. Moreover, the request for designation procedure is routine; CWCB is directed by statute to designate technically sufficient data and the County has requested and received designation from CWCB before receipt of FEMA's final approval in the past.

Regardless of the designation, under state statute and its own Land Use Code, the County is authorized to regulate to the best available information as regards floodplain management. *See* 2 C.C.R. § 408-114 ("In the event that a community is aware of and has access to better available information on a previously designated flooding source, then the CWCB allows for that undesignated information to be used for regulatory purposes"); *see also, e.g.*, Boulder County Land Use Code § 4-403(C)(2) ("Sources of best available information for interpretations [of flood district maps] include . . . any other reliable sources that the County Engineer finds meets an acceptable level of technical accuracy as determined through prevailing industry practices"). Contrary to Crestone's assertions, the County has been telling Crestone and COGCC for over a year that the best available floodway information in the CDP area demonstrates that the entire 56-well pad in Section 1 on the Wheeler Open Space is within the floodway.

Finally, the County would like to remind the COGCC of its own report, "Lessons Learned' in the Front Range Flood of September 2013," *see* http://cogcc.state.co.us/announcements/hot_topics/flood2013/finalstaffreportlessonslearned20140314.pdf, including its executive summary which begins:

The Colorado Oil and Gas Conservation Commission ("COGCC" or the "Commission") estimates that more than 5,900 oil and gas wells lie within 500 feet of a Colorado waterway that is substantial enough to be named. When these streams flood, nearby oil and gas facilities are at risk of damage, spills, environmental injury and lost production.

Additionally, the report's "Suggestions for Improvement Gathered by COGCC" include at number one: "Operators should avoid locating wells and production equipment and tanks near waterways whenever practical and possible."

As the County testified in the 2015 Rulemaking related to the Lessons Learned report, hazards should be avoided (i.e., locating a well pad outside of the floodway) before considering mitigation measures that simply help lessen any damage. It is illogical to reason otherwise. Almost five years after the Front Range Flood, Boulder County is still recovering from the damage experienced. The COGCC should not ignore its own lessons learned.

Despite unnecessary interpretations from Crestone, the floodway information provided by the County with all of its comments to former CDP drafts is technically correct and procedurally routine. The designation the County seeks allows the state, the County and the public to recognize an existing flood hazard, it does not create a hazard that doesn't already exist. Moreover, Crestone's accusations ignore the most significant issue: locating large-scale oil and gas facilities in the floodway involves flood risk that should be avoided by more careful planning in this COGCC process.

V. Numerous issues have been raised by commenters and never addressed by Crestone.

The County and other commenters have raised numerous concerns and provided voluminous, specific information to Crestone in response to its first, second, third, and fourth drafts that has gone largely unaddressed. With each set of comments, the County has pointed back to its earlier comments, continuing to incorporate their substance. The list of unaddressed matters is contained in the following table. Other commenters have certainly raised additional issues that have not been addressed; this section lists only the County's comments. Given that the Fifth Draft is styled as the Final CDP, there is no more time for Crestone to address those matters it has continued to ignore or push off. The CDP should not be considered ready for Commission consideration, and certainly should not be approved, while these substantive issues remain unanswered.

Issue	Answered in 2nd Draft?	Answered in 3rd Draft?	Answered in 4th Draft?	Answered in 5th Draft?	Answered in Draft Form 2A?
Failure to prove ownership and scope of mineral rights	No	No	No	No	No
Failure to demonstrate lease rights on any given parcel for placement of massive well pads to drill several square miles	N/A	N/A	No	No	No
Failure to fully consider all available surface sites	No	No	No	No	No
Failure to use best available data regarding floodway	No	No	No	No	No

Failure to demonstrate need to use open space lands purchased with county taxpayer dollars and strictly protected from development	No	No	No	No	No
Failure to use best available data on wildlife and sensitive plant species	No	No	No	No	No
Failure to identify fresh water sources	No	No	No	No	No
Failure to address measures to protect sensitive plant and wetland communities	No	No	No	No	No
Failure to specify that pipelines under wetlands will be bored and not trenched	No	No	No	No	No
Failure to provide specific information on the timing and methodology for seismic testing	No	No	No	No	No
Failure to specify emergency response planning	No	No	No	No	No
Failure to identify how and when the “other parties” listed in the narrative will be contacted	No	No	No	No	No
Failure to include timing considerations for agricultural activities and wildlife needs in the development timeline	No	No	No	No	No
Failure to provide for updating wildlife and plant surveys annually to reassess nesting and foraging areas	No	No	No	No	No
Failure to indicate whether Quiet Fleet technology will be used	No	No	No	No	No
Failure to identify how livestock uses will be accommodated and protected	No	No	No	No	No
Failure to identify which existing wells will be plugged and abandoned	No	No	No	No	No
Failure to clarify and commit to use of storage tanks on site	No	No	No	No	No
Failure to identify	No	No	No	No	No

accommodations for agricultural infrastructure and equipment					
Failure to demonstrate state approval for use of state highways	No	No	No	No	No
Failure to commit to holding start of production until all takeaway capacity is in place	No	No	No	No	No
Failure to identify which existing wells will be plugged and abandoned or criteria for that selection and failure to provide a timeline for p&a	No	No	No	No	No
Failure to describe or identify how topsoil will be segregated and stored	No	No	No	No	No
Significant deficiencies in the Phase I environmental report relied on by Crestone, identified in the County's comments on the Second Draft	N/A	No	No	No	No

VI. The CDP proposes the largest and most intensive development in the state.

According to the production timeline, at the two proposed 56-well sites in the CDP area, there will be drilling activity followed by completion work going on 24 hours a day and 7 days a week for three years. Occasionally there will be both drilling and completions happening at the same time. The county residents, wildlife, and livestock living near these areas will experience truck traffic, noise, bright lights, odor and vibrations without respite for three years. According to the development timeline, those who live between the central site and the westernmost site will experience this disruption for almost five years running. In addition, pipeline construction may extend the on-going construction impacts at each area by several weeks. Impacts of this intensity will undoubtedly cause stress and health issues, interrupt wild animals' feeding and breeding activities, and alter the nature of the surrounding lands and inhabitants' lives well beyond the active construction phases.

The facilities proposed in the CDP, particularly the sites where two 28-well pads are proposed together, represent some of the largest and most intensive well pads in the state. According to COGCC staff, 58 wells were previously approved on a single pad in Weld County, but that permit expired before the wells were drilled and the minerals were

drilled from other locations. Forty wells are currently active on a single pad in Routt County, the highest number of active wells on one site in Colorado. Thus two sites with 56 wells will represent the largest well pads in the state. Crestone's proposed alternate site on Section 36 right next to its Section 35 site would create a virtual pad of 84 wells, more than double the largest operating pad in the state and almost double the largest pad ever permitted by COGCC. Thus, the impacts on people, animals and the land from such intensive industrial-scale development are unknown and unprecedented.

Crestone should not be permitted to overload single parcels, particularly those purchased and preserved with public funds, with development on a never-before-seen scale.

VII. The CDP process has not met COGCC's intention for robust public input.

Starting before the First Draft was submitted, the County has pointed out that the CDP process did not provide for adequate or robust public input and that Crestone's interpretation of that process appeared to give only lip service to the public engagement aspects. Public meetings were held by telephone town hall rather than in person, sharply limiting the type and quality of interactions available. Town halls were scheduled with inadequate prior notice and after insufficient time to review the most recent draft of the CDP. A new alternative site was first put forward in the Fifth Draft, with only one telephone town hall and a foreshortened public comment period in which to consider its impacts. COGCC failed to post the complete Fifth Draft for three days into the public comment period, which also included a federal holiday, but was willing to extend the public comment deadline by only two weekend days. While Crestone can say that it did public outreach, for a variety of reasons, that outreach was inadequate for a proposal of this magnitude.

VIII. Conclusion

At this late stage of the process, the County remains concerned with the adequacy of the data and information Crestone has provided, Crestone's failure to respond to numerous requests for information or clarification, the nature and degree of public participation, and the CDP process overall. This is best illustrated by a Fifth (presumably final) Draft that proposes an "alternate location" but contains little analysis of the alternative location and provides only one, abbreviated opportunity for the public to comment on the new site before the CDP may be deemed final by COGCC staff. Moreover, nothing in COGCC rules or policy statements provides the standards or criteria by which the Fifth Draft, or any CDP, can be evaluated. Crestone and the COGCC must address these issues to avoid a flawed process and a flawed outcome.

Submitted this 6th day of July, 2018



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ADDENDUM 1

Boulder County floodplain and floodway modeling and mapping timeline

- **September, 2013** – Flooding severely impacts all areas of Boulder County
- **May 1, 2015** – Senate Bill 15-245 ‘Concerning the provision of state funding for natural hazard mapping’ signed into law with 6+ million dollars, for purposes including ‘to update floodplain mapping for flood-impacted areas... ‘ creates the Colorado Hazard Mapping Program (CHAMP)
- **November 20, 2015** – Boulder County signs CHAMP scope agreement with CWCB
- **December/January 2017** – CWCB delivers 2D modeling and mapping of Lower Boulder Creek floodplain to Boulder County for review. Modeling and mapping incorporated US Army Corps post-flood stream restoration project.
- **January 25, 2017** – Technical memo prepared by AECOM/CWCB proposing methodology for analysis of 2D floodways, revised May 1.
- **March 2017** – CWCB sends floodplain modeling of Lower Boulder Creek to FEMA for hydraulics review.
- **April 20, 2017** – County sends written request to CWCB for designation of Phase I CHAMP and Risk MAP studies.
- **May 16, 2017** – County approves Phase I maps as requested for CWCB designation, signing final resolution May 30.
- **May 17, 2017** – CWCB approves Boulder County’s designation request from April 2017.
- **May 22, 2017** – FEMA Region VIII approves AECOM/CWCB proposed technique for analysis of 2D floodway.
- **October 13, 2017** – CWCB issues written resolution memorializing its May 17 designation and approval of “Colorado Hazard Mapping Program, Phase I and Related Study Areas, Boulder County dated April 2017” and covering identified stream reaches listed at page 3 of their resolution.
- **November 10, 2017** – Boulder County submits comments on the First Draft CDP, stating that the floodway on Lower Boulder Creek should be measured by the CWCB’s six-inch rise standard, not the earlier one-foot-rise standard.
- **December 8, 2017** – Boulder County submits comments on the Second Draft CDP, stating that better and updated floodway information is available but not incorporated in the Second Draft.
- **January 12, 2018** – FEMA contractor (Compass) approves Lower Boulder Creek floodplain modeling hydraulics.
- **January 19, 2018** – Boulder County submits comments on the Third Draft CDP, outlining that the Section 1 proposed pad is wholly within the six-inch-rise floodway.
- **February 1, 2018** – Boulder County requests from CWCB modeling and mapping of 6-inch floodway on Boulder Creek from Kenosha Rd/ 115th Street bridge to East County Line Rd.
- **March 30, 2018** – CWCB delivers Lower Boulder Creek floodway modeling and mapping to Boulder County for review and outreach to residents.

- **April 15, 2018** – Boulder County submits comments on the Fourth Draft CDP, detailing how the floodway has been newly modeled and mapped and repeating all of its earlier comments that best available information shows the Section 1 proposed pad is within the floodway.
- **May 1, 2018** – CWCB delivers Lower Boulder Creek floodway modeling and mapping to FEMA for review.
- **June 4, 2018** – CWCB receives mapping comments from FEMA’s reviewer Compass.
- **June 13, 2018** – Boulder County requests CWCB designation of Lower Boulder Creek floodway.