Colorado Petroleum Association – Rule 609 Alternate Proposal

Proposed Statement of Basis, Specific Statutory Authority, and Purpose

Statutory Authority:

The statutory authority for Rule 609 is C.R.S. §§ 34-60-105(1) and 106(2)(d).

Basis and Purposes:

As horizontal drilling has increased in Colorado in the last several years, a number of local governments have taken steps to require, or have considered requiring, oil and gas operators to conduct water well sampling in proximity to proposed oil and gas well locations. The concern held by these local governments is that oil and gas wells potentially create conduits through which hydrocarbons or other substances used downhole can migrate into water bearing formations used as domestic water supplies.

The Commission is cognizant of the concern held by these local governments. However, the Commission is also cognizant of the fact that, there have been virtually no instances outside of the coalbed methane setting where the Commission has concluded that oil and gas wells have acted as conduits for the migration of substances into ground or surface waters. Therefore, the Commission believes that a narrowly tailored rule is appropriate to address the local governments' concerns, while at the same time honoring the oil and gas industry's concerns that a water sampling rule could create unnecessary costs and other burdens.

Two other factors militate in favor of adopting Rule 609. First, the Commission believes that a patchwork of local government water sampling requirements is undesirable. The Commission's regulations can preempt local government regulation where there is an operational conflict between the two. Such an operational conflict exists where the effectuation of the local interest would materially impede the Commission's interest. *La Plata County Bd. of Comm'rs v. Bowen/Edwards Assocs*., Inc., 830 P.2d 1045, 1059 (Colo. 1992). In promulgating Rule 609, the Commission heard extensive testimony from local governments and other stakeholders, reviewed numerous exhibits and other filings, and comprehensively considered the need for statewide water sampling. As such, the Commission believes that any local sampling requirements which are more stringent than, or add to, Rule 609 would materially impede the Commission's regulatory interests.

Second, the Commission notes that a number of operators have been voluntarily participating in a sampling program which is similar to Rule 609. Members of the oil and gas industry have engaged in this program in an effort to be a good neighbor to surrounding water well owners. Sampling in this manner could also benefit the industry. The Commission anticipates that, in the vast majority of cases, the water sampling protocol under Rule 609 will enable operators to demonstrate that there is no causal link between oil and gas operations and water quality problems.

The opening language of Rule 609 acknowledges that certain existing rules already address water sampling for specific types of wells and/or distinct portions of the state. Those rules would remain intact and would continue to govern according to their stated scope. This opening language also recognizes that a "one size fits all" approach is often not appropriate. Therefore, existing or future orders may supersede Rule 609 where such orders set forth water sampling protocols for particular areas of the state and/or particular types of wells.

The opening language also establishes that only oil and gas wells are subject to the Rule, and that duplicative sampling events are not necessary for multi-well sites. Certain parties to the rulemaking proposed to extend Rule 609 to all or oil and gas facilities. The Commission considered their evidence and testimony and rejected this proposal. The Commission does not believe that these additional facilities in themselves pose a potential threat to ground water resources. Further, to impose sampling for such facilities in every instance would place a considerable cost and burden on the industry, without the corresponding benefit to the public health, safety, and welfare.

Subsection (a) sets forth the basic sampling location criteria. Sampling two wells within a half mile radius finds precedent in Rule 609, Rules 318A(I) and (II), and the sampling program voluntarily implemented by a number of operators. The other criteria in subsection (a) are designed to ensure that the highest quality samples are taken, in light of the Rule's purpose to protect domestic water sources. As indicated, sampling is limited to oil and gas wells and multi-well sites because the Commission finds that a broader rule would impose duplicative and/or unnecessary sampling requirements. Similarly, operators may use existing data to avoid redundant testing.

Subsection (b) acknowledges that compliance with Rule 609 can be prevented by the owners of domestic water sources. This provision exempts oil and gas wells from the sampling requirements where such owners cannot reasonably be contacted, do not grant access to the well(s) or spring, or are unwilling to consent to public disclosure of the data obtained through sampling. The Rule expressly acknowledges that operators who cannot meet the sampling requirements for these reasons are not in violation of the Rule. Further, this subsection acknowledges that Rule 609 is intended to further build a database regarding water quality and not to create substantive or procedural rights in domestic water well or spring owners. Thus, operators will never be required to compensate such owners in order to comply with Rule 609.

Subsections (c) and (d) cover the timing of sampling. Sampling is required prior to drilling operations on a well site or a multi-well site in order to establish baseline water quality for the tested water sources. One subsequent monitoring sampling event is then required under Rule 609 to assist the Commission in determining whether baseline levels have changed, with additional sampling as deemed necessary under specified circumstances. The Commission considered and rejected requiring additional subsequent monitoring samples as a matter of course. It is the Commission's opinion that re-testing the sampled wells within 12-18 months of completion corresponds to the 1/2 mile radius under subsection (a). It is anticipated that any substances that may have migrated from the wellbore will be detected within the 1/2 mile radius within the 12-18 month time frame. Monitoring sampling at greater distances and longer time frames is less reliable in identifying whether changes in water quality relate to oil and gas activities.

The Director may require subsequent sampling in response to verified complaints from certain water well owners, or if he or she sees material changes in water quality related to oil and gas production activities. When the Director requires such sampling, it will be solely for the purpose of protecting domestic water well owners and the decision to require further sampling will often be made when the Director does not have complete information. Therefore, no inference should be made in any judicial or administrative proceeding when an operator assists in this effort by conducting the sampling requested by the Director.

Finally, subsections (e) through (i) address sampling procedures and other miscellaneous matters. In subsection (f), the constituents to be tested for are very similar to those required in other rules and the voluntary program that preceded Rule 609. The Commission declined to require hydrogen sulfide testing in all instances, given the varying geologic conditions in the oil and gas bearing formations throughout the state. Subsection (g) makes clear that an operator will not be deemed to be in violation of the Commission's rules for changes in water quality unless and until the operator is found to be a "Responsible Party" under existing procedures. Subsection (i) expressly states the Commission's intent that Rule 609 preempt any operationally conflicting local government sampling requirements, whether imposed by permit, land use processes, or otherwise.