

**BOARD OF COUNTY COMMISSIONERS
COUNTY OF PARK**

IN RE: THE APPEALS OF THE ISSUANCE OF A NO SIGNIFICANT IMPACT OIL AND GAS OPERATION PERMIT TO EL PASO E & P COMPANY LLC FILED BY EDDIE KOCHMAN, RICHARD HAMILTON, SAVE OUR SOUTH PARK WATER REPRESENTED BY RAMON CASTRO, SUSAN H. MOORE AND DORIS LEDUE, APPEALLANTS

FINDINGS OF FACT, CONCLUSIONS AND ORDER

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF PARK STATE OF COLORADO (the "BOCC"), enters the following Findings of Fact, Conclusion and Order in the above-captioned matter.

FINDINGS

1. On August 10, 2010, after a duly noticed and properly conducted public hearing the Park County Planning Commission adopted Resolution No. 08-2010-03, issuing to El Paso E & P LLC ("El Paso" or the "Permittee") a No Significant Impact Oil and Gas Operation Permit (the "Permit") for the construction of three natural gas exploration wells in Park County.

2. Five parties, Eddie Kochman, Richard Hamilton, Save Our South Park Water represented by Ramon Castro, Susan H. Moore and Doris LeDue, filed timely appeals to the issuance of the permit as allowed by Section 5-1006B.7 of the County's Land Use Regulations.

3. A hearing on the appeals was held before the BOCC on September 30, 2010.

4. Notice of the hearing was given in the manner required by Sections 5-1006 and 1008 of the County's Land Use Regulations and evidence of such notice was made a part of the record of the proceeding. No party or person objected to either the jurisdiction of the BOCC or the procedure for the hearing described at the commencement of the hearing.

5. At the hearing each Appellant were given a full and fair opportunity to present evidence and argument as to why the Planning Commission's issuance of the Permit should be reversed or amended. El Paso was then given a full and fair opportunity to present evidence and argument as to why the Planning Commission's issuance of the Permit should be affirmed. The Appellants were then given an opportunity to present rebuttal evidence and argument. El Paso, with the consent and approval of the Appellants, then responded to questions raised by the Appellants during their rebuttal. The entire proceeding was recorded.

6. The BOCC has reviewed and considered the evidence presented to the Park County Planning Commission (the record of which is made a part of the record of this proceeding) and all evidence and argument submitted by the parties to this proceeding. That evidence is briefly summarized herein.

7. Appellant Eddie Kochman owns property on the Middle Fork of the South Platte River approximately 4 miles from the proposed gas wells. He presented written argument which was made a part of the record. He noted that the Planning Commission hearing was poorly

attended by the public. He further stated that if natural gas is found during the exploration process this will be a big project. Mr. Kochman stated that his primary problem with the Planning Commission's decision was that the Commission did not require water well monitoring within a three mile radius of the proposed gas wells, rather than the 1 mile radius required by the Permittee's surface use agreement with the Colorado Division of Wildlife. He further requested that additional monitoring be performed downstream on the Middle Fork, that the County consider funding the proposal by the Coalition for the Upper South Platte ("CUSP") to perform monitoring, voiced concerns about the impact of this project on wildlife in the vicinity, and suggested more public notice of future applications of this type. Mr. Kochman withdrew his suggestion to the Planning Commission that radon testing be a condition of the Permit.

8. Appellant Richard Hamilton also presented written argument which was made a part of the record. He disputed the determination of the Planning Commission that the proposed gas wells have no significant impact, referring to the "fallacy of authority." He presented a petition to the Pikes Peak Area Council of Governments regarding safe drinking water standards which was accepted into evidence, although it would seem to have little if any relevance to this proceeding. Mr. Hamilton suggested that a water decree or well permit might be required from the State of Colorado for this project.

9. Ramon Castro, representing Appellant Save Our South Park Water, read aloud his written appeal which is a part of the record. He added that he had spoken with representatives of the Colorado Division of Wildlife ("CDOW") and that he was told that CDOW would not object to additional monitoring wells over and above those already required by the surface use agreement. Mr. Castro asked that the Permit be amended to require that El Paso submit a plan for additional monitoring wells and that El Paso be required to use "green" fracturing fluid, a compound which he said is currently in use in Canada and in off-shore drilling operations.

10. Appellant Susan H. Moore stated that she is a landowner in Park County and that she does not agree with the Planning Commission's "no significant impact" determination. She requested that the BOCC require water well monitoring within a 3 mile radius of the proposed gas wells as well as additional testing downstream on the Middle Fork.

11. Appellant Doris LeDue also disagreed with the Planning Commission's "no significant impact" determination, voiced her concern that El Paso had not released water test results, and asked that the BOCC modify the renewal condition in the Permit. She introduced the testimony of two witnesses. The first was James Tyson of the Colorado Wildlife Federation who stated that the Permit would jeopardize Park County's National Heritage Area designation and addressed the impact of the proposed gas wells on wildlife. The second was Mel Shulman of the Park County Advisory Board on the Environment ("ABE"). Mr. Shulman referred to the matrix developed by ABE which is a part of the record in this proceeding and stated that the High Creek Fen, as a matter of hydrology, will not be affected by this project. He further stated that CUSP will be doing monitoring.

12. El Paso next put on its case with David Wheeler serving as El Paso's primary witness and spokesman. El Paso submitted both a written response to the appeals and a slideshow, both of which were made a part of the record of this proceeding.

13. Based on the diagrams, testimony and evidence presented, the BOCC finds that the natural gas exploration wells allowed by the Permit will be sleeved and lined to below the depth of any water wells or groundwater water sources currently in use in the vicinity of the proposed wells. While these safeguards do not eliminate any conceivable risk of groundwater

contamination from the construction of these wells, the BOCC finds that they render that risk extremely remote.

14. El Paso also presented evidence regarding the typical components for fracturing fluid. Fracturing fluid typically consists of mostly water and sand (either natural or synthetic) with small amounts of other constituents commonly found in household products. The BOCC finds that, while helpful, this information does not identify the components of the fracturing fluid to actually be used on site in this project. Moreover, the parties all acknowledged that, while common, some of the components of fracturing fluid would be harmful pollutants if found in drinking water.

15. El Paso testified that the results of water testing performed by El Paso and its consultants have been released to CDOW and the owners of the tested wells. The BOCC notes that pursuant to Condition 6 of the Permit, these test results must be filed with the County's Planning Department.

16. El Paso also noted that if the initial exploratory wells discover commercially quantities of natural gas with the result that additional production wells are proposed, the Colorado Oil and Gas Conservation Commission ("COGCC") could require a comprehensive water study as a condition to further development. The BOCC concurs, and states for the record that it would encourage both COGCC and any future BOCCs to require such a study as a prerequisite to full-scale development of oil and gas extraction in this area.

CONCLUSIONS

1. The field of oil and gas regulation is addressed extensively by the Colorado Oil and Gas Conservation Act, C.R.S. § 34-60-10 1 et seq. (the "Act"), and regulations adopted by the COGCC under the authority of the Act.

2. While state law addresses oil and gas extraction extensively it does not, either expressly impliedly, preempt local regulation of this important activity. *See Bd. of County Commissioners v. Bowen/Edwards Associates, Inc.*, 830 P.2d 1045 (Cob. 1992). *See also Kalish, Dahi and Price, The Doctrine of Preemption and Regulating Oil and Gas Development*, 38 *Colo. Law.* 47 (Oct. 2009).

3. While local governments such as Park County may regulate oil and gas drilling within their boundaries they may not prohibit such drilling. *Voss v. Lundvall Bros., Inc.* 830 P.2d 1061 (Cob. 1992).

4. Moreover, local government regulations that seek to control the technical aspects of oil and gas drilling may be operationally preempted by state law if they materially impede or destroy the state interest in regulation. *Bowen/Edward, supra*. *See also Town of Frederick v. North American Resources Co.*, 60 P.3d 758 (Cob. App. 2002).

5. The Colorado appellate courts have specifically rejected the suggestion that the Act generally preempts local oil and gas regulations pertaining to water quality, while recognizing that particular local regulations may operationally conflict with state law.

Protection of water supplies is a matter of both state and local concern and may be regulated by local governments. *Town of Carbondale v. GSS Props., LLC*, 140 P.3d 53 (Cob. App. 2005) [reversed on other grounds, 169 P.3d 675]. In *Town of Carbondale*, GSS contended that a municipal ordinance regulating water quality was facially preempted by state law. A division of this court held that an

evidentiary hearing was necessary to determine whether there was an operational conflict between state and local water quality controls. *Town of Carbondale, supra.*

County Regulations § 1-1-4 (B19), 1-107G, and 1-107H impose water quality standards and waterbody setbacks. Here, the general grant of authority in §34-60-1 06(2)(d) to regulate environmental impacts on water does not on its face conflict with the County regulations. Therefore, an evidentiary hearing is necessary to determine the existence of any operational conflicts.

Board of County Commissioners of Gunnison County v. BDS International, LLC, 159 P.3d 773, 780 (Cob. App. 2006).

6. Based on the evidence adduced at the public hearing the Board concludes that there is insufficient evidence to allow it to conclude that the Planning Commission erred in issuing the Permit. The BOCC holds that, with the amendments discussed below, the Permit adequately protects water quality, wildlife and air quality as to the three exploratory natural gas wells allowed by the Permit. The BOCC notes that additional protections and conditions may be required if full development of a natural gas well field is proposed in the future.

7. The BOCC further concludes that an amendment to the Permit is appropriate to require additional water testing and monitoring if any of the water monitoring already required indicates the presence of contaminants or pollutants reasonable attributable to El Paso's activities.

ORDER

The decision of the Park County Planning Commission to issue the Permit is affirmed, but amended by the addition of a new Condition 13, to read as follows:

13. Should any of the testing or monitoring required by Section 11 of the Surface Use Agreement between the Colorado Division of Wildlife and El Paso E&P Company, L.P., dated May 27, 2010, identify contaminants or pollutants which are reasonably determined by County staff to be attributable to El Paso's activities pursuant to this Permit, this Permit may, in Park County's reasonable discretion and upon the giving of reasonable notice and an opportunity to be heard to the Permittee, be withdrawn or amended to add conditions including, but not limited to, additional monitoring and testing requirements, remediation or such other conditions as are warranted under the circumstances.

DATED this 14th day of October, 2010.

PARK COUNTY BOARD OF COUNTY COMMISSIONERS

Mark Dowaliby, Chairperson

ATTEST:

County Clerk