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SUMMARY OF MEETING

COMMITTEE ON LEGAL SERVICES

March 6, 2009

The Committee on Legal Services met on Friday, March 6, 2009, at 12:13 p.m. in the Old Supreme Court Chambers. The following members were present:

Senator Veiga, Chair
Senator Brophy
Senator Mitchell
Senator Morse
Senator Schwartz
Representative B. Gardner
Representative Labuda
Representative Levy
Representative McGihon, Vice-chair
Representative Roberts

Senator Veiga called the meeting to order. She said we're here to consider House Bill 09-1292, the rule review bill. I've asked Charley Pike to come forward and briefly talk about the procedure and then we will move forward with a presentation from Tom Morris who provided the report, and from then on into testimony.

Charley Pike, Director, Office of Legislative Legal Services, addressed the Committee. He said the usual practice in this kind of a situation is you sit as the Committee on Legal Services when the Committee is acting on the rules and then the Committee sits as the committee of reference when it acts on the rule review bill. The Committee is sitting in a bit of an unusual circumstance today and that's because the Executive Committee asked you all to look at the oil and gas rules out of cycle. Basically, these are rules that were promulgated after November 1, so they actually would be reviewed in the usual course next

interim. They expire on May 15, 2010. Since you're reviewing them out of cycle, you would normally take the standard approach, i.e., a member of our staff would present the memo to you with regard to the oil and gas rules and then you all can take whatever action it is you deem appropriate on the rules. Then subsequent to that, you actually sit as the committee of reference for the rule review bill. Ms. Haskins has handed out some suggested motions that you all can look through, and the purpose for that was, again, since these rules are out of cycle, they're a bit different than how you would normally handle a motion to extend or not extend a particular rule that would be expiring this May. Since these rules expire the following May, you would either extend the rules or you would want to simply delete them or repeal them. The other thing is, once you're acting as the committee of reference, we put a suggested motion in the sheet that Ms. Haskins handed out that you might consider for purposes of expediting the actual vote on whatever it is you elect to do as the Committee on Legal Services once you're sitting as the committee of reference. Our suggestion was you might want to think about doing simply one motion that incorporates into the bill all of the actions that you've previously taken as the Committee on Legal Services. If you want to proceed as you would normally do, Tom Morris is here and ready to proceed with the memo.

Tom Morris, Senior Staff Attorney, Office of Legislative Legal Services, addressed agenda item 1 - Rules of the Colorado Oil and Gas Conservation Commission, Department of Natural Resources, concerning Practice and Procedure, 2 CCR 404-1.

Mr. Morris said we have the rules of the Oil and Gas Conservation Commission. We have essentially four recommendations to repeal rules relating to three issues and to postpone the expiration of the remainder of the rules. The first issue relates to something called a compliance checklist. It's a new form required by the commission and the issue is whether the commission can exempt violations that are disclosed by that compliance checklist from the criminal punishment that is specified in statute. Our recommendation is that they cannot and that the rule ought not to be extended. The second issue relates to the consultation procedure that the General Assembly recently enacted and whether the obligation to consult should be on the government party, in this case the division of wildlife (DOW), or on the oil and gas operator. Our conclusion is that the rules in one instance got that obligation backwards and that rule ought not to be extended. The third issue is with regard to some incorporation by reference issues and those you've heard before so I won't spend a lot of time on that issue at this point. I will draw your attention to the suggested motion language, as Mr. Pike mentioned, that is in my memo. It is slightly different because these rules are out of cycle and

so their expiration won't simply be postponed or not postponed. The recommendation is that those particular rules we have concerns about be repealed and that they be included in this year's rule review bill. The flip side of that is that the automatic expiration of the remainder of the rules be postponed and that automatic expiration also be included in this year's rule review bill.

Mr. Morris said I'll start with a brief overview of the commission's general rule-making authority before I dive into any specific concerns that we have with the rules. The commission has broad general authority to administer the "Oil and Gas Conservation Act". Section 34-60-105 (1), C.R.S., says the commission has jurisdiction over all persons and property and has the power to make and enforce rules and to do whatever may reasonably be necessary to carry out the provisions of this article. That's a broad grant of authority. The commission also has a somewhat unusual grant of authority. Section 34-60-106 (4), C.R.S., says the grant of any specific power or authority to the commission shall not be construed in this article to be in derogation of any of the general powers and authority granted under this article. This particular grant will come up and be significant with regard to some of the issues other parties may raise with the Committee with regard to specific rules. The legislative declaration of the "Oil and Gas Conservation Act" directs the commission to do essentially a balancing act between the development of oil and gas resources and public health, safety, and welfare, including protection of the environment and wildlife resources. A broad and important grant of rule-making authority is in section 34-60-106 (2) (d), C.R.S. It's important in that it says the commission has the authority to regulate oil and gas operations, which is a defined term in the act and is a very broad description, so as to prevent and mitigate significant adverse environmental impacts to the extent necessary to protect public health, safety, and welfare, including protection of the environment and wildlife resources. I think the word "prevent" is important and I will be coming back to that later in my presentation.

Mr. Morris said the main impetus for the current rule-making are two bills the General Assembly passed two years ago. They are two related bills that were tied fairly closely together, House Bill 07-1341, regarding public health, and House Bill 07-1298, regarding wildlife resources. The main portion of House Bill 1341 tells the commission to promulgate rules to protect public health, safety, and welfare in the conduct of oil and gas operations. I'll be talking more about it later, but House Bill 1298 essentially directs the commission both to administer the entire article so as to minimize adverse impacts to wildlife resources and to promulgate rules to achieve essentially the same end. The first issue I'm going to talk about on the rules is the compliance checklist.

Section 34-60-121 (2), C.R.S., says that if any person, for the purpose of evading this article, causes to be made any false entry in any record, account, or memorandum required by this article or by any such rule, such person is guilty of a misdemeanor. There's this very broad description of any record, account, or memorandum and it includes only those that are required either by the article or by rule. Rule 206. b. requires operators who have facilities in certain counties to keep a new type of record, a compliance checklist. The compliance checklist is supposed to demonstrate the operator's ongoing compliance with requirements listed in subsection (1) of the rule. Subsections (2) and (3) of the rule require operators to annually complete and sign the compliance checklist, to retain the checklist, and to provide the checklist to the director of the commission upon request. Our conclusion, therefore, is that the compliance checklist is a record, account, or memorandum required by the rule as contemplated by the statute. However, subsection (4) of Rule 206. b. exempts compliance checklists from the statute's requirement that falsification of a required record is a misdemeanor. It says that the compliance checklist, Form 36, is not considered a report, record, account, or memorandum for purposes of section 34-60-121 (2), C.R.S. The new rules' Statement of Basis and Purpose gives the commission's intent in so exempting the compliance checklist from the misdemeanor penalty. It says the checklist's primary purpose is to ensure that the operator takes an active approach to compliance. It goes on to say that including false information could result in a civil enforcement action. However, the Commission intends that such conduct would not result in a criminal enforcement action under section 34-60-121 (2), C.R.S. However, laudable such a policy to raise compliance issues in operators' minds may be, the commission does not have the authority to exempt this type of record which is required by rule from the requirements of the statute. There is both a U.S. Supreme Court case [*Mistretta v. United States*] and a Colorado Supreme Court case [*People v. Lepik*] that say essentially that the determination of what conduct is criminal is a legislative prerogative and that the executive branch, while it can make determinations of fact as to whether a particular violation has occurred, cannot make a determination of law - the way the commission has done - that a certain conduct, such as falsifying a required record, isn't criminal after the General Assembly has clearly done that. There's also a provision of our statutes where the General Assembly in a different context has provided a sort of exemption from a compliance checklist. Section 25-1-114.5, C.R.S., in the Colorado department of public health and environment (CDPHE) statutes, says if a person who is subject to environmental requirements conducts a voluntary self-evaluation audit, there's a lot of procedural safeguards that have to be gone through in order to claim that criminal immunity. In that instance, again, the CDPHE has the authority to make determinations of fact as to whether

individuals have complied with those requirements, but they cannot as a matter of law simply exempt certain violations from criminal penalties. That's what the commission has tried to do here and so our recommendation is that Rule 206. b. (4) was promulgated without statutory authority and should be repealed.

Representative Gardner said with respect to Rule 206.b. (4), I completely understand this. Let me see if I can state this back for the benefit of those listening because it's a very complex issue and it took me several days to familiarize myself with this. Basically, under Rule 206. b., there's a requirement for a compliance checklist. Through the commission proceedings, apparently there was some discussion about what the effect of this compliance checklist would be and the commission decided in their rules that they would provide that the compliance checklist was not subject to criminal penalties if it was done incorrectly. Am I right so far? Mr. Morris said that's my understanding.

Representative Gardner said what Mr. Morris is saying, and I agree with this legal analysis, is that it's really not within the commission's authority to choose what kinds of reports and checklists and things that are submitted are within the purview of the criminal statute or not. Mr. Morris said with the caveat that if they had not made it required, then they could have specified this. By saying you shall keep it, you shall give it to us, and you shall fill it out, that makes it a required record. It they had said, here's a good idea, just to help you stay in compliance, you might want to think about using this form that we've created, that would not be a required record.

Representative Gardner said here's my concern, because the commission says in their Statement of Basis and Purpose that the commission intends that such conduct would not result in a criminal enforcement action under section 34-60-121 (2), C.R.S.: If we remove this piece of that rule, basically we would be reversing the intent of the commission with respect to the checklist. Where I'm going with that is it seems to me that it might make more sense to repeal Rule 206. b. in its entirety so that we don't end up with a situation where there's a requirement for a compliance checklist that the commission never intended to be subject to criminal enforcement, and that's clearly their intent in their Statement of Basis and Purpose. With one stroke of the Committee pen, we will restore criminal penalties. I'm just wondering if it isn't wiser to say that in its totality, the commission has tried to say the compliance checklist is not subject to criminal penalties, but they can't do that. We don't want to thwart their position on the checklist, but we would precisely do that if we only eliminate it. I'm just struggling with whether that's the appropriate repeal or

whether the repeal ought to be of the entire checklist. The commission may come back and decide that criminal penalties are appropriate. Mr. Morris said I have two points on that. One, I recognize the industry's concern in having a safe harbor being removed. All of a sudden, they're exposed in a way they thought they would not be. I will say that in other contexts, that's not unconstitutional in the sense of a self-incrimination violation under the constitution. I know that under the water quality statutes, you have discharge monitoring reports that people who have a discharge permit have to keep and they have to disclose those and if those disclose a violation you can be subject to criminal penalties based on a record you have to keep and produce. I will also say that Rule 201. has a severability clause that says if any portion of these rules is found to be invalid, the remaining portion of the rules shall remain in force and effect. I think the typical analysis under that kind of clause would be you don't just strike one thing if you think the entity that enacted what you're striking wouldn't have also gotten rid of some other things. I think there's something to your point and I would certainly take however the Committee decides to deal with it.

Representative Gardner said I appreciate that. I have to tell you this is not something the industry raised to me. I looked at your memo and when I understood it I said that seems to me as a policy matter for us as legislators and repealing rules to be perhaps the worst of all worlds. A better world would be either to go ahead and leave that in place, although I understand your legal objection and I think it's well-founded, or to simply remove the rule in its entirety and not upset the compromise that apparently was reached in the commission proceedings and let them go work it out. In the meantime, if we acted as you recommend, we then expose people to potential criminal liability in a situation that the commission made it very clear they did not intend to. That seems to be, from a regulatory and legislative oversight, not the best way to do it. That's just my concern and this has been a tough process to figure out what is the least restrictive alternative and at the same time accomplish something that's appropriate legislative oversight. Mr. Morris said our Office is simply required to make our recommendation based on what lacks statutory authority. This one portion lacks authority. The other portions didn't, as far as we could tell.

Senator Mitchell said I had a reaction similar to Representative Gardner's, but maybe with a slightly different angle. On the issue in which Mr. Morris responded to him that companies may find themselves criminally liable for reports the government requires they file and that's not that uncommon, I don't think that's the dilemma Representative Gardner was trying to raise. I think the dilemma he was trying to raise was that the commission had intended to

require certain documentation to be conducted that would provide civil utility without creating criminal liability. If something about that policy reach is found defective, it seems to be one complete policy, not just the criminal piece. They would seem almost inseparable. I just wanted to comment on that exchange between you two. My take was even a little bit different. When you cited the state and federal case law that only the legislature can declare an act criminal, that's beyond dispute. What we have here, as you characterize it, is someone other than the legislature not declaring an act criminal but declaring certain conduct not to be subject to criminal prosecution, which not only is a slightly different action that goes in reverse, but I think it could also be understood as a formalized exercise of prosecutorial discretion. The legislature can declare what acts are crimes but the executive branch in its enforcement can set priorities and even, pursuant to rule and regulation, maybe decide that something doesn't suit enforcement purposes or the public good in pursuing it criminally. If that sounds too loose, I think maybe there's even a precise legal argument that rather than thinking of this compliance checklist as a record, account, or memorandum required to be provided to the government, think of it as an aide in compliance that the government wants to ensure that industry is using. It's really a different species of document. It's not the kind of report we want to see available because of its results, but because of what we know it means the regulated company is doing, the steps they're taking, the hoops they're jumping through. To use an analogy, it's sort of like a teacher saying I'll only grade your answers but I want to see your work. It strikes me that this rule is a very sensible exercise of judgment by the commission, that as long as industry is making a good faith effort to file this list, it's not the same thing as an end-product report that would have been covered by the misdemeanor statute. Mr. Morris said I find it hard to conclude anything other than that the compliance checklist is required. It's a required record. What the commission has done is say this required record isn't subject to the statutory penalty. That, to me, is not an exercise of prosecutorial discretion, but more or less a determination of law that that which the General Assembly has criminalized isn't criminalized. We're going to decriminalize it and not on the basis of a determination of fact. It's general forward, complete, blanket immunity. It's not on the basis that we find this particular conduct wasn't taken to evade compliance with the act or it wasn't truly falsified, or any of those sorts of determinations of fact, and it seems to me they have undone what the General Assembly did.

Representative Roberts said I wanted to back up before you switch to the next issue. House Bill 07-1252 passed the same year as the other two bills and I was the House sponsor. Because its placement in the statutes is right up against these two others, was that considered in this whole package and, if so,

how did you factor that in? Mr. Morris said I was going to get to this later, but when I said the remainder of the rules ought to be extended, this is what I mean by the remainder of the rules. This is essentially everything. The commission has only one other small, five-page rule. This is probably 97% of all of their rules. That's what they submitted to the secretary of state and that's what I reviewed. I think there's a fair amount of confusion about exactly what Representative Roberts asked about and that's what did I look at as the authority? I looked at everything from the federal constitution, the state constitution, and everything that's in the C.R.S. that's particularly in the commission's act. House Bill 1252 in particular is somewhat unusual in that it's codified in the act but it doesn't have a lot of interplay with the commission's authority. It's largely outlining relations between the surface owner and the operator. I don't see a lot of additional authority for the commission in that particular bill.

Mr. Morris said the next issue is with regard to the duty to consult. That was one of the major new requirements from the two bills, House Bill 1341 and House Bill 1298. It was for a "timely and efficient" consultation procedure. My reading of that is that it's a consultation procedure for intergovernmental consultation. Section 34-60-106 (11) (a), C.R.S., says the commission shall promulgate rules, in consultation with the CDPHE, to provide a timely and efficient procedure in which the CDPHE has an opportunity to provide comments during the commission's decision-making process, and that this rule-making shall be coordinated with the rule-making required in section 34-60-128 (3) (d), C.R.S.,which is the section of law added by House Bill 1298 regarding wildlife, so that the timely and efficient procedure established pursuant to subsection (11) is applicable to the CDPHE and to the DOW. This does two things: It requires the CDPHE to consult with the commission pursuant to this timely and efficient procedure and it requires the same timely and efficient procedure to apply to both the CDPHE and to the DOW as required under section 34-60-128 (3) (d), C.R.S. That section, as I mentioned, was added by House Bill 1298 and uses the phrase "timely and efficient" several times. In subsection (3)(a), it says the commission shall establish a timely and efficient procedure for consultation with the wildlife commission and the DOW on decision-making generally. In subsection (3)(b), it says the commission shall provide for commission consultation and consent of the affected surface owner. Here we have a private party involved, but it is commission consultation with a surface owner, indicating it is the governmental entity that has the duty to consult. Finally, in subsection (3)(d)(I), it says the commission shall promulgate rules in consultation with the wildlife commission to develop a timely and efficient consultation process with the DOW. So, in paragraph (a), the commission has this timely and

efficient procedure. Obviously, there's only two governmental entities involved in there, the commission and the wildlife commission in the DOW. In paragraph (b), the commission has to provide for commission consultation with surface owners. I believe that's reasonably clear that that is a duty the commission has. Under all of those provisions where this mention of a timely and efficient procedure is mentioned, the entity with the duty to consult is the governmental entity. However, in section 34-60-128 (3) (d) (I), C.R.S., it is silent with regard to who has the duty to do the consulting. It says simply that the rules shall address a timely and efficient consultation process with the DOW, but it doesn't say who has the duty to consult. If you go back to the section added by House Bill 1341, section 34-60-106 (11) (a) (II), C.R.S., that requires that the timely and efficient consultation procedure established in that section apply to the DOW in the rules promulgated pursuant to section 34-60-128 (3) (d) (I), C.R.S. That latter section ought to be construed to place the duty to consult on the government, not on the operator. However, Rule 306. c. (1) A. does the reverse. It requires the operator to consult with the DOW. It says an operator shall consult with the commission, the surface owner, and the DOW. In every other instance, the rules, in accordance with the act, put the obligation on the governmental entity to do the consulting, not on the private entity. Indeed, in another rule of the commission, the commission got it right and put the duty on the commission to do the consultation and not the surface owner. Rule 1202. b. says the DOW shall consult with the operator in accordance with Rule 306. c. Rule 306. c. is the very rule I have a problem with because it put it backwards. The commission got it correct in Rule 1202. b. and got it incorrect in Rule 306. c. Therefore, our recommendation is that Rule 306. c. (1) A. conflicts with the act and should be repealed.

Representative Levy said I wrestled with this analysis a lot. I thought the language was very difficult to follow. I actually came down with not exactly the opposite conclusion that Mr. Morris came down with, but I don't see Rule 306. c. (1) A. as conflicting with the statutory authority. I see it not as necessarily putting the burden in the wrong place, but establishing that if consultation is to occur, and I think it's clear that consultation is to occur in some way, it creates an affirmative obligation on the part of an operator to participate in that process, rather than creating a duty or an obligation that wouldn't otherwise exist. I read and reread and tried to paraphrase the statute over and over again and I guess I read it in the totality as requiring this consultation process in order to set up the procedure for additional consultation to occur pursuant to rule. I don't see the conflict where Mr. Morris does and I don't see the burden being put on the wrong party. I just see Rule 306. c. (1) A. as the way in which this consultation is actually going to be carried out. I

guess I'd go further and question what's the actual harm that results from having put what could be construed to be the emphasis in the wrong place, given that we want consultation to occur and we have to have parties at the table in order for that consultation to occur. Mr. Morris said I think it's clear the operator would be well-advised to cooperate, to consult, to participate. I think that's a different issue from whether a rule requiring them to initiate consultation is authorized. I think that under section 34-60-106 (11) (a) (II), C.R.S., it's clear that the duty ought to be on the DOW to initiate the consultation and that the operator, should it choose to do so, doesn't need to get involved, doesn't have an obligation. It won't be a violation of the rule if it doesn't participate and doesn't initiate. Because this is a rule, if they fail to comply with the rule, that's a violation and they could be subject to enforcement by not initiating consultation. I think it's a difference with significance.

Representative Levy said Mr. Morris has interpreted language into Rule 306. c. (1) A. that isn't there, though. He said a duty to initiate consultation. It states that subject to Rule 1202. d., an operator shall consult with and then it lists three situations in which an operator shall consult subject to the provisions of Rule 1202. d. Rule 1202. d. states that the DOW shall consult with the operator, the surface owner, and the director in accordance with Rule 306. c. They refer to one another, but if Rule 1202. puts the burden on the DOW to consult with the operator, I guess I would read Rule 306. as just saying where that duty exists on behalf of the DOW, the operator has to come to the table and respond and sit down with them. I don't see where Mr. Morris is saying the duty to initiate is wrapped up into Rule 306. Mr. Morris said actually there are two different rules under Rule 1202. The one that gets it right is Rule 1202. b. The one that's referenced in Rule 306. c. (1) A. is 1202. d., which is a different rule that talks about when consultation isn't required, so that's sort of an exemption.

Representative Levy said I meant Rule 1202. b. Mr. Morris said the fact that Rule 306. c. (1) A. refers the subject to Rule 1202. d. doesn't cure the defect. These two rules conflict with each other and it seems to me that one of them is right and one of them is wrong and it seems to me clear that Rule 1202. b. got it right and Rule 306. c. (1) A. got it wrong. To me, the clear meaning of the "operator shall consult" means they have to do it. It doesn't say the commission shall consult or it doesn't say the commission, if approached by the operator, shall consult. It doesn't say that. It says the operator has the duty to consult. To me, that means they have to initiate it. I think that's a natural reading of you "shall consult" when you don't mention the other party having any kind of corresponding duty.

Representative Levy said I don't read it that way.

Representative Roberts said if I were to think about the practical application of why would that make a difference, it seems that when we talk about, and you do in your memo repeatedly, that timely and efficient language, it's putting the burden on the government piece of this, to say you get in there quickly and engage in this process. The practical application is if the operator were to bear that burden but wasn't getting a quick and timely response from the government involved, that could have dramatic consequences out in the field. Is that right? Mr. Morris said I think that's right. This timely and efficient consultation process added by House Bills 1298 and 1341 was to get the DOW's and the CDPHE's input into the commission's decision-making. I think the expectation was the consultation was going to occur at the governmental level. I don't think the intent was to put a new burden on the operator.

Representative Labuda said sort of along the same lines, I was thinking of the practical application of this and when you go to Rule 306. c. (1) A. ii., the operator seeks a variance from a provision. I'm thinking out in the field, the operator sees something, wants to have a variance, but how does he notify the DOW to contact him about the variance he wants? Mr. Morris said this whole process would be triggered when an operator comes to the commission seeking approval of something, whether it's a permit or a variance, or whatever it may be. As I say, from a policy perspective, the operator's going to be well-advised to cooperate, to get involved, and to not just sit on the sidelines during this consultation. If they're invited to attend and participate, by all means, they probably ought to, but I don't think that means they have the burden to initiate the consultation. As I say, once an operator files one of these applications for approval, there are procedures in the rules for notifying both the CDPHE and DOW that an application requiring their input and consultation has been filed.

Mr. Morris said the last issue is simply an incorporation by reference. The "State Administrative Procedures Act" (APA) allows the incorporation of certain types of materials into rules by reference, but you have to jump through certain hoops in order to do that. Section 24-4-103 (12.5) (d), C.R.S., says the agency shall include in any rule which incorporates material by reference the title and address of an employee of the agency who essentially is the custodian of those incorporated materials and a statement indicating that any material that has been incorporated by reference in the rules may be examined at any state publications depository library. Rules 604. a. (1) and (10) incorporate various standards but they fail to make the required statements regarding the custodian of the records and the state publications depository library. Therefore, those two rules conflict with the statute and should be repealed.

Mr. Morris said the remainder of the memo is about our recommendation that the remainder of the rules are authorized and ought to be extended. As I mentioned before, the remainder of the rules is all of 2 CCR 404-1 and that is the vast majority of the commission's rules. As I mentioned, the commission has broad rule-making authority. They have jurisdiction over all persons and property necessary to enforce the act and they have the authority to do whatever may reasonably be necessary to carry out the act. They have jurisdiction to regulate oil and gas operations, including by promulgating rules to prevent and mitigate significant adverse environmental impacts. They have the duty and authority to promulgate rules to minimize adverse impacts to wildlife resources under House Bill 1298. Drawing your attention back to that unusual grant of authority in section 34-60-106 (4), C.R.S., it says the grant of any specific power or authority to the commission shall not be construed in this article to be in derogation of any of the general powers and authority granted under this article. Some of these comments are likely to leave you cold because they're not in reference to any particular rules. I'm anticipating and hoping that I can come back later after other people who are proposing that certain rules are unauthorized, and I can then refer you back to these citations of statutory authority and they might make a little bit more sense to you.

Mr. Morris said the commission also has broad rule-making authority over its own hearings process. Section 34-60-108 (1), C.R.S., says the commission shall prescribe rules and regulations governing the practice and procedure before it. There are very few limits there. Section 34-60-106 (1) (f), C.R.S., talks about the procedure for approval of an application for a permit to drill. It says you can't drill a well without first obtaining a permit from the commission, under such rules and regulations as may be prescribed by the commission. There are very few sideboards on that in terms of who might have the authority to participate in such a permit process. Section 34-60-106 (11) (a) (I) (A), C.R.S., says the commission shall 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. Again, there's nothing about specific limits on who can participate in those applications, other than the operator.

Mr. Morris said there's a section of law that relates to the geographic scope of the rules' applicability. Section 34-60-120 (1) (a), C.R.S., says the article shall apply to all lands within the state of Colorado, except as to lands of the United States that are subject to federal jurisdiction, and the article shall apply only to the extent necessary to permit the commission to carry out the provisions of several sections, including, importantly I think, section 34-60-106, C.R.S. Section 34-60-106, C.R.S., is where a lot of the commission's rule-making authority over public health and protection of the environment, including wildlife resources, is located. It also goes on to say that the

other provisions of the article shall also apply to such lands only if the officer of the United States, in this case the bureau of land management (BLM), having jurisdiction approves the order. There is a memorandum of understanding (MOU) the commission has with the BLM regarding exactly that process, how these rules can apply on federal lands, with the BLM having more or less the duty to get involved if it objects and the commission having the duty to limit anything that the BLM objects to. Based on these broad authorities, we recommend that the remainder of the rules be approved, be extended, and be included in this year's rule review bill.

Senator Mitchell said this is a legally curious question because I don't really like the direction it would point by implication, but if the commission is granted this broad authority to promulgate good policy, then on what basis are any of the rules stricken, even the earlier ones that Mr. Morris recommends be stricken, especially in light of the provision that says none of these specific directives are in derogation of the broader authority granted in the statute? Mr. Morris said if, for instance - this is foreshadowing something that may be coming down the pike - the statute says that operators have to give notice to "A" and "B" and then the rule says the operator shall give notice to "A", "B", and "C". The statute doesn't say you will give notice only to A and B and not to C. If the rule I just described were promulgated under that statute, I'd say notwithstanding that unusual grant, that rule conflicts with the statute because it specifically says you can't require the operator to give notice to C. But, the statute doesn't say that in this instance, it says you'll give it to A and B. It's possible to conflict with the statute and, for instance, that's what the incorporation by reference does. It attempts to incorporate by reference without complying with the statute's requirements. That's a conflict. It's a little harder, I think, to say that a rule was promulgated without authority as opposed to conflicting with the statute. We always struggle with figuring precisely what our argument is. Is it something conflicting with the statute and therefore it's invalid or was it promulgated without authority? It seems to me it's possible to make those arguments. I made the argument, for instance, on the criminal exemption, that they just don't have the authority to criminalize things and with the consultation procedure being backwarded I think our recommendation there was that it was a conflict because we found that wasn't sufficiently precise.

Senator Veiga said the Committee will likely get back to Mr. Morris later. Next, let me just let everybody know how I intend to proceed at this point. First of all, I was under the impression that somebody from the Attorney General's office would be here to testify but has not signed up and we'll get to you in one second. We'll move next to the Attorney General's office, next we'll hear from the commission, both Mr. Sherman and Mr. Neslin, then we'll move into opponents or those that have expressed some concern relative to the rules, and then we'll move into proponents with the possible caveat of this: If it appears that as we're moving into opponents that we start getting into the several hours, I may just take an hour of opponents, then an hour of

proponents, and break it up. I'll see how that plays out a little bit. The only other caveat I have to individuals - and I thought this was expressed relatively succinctly on an orange card over by the sign-up table - is this: Our purview here and our review is very focused on whether these rules exceed statutory authority. We do not focus on whether the rules are good public policy or bad public policy. To the extent as witnesses you stray, I'm going to try to keep folks on track so that we conclude our hearing some point today.

1:05 p.m. -- Casey Shpall, Deputy Attorney General for the Natural Resources and Environment Section, Attorney General's Office, testified before the Committee. She said I would like to briefly discuss what the role of my office is in this rule-making and the conclusions we have reached about the rules. Kelly Rees, who is the Attorney General for the commission, Cheryl Linden, who is the First Assistant, and I all worked on this rule-making effort for the last 18 months. We've provided legal advice to the commission throughout the rule-making process, both orally and in writing, for the six months of the informal meetings as well as the nine months of formal rule-making. We also counseled the commission and its staff regarding their statutory authority on the proposed rules and any legal issues that may have arisen during the proceedings. The commission, as you all know, had an extensive rule-making proceeding. There were 24 days of hearings, 12 hours of public comment from about 200 different people, 75 hours worth of testimony from 160 parties and staff witnesses, and 9 days of deliberations. Throughout the hearings, the commission listened to all the witnesses, questioned them about their written testimony, and directed the staff to work with parties to resolve any outstanding issues. During the proceedings, the commission's counsel - that would be one of the three attorneys that I mentioned - advised their client on their options regarding a myriad of legal issues raised by the parties, by public commentors, and even legislators, and tried to address those issues. There were 30 legal motions filed by the parties that were also responded to. The commission was responsive to all this input and adopted numerous changes to the proposed rules to reflect this fact. This effort resulted in final rules that differed substantially from the draft proposal. Of the 21 different topics covered in the initial draft proposal, 17 of them reflect significant changes. These changes improved the draft and better balance oil and gas development with the protection of public health and the environment and wildlife resources.

Ms. Shpall said the authority for this rule-making is extensive as Mr. Morris explained to you all. The commission has broad authority and the General Assembly has declared that it's in the public interest to foster responsible balanced development of Colorado's oil and gas resources consistent with the protection of public health and the environment, including wildlife resources. The commission, and this is before the passage of the two bills in 2007, has authority to regulate oil and gas operations so as to prevent and mitigate significant adverse environmental impacts on air, water, soil,

and biological resources resulting from oil and gas operations to the extent necessary to protect the public health, safety, and welfare, and taking into consideration cost-effectiveness and technical feasibility. When the commission undertook this rule-making, they really had three goals in mind. One was to address the increase in oil and gas activity and the broad impact that was having on Colorado. Just to give you a little bit of flavor for that, in 1996, there were about 1,000 permits approved by the commission. In 2007, there were 6,000 permits approved by the commission. In 2008, there were 8,000 permits approved by the commission and this year, they're on track to meet that record. So far, there have been 1,200 permits approved by the commission. There's been a huge growth in activity and the commission felt it needed to update that under existing authority. In 2007, the General Assembly did pass two additional pieces of legislation, which is the second goal the commission was trying to fulfill, and that was to meet the requirements of the legislation to protect health, safety, and welfare, including the environment and natural resources. The third goal of the rule-making was to update the existing rules where appropriate. The last set of comprehensive amendments occurred more than a decade ago and many of the rules were outdated. The commission promulgated its rules on December 11, 2008, and submitted them to my office for attorney general review. This review requires the attorney general to render its opinion in the constitutionality and legality of the rules. On December 19, the attorney general issued its opinion stating that we reviewed the rules and there was no apparent constitutional or legal deficiency in their form or substance.

Ms. Shpall said now I'm going to briefly address the issues raised by Mr. Morris. One thing I also wanted to mention was that there's a provision in the rules that was adopted in House Bill 1341 stating that the General Assembly confirmed that this rule-making would go through the regular APA rule review process. I understand there's some question as to whether the process stated in that rule was any different from the regular rule review process and we have looked at that and I understand the Office has looked at that and has determined that is the precise process that you always go through, which is the rule review process. Mr. Morris reviewed all of our rules. There are 100 rules out there and he found deficiencies with three of them. I would like to address those issues and then I would also like to address some additional issues raised by Noble Energy in a submission they made to the Committee. I think Representative Gardner made an excellent point about the first point Mr. Morris raised, which is the compliance checklist. The commission's intent in adopting that rule was not to usurp the role of the General Assembly in determining what is a criminal matter. The commission, perhaps wrongfully, did not consider the checklist as a formal report, but just, as Senator Mitchell said, as sort of a consciousness-raising activity. The reports are not required to be filed with the commission unless specifically requested; they're just supposed to be kept on site and referred to so that it can keep everybody on a compliance track. It was the hope that the checklist would reduce noncompliance

especially when it was based on lack of knowledge of the on-site operator or failure to adequately plan for and implement requirements. Adoption of the rule was also driven by concerns of the regulated community about being criminally prosecuted for mistakes they made in the checklist through inadvertence or misinformation. I have a copy of the checklist and it's just little boxes where you check "Yes" or "No" to questions like did you look at your stormwater management plan or did you remember to label your tanks? I think the intent of the commission was indeed to have it be something less than a report as required by the statute. Nonetheless, we understand the concerns of the Office and are not objecting to that provision being struck although I think the commission would not like to see the entire checklist struck. I think they worked very closely with the CDPHE who uses these checklists regularly in environmental compliance and really wanted to see that checklist survive regardless of the striking of this portion dealing with criminal enforcement.

Senator Mitchell asked is another way of interpreting the information Ms. Shpall just shared with us that it could have been the judgment of the commission that this checklist would serve a purpose different from that generally conceived of in the phrase "any record, account, or memorandum required by this article"? That yes, the legislature referred to certain kinds of documentation and this checklist was something of a lesser level or more informal, fluid part of the process than the finality implied by record, account, or memorandum? Ms. Shpall said I think that's correct. I think that's exactly what they had in mind. I believe if that provision is stricken the commission would still use its enforcement discretion on a case-by-case basis to determine whether or not it would criminally prosecute and I suspect that in most instances they would not because the intent was to help out the operator in their efforts to comply.

Ms. Shpall said the next rule that was raised in Mr. Morris' memo concerned Rule 306. c. (1) A. It has to do with who bears the burden to pick up the phone when you're having a consultation. I agree with some of the comments made by Representative Levy. I think that the intent was not to place something on the operator other than that when a consultation happens, they should come to the table. The commission in the Statement of Basis and Purpose and also in the 1200-Series of the rules acknowledges it is the DOW who has the duty to consult and in most instances will likely initiate it. I think Representative Labuda had mentioned about variance. Obviously if they want to vary, it's the operator who is going to have to initiate that effort. The commission has recognized that this is creating a problem where none really is intended. They have filed a notice of rule-making with the secretary of state to conform Rule 306. c. (1) A. so that it comports with the language in Rule 1202. b. that Mr. Morris believes properly puts the obligation to consult on the DOW. The proposed amendment will clarify that the obligation rests with the DOW. It should be published in the March 10 Colorado Register and the commission plans to have a rule-making hearing on this on March 30.

Ms. Shpall said on the incorporation by reference for Rules 604. a. (1) and (10), my office as well as the commission is very aware of the requirements for incorporation by reference contained in the APA, as evidenced by the fact that there were other incorporations by reference that were properly done in these rules. I think where we had some confusion was that these particular rules were not amended by the commission and therefore we did not think they would be subject to the General Assembly's review. Since you are reviewing them and they did not comport with the incorporation by reference, we have also noticed that for rule-making at the same March 30 hearing and will put in the magic words that are required for incorporation by reference.

Ms. Shpall said I'll move on to the arguments by Noble Energy in its submission to the Committee. It raised several arguments that were raised throughout the rule-making hearing and were addressed by the commission in its rulings or in the rules themselves. The first issue I want to talk about is the federal preemption and the applicability of these rules to federal lands. The rules are intended to apply on federal lands May 1 of this year. The commission has directed its staff to work with the BLM to craft a memorandum agreement that would clarify how the rules apply on federal land and avoid duplication and inconsistent regulations. I believe Mr. Neslin, who is going to address this Committee later, will speak to the specifics of that memorandum agreement. These rules are grounded in the police powers of the state and designed to protect the public health, safety, and welfare of the citizens of Colorado when they're affected by oil and gas operations. The act, as Mr. Morris pointed out, provides that the commission has jurisdiction over all persons and property, public and private, necessary to fulfill the provisions of the act. In addition, the commission has specific authority regarding federal land. Section 24-60-120, C.R.S., provides that as to lands of the United States or lands which are subject to its supervision, the "Oil and Gas Conservation Act" shall apply to carry out the regulatory programs of the commission. There are specific statutory provisions that apply on federal lands and one of them is section 34-60-106, C.R.S., which is basically the oil and gas regulatory program. Of course we recognize that in spite of the broad scope of the property clause, federal ownership of lands within the state does not necessarily withdraw those lands from the state's jurisdiction, meaning that federal and state regulations can coexist on federal land. The United States Supreme Court preemption doctrine favors a regulatory role for states even in the face of federal statutory schemes. The court has said when considering preemption, we start with the assumption that the historic police powers of the state are not superseded by federal acts. In that particular case, the federal acts in question are the "Mineral Leasing Act" and the "Federal Land Policy and Management Act of 1976", which are acts that are probably in play here. The court went on to say a state is free to enforce its criminal and civil laws on federal land as long as those laws do not conflict with federal law. In a case called *California Coastal Commission v. Granite Rock*, the supreme court stated expressly that states can impose

environmental controls on mining activities on federally owned land. Here, there is no express federal preemption of the commission's efforts to regulate on federal land, nor do these commission rules, on their face, conflict with any federal regulations. Therefore, the mechanism to deal with these issues is through an MOU with the BLM where all the kinks are worked out so that there is no duplication and conflicting regulations. We intend to do that. The commission has done that before and it will proceed in doing it this spring. The other issue that was raised had to do with who can request a hearing under Rule 503. b. Rule 503. originally just extended the right to hearing to a local government designee or the operator on specific issues. The amended Rule 503. b. allows not only those two entities to request a hearing, but also the agencies with which the commission is to consult - the CDPHE and the DOW - and the surface owner. The surface owner's right to a hearing is limited to alleged noncompliance with commission rules or statutes or potentially adverse impacts to the public health, safety, and welfare within the commission's jurisdiction to deal with. So, it's not every issue that a surface owner would have a right to raise before the commission in this context. The CDPHE's right to a hearing would be on those very specific public health, safety, and welfare issues that it has jurisdiction over. Normally, we don't anticipate that this would happen very often. I think the commission staff would work with the CDPHE and the DOW to work out all their issues, but should they not be able to work them out, it is the commission who has the authority to consult, not just their staff, and so these issues do need to be raised to the commission so they can weigh in on what conditions should be placed on a permit. In addition, Rule 503. b. does not allow nearby landowners or members of the public to apply for a hearing before the commission. There has been some confusion about that. The only thing that's required of adjacent landowners within 500 feet is that they be notified when work is going to begin taking place on adjacent property so they're aware of that. The trucks are going to start rolling in and they can make their accommodations for that. The commission has the authority to remedy only those issues that are within its jurisdiction. All of these parties can raise issues where the commission would say sorry, that is something you need to take to district court, we don't have authority over those matters. One of the things the commission cannot remedy are issues related to the interpretation or enforcement of surface use agreements or other contracts between surface owners and operators governing surface application such as the reasonable accommodation doctrine, which was mentioned earlier under section 34-60-127, C.R.S. Representative Roberts asked a very good question regarding what is the interplay between these two bills that were passed in 2007 and House Bill 1252, because there is some confusion about it. House Bill 1252 and Senate Bill 07-237, mentioned by Noble Energy, concern private property rights and the contracts between private properties and the give and take. They do not concern issues that are within the regulatory authority of the commission. House Bill 1252 simply codifies the reasonable accommodation doctrine. Section 34-60-127, C.R.S., states an operator shall conduct oil and gas operations in a manner that

accommodates the surface owner by minimizing intrusion upon and damage to the surface of the land. That concerns private remedies where the surface owner can bring a claim against an operator for failure to comply with the provisions of the reasonable accommodation doctrine and it's limited to reasonable accommodation claims and not to claims for every and any violation of the act. In addition, Senate Bill 237 concerns notification of mineral estate owners in connection with applications for surface development in the greater Wattenberg area. Significantly, in 2008, Senate Bill 202 added a provision to that that made clear that nothing in Senate Bill 237 overrides the authority of the commission to establish or amend or otherwise regulate with respect to drilling windows or any other matter within the commission's jurisdiction. Any implication that Senate Bill 237 or House Bill 1252 somehow took away some of the authority of the commission to regulate under its broad powers is misplaced. In conclusion, I think all the problems identified by the Office will shortly be rectified. We request that this Committee extend the rules but for those three instances and allow this program to move forward.

Representative Labuda said I thought I heard that if we vote not to extend certain rules, on March 30 the commission will take them up and there's not going to be a big absence of regulation. Ms. Shpall said that's correct.

Representative Gardner said, since Ms. Shpall raised the issue with respect to Rule 503. b., as I understand the rule, it seems to set out who can file an application to the commission. The particular provisions you discussed were, I think, Rules 503. b. (7) B., D., and E., or they are certainly the ones I've heard discussed the most. They refer to the regulations creating the right of the surface owner to file an application and then the latter two , D. and E., the right of the CDPHE and DOW to file applications. Now, I recognize that there is limiting language there about solely to allege noncompliance or to raise issues relating to protection of health, safety, and welfare or adverse impacts on wildlife, etc., but what is the significance of making these particular parties applicants as opposed to just allowing them to comment on a procedure? Does that confer on them some procedural ability that they didn't have prior to these rules? Ms. Shpall said yes, I believe they do. I think the intent of House Bill 1341 was to acknowledge that the oil and gas boom was having significant effects on communities and individuals who live in those areas and that in order to give these landowners opportunity to make sure that the full commission hears their concerns, they are given the right to appeal an issue to the commission. That doesn't necessarily mean the commission will hear the appeal. It has to be properly framed and deal with something that is within the commission's jurisdiction, such as a rule violation or a regulatory violation.

Representative Gardner said just so I'm not misunderstanding this, and I don't want to characterize what you said, but it sounds to me like Rules 503. b. (7) B., D., and E.

accord substantial new rights to surface owners and to two Colorado departments over and above what exists prior to these regulations. Ms. Shpall said that's correct, because they are implementing some new statutory authority granted them in House Bills 1341 and 1298.

Representative Gardner said the last sentence you said that they're implementing new statutory authority, that's sort of what this Committee has to decide, isn't it? Ms. Shpall said that's very correct.

Representative Roberts said I'd like to go to the jurisdictional questions, in part because my district is about 76% federal land as well as the largest producer of natural gas. I'm trying to understand the interplay jurisdictionally there and squaring the timely and efficient language that's used repeatedly in the legislation with the suggestion that now we're bringing the federal government into it as well as the state government and the various agencies. How do we get there that this is within the timely and efficient? Ms. Shpall said I'm going to tell you the little I know about it and then probably Mr. Neslin can give you a little bit more information on how it works. Right now, we consult with the federal government on every application for a permit to drill that is on federal land. From my understanding, a lot of the provisions that we put in our permits are things that the federal government has either conceded were alright to put in there or they had some discussion. I don't think the process is going to be that different from what happens now.

Representative Roberts said I guess the process itself is not a problem. The timely and efficient piece is of concern. If Mr. Neslin can answer, that's fine too. Ms. Shpall said I think he could probably give you some more details but I suspect the memorandum agreement will lay out some very specific interactions that will be had at the same time the commission staff is doing all this other work. I can't imagine that the consultation with the federal government will delay any further the process.

Representative Gardner said, continuing on that line, again for my own edification here, do these rules apply in their entirety and totality on federal lands? Ms. Shpall yes, unless the federal government can point to a rule that in a specific instance directly conflicts with a federal regulation or statute or is preempted. For instance, there are some federal statutes that clearly preempt the commission's ability to do things. I can't remember the name of the federal entity but it has to do with underground storage tanks containment areas and we have specifically set out in the rule where we recognize the federal government has preeminent authority and have not regulated in those areas.

Representative Gardner asked are those areas somewhere spelled out in the regulations? Could I find where it says they don't apply? Ms. Shpall said I think in the

200-Series, in Rule 201 perhaps, the applicability section. In addition I think there's a provision in there relating to the Ute Mountain Ute and Ute tribe where we explicitly exempt them from certain other regulations.

Representative Gardner asked does the federal government agree that those are the only portions of these regulations that don't apply to them? Ms. Shpall said I don't know if the federal government agrees or not but certainly the BLM and the forest service had the opportunity to become parties in this rule-making hearing and they did not. We have been in touch with the BLM to set up this MOU consultation. We haven't heard if there are specific instances where they feel these rules have been preempted.

Representative Gardner said a minute ago when I asked did the rules apply in their entirety to the federal government you said "yes, unless", and then you gave me this big qualifier which I think turned your "yes, unless" into a "no". At least that's what I heard because I don't think they apply. At least the federal government doesn't seem to believe that. They seem to be taking issue, although in a very collaborative fashion. I'm just concerned that, as written, there are two different effective dates in these rules, one of them for the state and the other says they are effective on federal lands one month later, but it seems to me that almost implies that these rule are, in their entirety, with the stated exceptions, applicable to the federal government. I gather from the MOU I've seen that the federal government doesn't agree with that at all, that they take some issue with that. Why do we have a different date for the federal lands? Do you know? Ms. Shpall said my understanding was that the additional date was to give time to negotiate this MOU, but Mr. Neslin can also speak to that issue.

1:38 p.m. -- Harris Sherman, Executive Director of the Department of Natural Resources and Chair of the Colorado Oil and Gas Conservation Commission, testified before the Committee. He said I'm here with David Neslin, Acting Director of the Colorado Oil and Gas Conservation Commission. I might also point out that Tom Remington, Director of the Division of Wildlife, is here. He wanted to have an opportunity to address this Committee for a few minutes. And, if necessary, Jim Martin, Executive Director of the Department of Public Health and Environment, is here as well and he is also a member of the commission. Let me begin by thanking this Committee for the opportunity to present this package of rules. I want to particularly thank you for agreeing to take this out of cycle. It was very much our hope that these rules would be reviewed during 2009 as opposed to 2010. We appreciate your cooperation in that regard. I also wish to thank the Attorney General's office. Ms. Shpall and her colleagues have spent the last 18 months working with us almost on a daily basis, advising us about our statutory authority with respect to these rules and advising us about the constitutionality of the rules. We made a variety of changes along the way based on their advice and recommendations and we certainly appreciate

the recent solicitor general's opinion that all 100 rules promulgated by the commission were in conformity with our statutory authority and the constitution. Lastly, I simply want to thank the legal services staff, in particular Mr. Morris, for his herculean effort to get on top of this package of rules in a fairly short period of time. We appreciate his findings that 97 out of 100 rules conform to the statutory authority and constitutional guidelines that pertain to us. As to the three that did not in his view, we have been working with the Attorney General's office on a quick fix to that. We believe that two of the three rules relating to the wildlife consultation and incorporation by reference can be fixed very quickly by the commission and hopefully will become part of our ongoing regulatory process. With that said, and I am mindful of the Chair's hopes that we narrow our comments and not stray, I think it would be helpful to give a very brief background of these rules in the context of the world in which we are operating because I think it will help to put this in perspective. I will try to be very brief before turning this over to Mr. Neslin. As Ms. Shpall indicated, we've had an 800-fold increase in the number of permits we've issued in the last eight to nine years. The last two years have been record-breaking numbers of permits issued. I think you're aware this growth has been largely related to the increased price of natural gas and extraordinary technological advances in directional drilling and fracking, which has opened up new areas of Colorado to major oil and gas development. The coalbed methane industry in this state and the deep-type sand drilling operations have proliferated in very significant numbers. The bottom line is the state is blessed with world class hydrocarbon resources and I think we have every ability to make this oil and gas industry a stable, long-term, healthy industry for Colorado. At the same time this growth has occurred, there have been inevitably a variety of challenges and problems that have arisen. I think you're aware of some of these in a number of these areas that the new activities have occurred. These occur in split estate situations. Some of this activity occurs in areas with already very strong economic activities, such as tourism, recreation, hunting, fishing, real estate development, second home development, retirement communities, agriculture, and so forth. Part of this activity has occurred in areas where the state has its most important wildlife resources. For example, the Piceance basin in northwestern Colorado is the location of Colorado's largest wildlife populations, the largest mule deer herd in North America, one of the largest elk herds in North America. Conversely, in some of these areas, because of past activities, we have seen a serious scarcity of certain species of wildlife that has led us to a concern that we may be facing the possible listing of certain Colorado species under the endangered species act which is something Colorado really very much wants to avoid because of the obvious implications for such species. As a result of these types of issues and certainly the effort of the commission to protect drinking water systems of communities in western Colorado and the obvious quality of life issues that come up, the legislature in 2007 did pass the two bills. I think it's important to mention that the twin goals of that legislation were to foster the development of natural gas in the state and to make sure this development was consistent with protecting the state's

environment, our wildlife, and public health, safety, and welfare. The legislature two years ago told the commission to focus, in addition to the down hole issues concerning oil and gas development, on these surface issues, which we are hearing a lot of discussion about. As part of the legislation, a new nine-member commission was created by House Bill 1341. The commissioners were to reflect a broad set of skills and backgrounds to address not only the technical issues with oil and gas development, but the broader surface concerns as well. In this nine-member commission today, three of the members are experts or have backgrounds in oil and gas development, including petroleum, geology, and petroleum engineering. Other members have expertise in soil conservation and reclamation, mineral royalty and agriculture expertise, local government expertise, and wildlife and environmental expertise. The executive director of the CDPHE and the executive director of the Department of Natural Resources round out the nine-member commission. The legislature gave us very broad direction, as you've been advised, to promulgate rules to carry forth and implement the intent of the two bills. I will tell you unequivocally that in the past 18 months, this is the hardest working commission in the state of Colorado, not to mention the hardest working staff. The rules have gone through tremendous changes as a result of the stakeholder process, as a result of public input and public hearings, and then the formal rule-making process, which as I said has occurred over an 18-month period. Literally hundreds of changes have occurred from the earlier conceptual drafts to the final drafts that were reviewed by the commission. I think it's very important to mention that this has been truly a give and take process in the review of these rules by the very diverse commission. There has been a lot of compromise, there has been an effort to balance the different interests that were in front of us, and to try to come up with a compromise which would reflect the various goals and intents of the legislature. At the end of the day, although we had certain limited divided votes on certain subsections, there was a unanimous decision by this commission to endorse and approve the overall rule package. I believe this rule package is clearly within our statutory and constitutional authority. I believe it does not conflict with any other laws or rules of the state and I believe it is clearly constitutional, both with respect to the federal and state constitutions. These regulations will serve Colorado well. I think they will build confidence overall in the good work of our oil and gas industry and I believe they will protect the state's environment, public health, safety, and welfare, and our wildlife. I want to pledge to this Committee that as we move into the implementation phase of the rules, if we learn new things as we go along I believe the commission will be flexible. If rules need to be adjusted or modified, we will work with the stakeholders to take a look at and where necessary we will make the necessary changes or adjustments and report back to you with any amended rules. With that said, I was going to comment briefly on the recent downturn in the economic activity of the oil and gas industry, but I will defer on that, assuming that if it is raised later we would have an opportunity to respond.

Senator Veiga said I will assure you if it is raised later I will try to put a stop to any of that discussion because we're not here to talk about whether this is good or bad policy for this particular industry. Our scope is reasonably limited.

Representative Gardner said I want to ask Mr. Sherman about Rule 206. Rule 206. b. (4) relates to the compliance checklist and the regulation that says that form is not considered a report, record, or account for purposes of the criminal statute. If we were to follow the staff recommendation, what we would do is repeal that provision that makes it not subject to criminal penalties. Maybe I'm asking you to pull out a crystal ball, but how do you think the commission would react to that? Would there be a new rule, would it sit, or what are the possibilities? Mr. Sherman said let me give you my take on this and perhaps Mr. Neslin has a different take. I would say I do think the checklist is helpful and we would like to see this in our rules, so I would hate to see a repeal of the entire section that deals with the checklist. I think the commission, as to whether there are criminal or civil consequences associated with this, would review this on a case-by-case basis. I personally think, based on the philosophy of those on the commission, I would be very surprised even if we had the authority to impose criminal sanctions that we would do so. Would Mr. Neslin like to add anything?

Mr. Neslin said I would agree with Mr. Sherman's assessment.

Representative Levy said I want to thank Mr. Sherman for the work he has done over the last 18 months to two years to come up with some very comprehensive and well-balanced rules. I recognize you were handed a very difficult job and I think the commission as a whole did its best. I guess I am wondering about this emergency rule-making that the commission will undertake and whether you think you can actually conduct that rule-making in a timely and efficient matter, or will this entail the same sort of extended process you undertook for the rules in the first instance? I'm concerned we may have a period in which we won't have rules in place that we need to have in place. Mr. Sherman said I am confident we can do this in an efficient and reasonably quick manner. I looked at these two changes that we would be handling through an accelerated rule-making as technical issues. I think generally the commission did feel that on the consultation issue it was to be at the initiation of the DOW and I think we can easily conform Rule 306. to Rule 1202. so there's not ambiguity or confusion over that. We've reviewed the schedule that would be involved and I think we can begin proceeding on this at the next meeting of the commission and hopefully have a final rule within a month or two. I don't see this as a problem in our ability to handle the issues in front of us.

Senator Schwartz said I'm not 100% comfortable with a case-by-case assessment. I personally would like to see if the commission could clarify whether the checklist is formal reporting, if it in fact is required, and at what point in time it is considered

formal reporting and required. I think that grey area of what this reporting is and what the consequence of that reporting is relative to its accuracy doesn't serve either the commission or the industry. Mr. Neslin said we believe Rule 206. does set forth the kind of certainty you're look for. It specifies what the checklist is to cover, where it is to be maintained, when it is to be updated. Now, the issue that Mr. Morris has raised is whether the commission has the legal authority to categorically say this checklist will never be subject to criminal enforcement and he believes that we do not. I think what Ms. Shpall and Mr. Sherman said is we would continue to make that decision on a case-by-case basis. We would look at the facts of the particular situation, determine whether the misexecution of the checklist - the misrepresentation of facts in the checklist - was so serious that it warranted criminal enforcement by the commission or whether it was something less than that and in our prosecutorial discretion we would choose not to criminally enforce that. We have that authority under other statutes. We implement that authority as it is. I don't think that's a new authority for us. I can say in the 18 months I've been on the commission, we have not initiated a criminal prosecution, so I think that would be relatively unlikely.

Representative Roberts said I would like to say thank you as well for the process that you all went through on the commission. I had the opportunity to spend a long day at the Paramount and watch what was going on and also a lot of time at the airport with both industry from my district as well as citizens groups. I think it really is commendable what you all did. I am concerned or still not settled on the jurisdictional issues and am kind of looking for what our scope is here today and what we're supposed to be doing. The fact that this wasn't raised by the staff memo still didn't assuage my concerns about jurisdictionally how this interplays. As you know in my district, it's not only the federal government, but tribal, and so I would like to know that in fact these rules will allow for timely and efficient operations and so maybe you can help expand on that. Mr. Sherman said let me give a preliminary answer and perhaps Mr. Neslin would like to follow up. We have had multiple discussions with the BLM about working together to create an MOU which will efficiently and effectively and without duplication implement the federal rules and state rules. We think we can do this. We are working with the BLM staff. I talk frequently to Director Sally Wisely, the state director, and we're all committed to making this happen. Personally, I think it's important for the state of Colorado to retain its jurisdiction to implement its environmental rules on federal land as well as state land. In fact, if you look at all of the agencies within the Department of Natural Resources, the CDPHE, or other departments, I think it's very routine that the state of Colorado does apply its environmental regulations to federal land. I'm hopeful that we can do this in a relatively seamless way with the federal government. I do not anticipate this is going to change the timing for the review of permits. We are not factoring in delays related to this and I am confident that with our working relationship with the federal government we can have our state regulations at the table and we can do it in a way

that will work for the industry.

Representative Roberts said what would the remedy be for an operator if their description or their definition of timely isn't matching up with some of these other entities? Do they have some sort of recourse? Mr. Sherman said yes, they do. Under these rules, we have timelines for our staff to review these regulations, to do the consultations with the DOW and the CDPHE if they are necessary, and to bring these matters to the commission. If the staff fails to bring it to the commission within a certain period of time, then automatically the commission must hear it after a specific set of time. Then, the commission will, in cases where there has been a delay, hear these matters at our next scheduled meeting. We believe that we can adhere to a reasonable time frame in reviewing these. I can't always speak for the federal government, because the federal government has a much lengthier process. While we may be taking 30 to 60 days now to review permits, the federal government will often take up to six months. We will have to work as efficiently as we can and again, I'm confident we can integrate our system with theirs without delays to the existing structure.

Mr. Neslin said if I could elaborate briefly on Mr. Sherman's answer and make a couple points. First, we have for many years issued drilling permits on federal land. We exercise jurisdiction on federal land. I believe, consistent with Ms. Shpall's testimony, that it is black letter law that states retain police power on federal land, so we have legal jurisdiction to apply our rules to federal land. There may be certain exceptions as she mentioned. Those exceptions do swallow the rule. They are exceptions and limitations, but generally we have the authority to apply our rules on federal land to protect public health, safety, and welfare. Other states have developed MOUs in recent years of the sort that Ms. Shpall and Mr. Sherman have talked about here. I know in the Noble Energy materials you received they refer, and other parties have publicly referred, to correspondence that the BLM submitted to us at the beginning of the rule-making process expressing certain concerns. I want to emphasize that was at the beginning of the rule-making process prior to many modifications, compromises, and revisions to the draft rules. I received a letter from state Director Wisely approximately two weeks ago updating the BLM's position on these issues. I would like to provide copies to the Committee if I could. I also have a copy of a letter we sent to the BLM at the same time. These two letters are important. Director Wisely's letter states that as you know, the BLM has enjoyed a successful working relationship with the state of Colorado in regulating oil and gas exploration and production on federal lands and minerals. She goes on to provide some examples of that and her expectation that that relationship will continue. She then goes on to note her staff is currently reviewing the amendments to the rules and that members of both her staff and her solicitor's office have been in discussions with Bob Randall of the department staff to work through these issues. She closes by

saying as you and I, meaning Director Wisely and myself, have previously discussed, we anticipate an update to the 1991 MOU could address these issues in a way that avoids conflicts and minimizes disruption to companies producing or seeking to produce federal oil and gas resources. She closes by saying she looks forward to working together to strengthen and clarify her relationship with the state and she believes that we will be able to work through these issues as other states have been able to do. I've included a copy of a letter from Mr. Randall to Tyson Powell, one of the BLM attorneys, reviewing and discussing an example of an MOU the state of New Mexico recently executed with the BLM office in New Mexico regarding the application of New Mexico's pit rules to federal land. That MOU provides, we think, one example of the kind of approach we could take ourselves where the MOU identifies, with respect to different types of regulatory requirements, which regulatory requirement takes precedence and then that is deemed to satisfy the other agencies' overlapping or relevant requirements, thereby avoiding any potential inconsistency or confusion and ensuring a timely process and timely regulatory decision-making. That's the track that we're on.

Representative Gardner said I want to go back to this issue of the compliance checklist and Rule 206. b. (4). I am struggling with that as to what is the appropriate thing to do in light of Mr. Morris' memo. I think Mr. Sherman said earlier something to the effect that you believe that all of these regulations were constitutional and within your statutory authority. I understand that's your position, but I read Mr. Morris' memo and that's not his position, so perhaps you could articulate to me why the commission believes that the compliance checklist is not a report, record, account, or memorandum. If I'm going to reject that staff recommendation, I need to be satisfied in my own mind that the compliance checklist is truly not one of those things. Mr. Sherman said on this particular point, only because Mr. Neslin has reviewed this perhaps in a more detailed fashion than I have, I would like him to address it, but I just want to say that the intent here was to provide a helpful tool to the operator, a tool that would remind the operator of the various things that would be necessary and helpful to carry out his responsibilities. We wanted to do this in a relatively informal way as a tool that would not be viewed as an enforcement lever, but would be viewed as a helpful method of operation to ensure good success at a particular drilling site.

Representative Gardner said I get that. I'm not disputing that. I'm trying to figure out if we strike this provision that would limit its application to the criminal penalty whether or not I've thwarted your intent. I'm trying to figure out whether to strike it or leave it. Is there an articulable basis for why it's not a report, record, and so forth, so we can say thank you but we don't agree as a committee? I would just like you to articulate that to me. Mr. Neslin said I can't improve much beyond the explanation Senator Mitchell offered earlier, that this was intended to be a tool, principally a tool for the operator, not so much a tool for us in terms of enforcing requirements. The

commission believed that it did have the authority to define what it considered to be a report, record, account, or memorandum for purposes of the criminal enforcement provision and the commission attempted to exercise that authority to clarify that it didn't consider this compliance checklist to be such a report, record, account, or memorandum. Mr. Morris disagrees with that and believes that this is inescapably a report or record. We respect that position. We believe that if this provision were to be stricken, that does not mean that anytime someone improperly fills out one of these compliance checklists we're going to bring a criminal enforcement action. We would have to exercise our enforcement discretion to go to the district attorney. I'm told by Ms. Shpall that the Attorney General's office doesn't represent us in a criminal enforcement proceeding, so we'd have to go to the district attorney and ask the district attorney to initiate such a proceeding. That would have to be a conscious decision by, not just the staff, but the commission, and we would consider very carefully whether that is appropriate, keeping in mind what's set forth in the Statement of Basis and Purpose about the intent that this be a tool for the operator. Understanding your concern, I do not believe that if Rule 206. b. (4) were stricken or allowed to expire as Mr. Morris suggests that that would be inconsistent with the commission's intent because the commission would still be able to make a case-by-case decision to reflect its intent.

Representative Gardner said just a comment and then I'll move on. I'm really, for my own part and other members of the Committee may think otherwise, of the notion that that particular portion of the rule provided some protection to those who have to do the checklist and it's a rather slim read these days to hang your hat on that the commission and some future director and some future set of commissioners might not choose to criminally prosecute. I'm really struggling about whether to leave your regulations intact or whether to strike them in totality, but I find it a rather slim read to hang my hat on that future prosecutors, commissions, and directors might not use this as a tool themselves for some reason. Let me move on. With regard to this federal preemption thing, I suppose this is a building filled with irony, so it's the height of irony that I would be arguing for federal preemption. And I'm not really arguing for federal preemption, I'm trying to argue for some clarity here. In a past life I was essentially a federal agency attorney and so I'm pretty good at reading between the lines between federal and state agencies. I went back to the letter you referenced of June 6, 2008, in which Ms. Wisely, who's the state director for the BLM, said on page 3, as drafted the above rules attempt to impose state surface regulatory objectives on mineral lands owned and managed by the federal government. Should the draft rules be imposed on the federal mineral estate, even where federal interests underlie privately owned surface, application of these rules may impermissibly impede access to the dominant federal mineral estate. This interference frustrates the purposes of the Congress for federal lands and the federal mineral estate, but also creates unnecessary uncertainty for federal leases. I think the implication of that is that the federal government doesn't

think these rules necessarily confine themselves to the police power. I guess the first question is, were there changes made in the rules after June 6 that adequately address that so that you are not impermissibly imposing on the federal mineral estate? Mr. Neslin said virtually every rule that was amended changed between June 6 and December 11. June 6 was the beginning of the rule-making process. We had had one procedural meeting at that point, but we had not begun taking public comment or witness testimony, the parties had not made any of their oral arguments, and the commission had not begun deliberating on the rules. Now, after that date, we had 23 days of hearings and deliberations, the staff made suggested clarifications and modifications in June and July, the parties submitted suggested alternative language in June and July, the commission went through initial deliberations in August, September, and October, where they directed changes to almost all of the rules under consideration, and then the commission took final action through three days of deliberations in December. The version of the rules that Ms. Wisely was looking at were quite different from the final rules. She gave you one example that I think was of concern for Ms. Wisely, although I'm inferring this and it's not based on a discussion and she can best speak for herself. Some of you may recall reading in the newspaper that as initially proposed the rules would have included some fall back mitigation for wildlife and the fall back mitigation for operators who did not want to participate in a consultation with the DOW on site-specific mitigation would have been timing restrictions, that they wouldn't have to consult if they agreed not to undertake drilling operations for periods of up to 90 days. I think that the BLM was concerned about the potential use of timing restrictions on their property. The rules as adopted do not include timing restrictions. That concept was dropped during the rule-making process. There was another rule that provided that operators would need to do wildlife surveys on property. That rule was dropped. Other rules impose restrictions and through the rule-making process the ability of operators to obtain variances or waivers or exceptions from those restrictions was added and clarified, so there's more flexibility added through the rule-making process. From my standpoint, the rules did change dramatically through the rule-making process. I can't speak for Ms. Wisely as to what she was referring to last June in her letter, but I suspect that some of her concerns, perhaps most or all of her concerns, were addressed.

Representative Gardner said here's my concern, and it's fairly nuanced. You have an effective date for nonfederal lands and you have a later effective date for federal lands. It seems to me that while that may have been well-intentioned in terms of your working it out with the federal government so to speak, it both implies too much and too little, and that's why I say it's somewhat nuanced. It implies on the one hand that these rules apply in some broad and general way to the federal government and, frankly, I'm far from convinced that the federal government believes that. I think the federal government believes they'll do it if they want to and if they believe it's preempted no matter what you wrote, they're not going to do it. I think where it

addresses too little is because there is some broader application that we as a state rightfully ought to impose on the federal government. I think that different date creates for lawyers and agency officials from both sides all sorts of arguments that probably just ought not to exist. My position there is that we probably ought to have a single effective date. I understand the commission handles many many things on a case-by-case basis apparently, and if the commission on a case-by case basis wants to enter into MOUs with the federal government after the fact about how they will resolve their preemption problems, maybe that's just fine, but I have a real problem with the different dates of the application. That's not a question, but if you want to comment, please do. Mr. Neslin said our prior rules, dating back to over a decade, have had different dates for different requirements, so that's not a significant new change or precedent that we would have a rule take effect as to a certain area or certain property on one date and not in a different area or on different property as to another date.

Representative Gardner said my only response to that is I didn't review those rules, so I can't really comment about the propriety of that. I'm not even dealing with a particular parcel of property as much as I'm dealing with federal and state authority and constitutional questions and whether or not we as a state would preserve our own and whether we would allow the federal government to preserve its own and work those things out, but not institutionalize it by giving them a different date than private landowners have. Mr. Neslin said again, the concept behind having a subsequent date for application of federal land was to provide us with a little more time to work with the BLM on these issues. I think both the BLM and our office recognize that because states do generally have police power on federal land, it's not a bright line issue, as some have suggested, that we lack authority here. We need to look at the specifics of the rules and we really needed to have final rules in hand to be able to compare those to the federal requirements and decide how we can best integrate the two to avoid duplication and redundancy and to try to ensure timeliness and effectiveness. That process could only begin once the commission had finished amending the rules and that is in fact what has transpired. The BLM has done a lot of hard work over the past six weeks to get up to speed on the final amendments and we've scheduled and are in the process of undertaking a series of discussions with them to work through these issues.

Senator Schwartz said going back to the issue of the MOU, you've cited New Mexico as an example of an MOU with a state and I'd like to know what other states there might be. More importantly, speaking to the issue of timeliness, one of our objections is we have the ability to develop a process or streamline the timing of applications to be timely on our permitting process. My concern is that we are not sufficiently able to provide oversight and hopefully the MOU is the mechanism that can bring the federal process into alignment with our own and that we will be able to have some assurance that we're not going to be working at cross purposes, that we're not further

complicating their review, that timing be paramount in this MOU and to the extent you are comfortable that that will be an outcome you are satisfied with. Mr. Neslin said I would echo your view on that. We believe that this legislature directed us that our process should be timely and efficient and we believe that should apply whether it's private land, state land, or federal land. We believe that it may be possible to help expedite some of these approvals on federal land. As Mr. Sherman said, the average time period for the BLM to issue a drilling permit is on the order of three to six months. It takes us about 60 to 65 days on average to issue a drilling permit. We're hopeful that if we can add additional staff as the legislature has authorized, we can reduce that to 35 to 40 days by the end of the month. I think we would echo Senator Schwartz's concern in this area.

Senator Schwartz asked if that 45-day period would also include the federal process or be in addition to? Mr. Sherman said I think what Mr. Neslin is saying is we can, on our end, be prepared to do this within 45 days. It will be incumbent upon us to urge the federal government to expedite its reviews, but at the end of the day on federal land where you also would need a federal permit, it may take more time simply because the federal government has a longer processing period.

Senator Schwartz said certainly we're placing value on the comprehensive drilling plan (CDP), and to what extent do you feel the federal government will also see merit in the CDP and make that a portion of their process to expedite those reviews? Do you have any feedback from them that that's something they also will be interested in? Mr. Sherman said the feedback I have had is that the federal government is very interested in a CDP process. In fact, the federal government on its own has often taken a broader look at streamlining wildlife permits on a broader geographic basis. I do believe that the state's CDP process will fit well within the same objectives and directions that the federal government is going and that will be part of our MOU relationship.

Senator Brophy said I have a couple questions with regard to timely and efficient. I think Mr. Neslin said we are right now at 60 to 65 days to issue a permit and that your goal is to get down to a 45-day range. I believe that House Bill 1341 specifically mentioned "timely and efficient" seven times in the seven pages of that bill. I'm observing across the state line from where I live in Nebraska and Kansas that they are issuing permits often in as short as 48 hours and certainly never exceeding a week and in my humble opinion that resembles a timely and efficient manner much more than a 45-day wait would. Is there a plan for the commission to ultimately get to something that is truly timely and efficient, under a week, for the issuing of a permit? Mr. Sherman said I don't believe we're going to get to one or two days as a timely and efficient review of permits. First of all, as I think has been discussed, these rules do have a notice period and the notice period is a 20-day process, so if Kansas and Nebraska issue permits in one to two days, clearly they do not include a notice

provision. In addition to that, I think as we've mentioned, we are trying to address environmental issues and we're trying to address issues for the protection of wildlife. I cannot imagine a process where a permit is issued in one to two days where there is adequate review to address those types of issues. I think we may have some different objectives than some of these states that have processes by which they in fact issue permits in one to two days. If we're going to try to address the issues that we've talked about, which start with the technical issues, the down hole issues, where we are ensuring that the state's water quality, its air quality, and its wildlife, are being protected, and we're trying to reach certain accommodations between surface owners and operators, it takes more than one to two days. I do believe if we can get this time period down to 30 to 45 days, that is an efficient process that I think will serve the state well.

Senator Brophy said as a follow up to that, Mr. Neslin also made reference to the legislature directing the commission to come up with a timely and efficient manner of issuing permits, and that was mentioned seven times in House Bill 1341. Was notice ever mentioned in House Bill 1341? Mr. Neslin said I don't believe it was. However, as I think Mr. Morris and Ms. Shpall pointed out, part of the basis for the rule-making is our broad regulatory authority over defining our permitting process. As part of defining that permitting process, the commission determined that transparency would best be served by providing for notice and a limited opportunity for the public to provide input on these applications. Interestingly, as part of the rule-making process, I think we had 15 local governments testify that they typically provide that kind of notice and opportunity for input to either the property owner or immediately affected property owners as part of their land use or other regulatory approval process. The commission believed that providing that kind of notice and opportunity for input here would improve our decision-making and lend further credibility to the process.

Mr. Sherman said let me also add to that that when you look at how the federal government is regulating oil and gas development on its lands, it clearly provides for notice that is at least equal to what the state does. If you look at how we are regulating mining operations in the state, every mining application has notice and where counties are dealing with this issue, almost all of the counties are providing at least comparable notice.

Senator Brophy said for the record, I did check House Bill 1341. It never does mention notice and I don't think anybody who's ever worked with the federal government would suggest that anything that they do with regard to oil and gas is either timely or efficient. I'd like to move on to a different question related to Rule 206. and the staff's recommendation that we strike that provision of Rule 206. b. (4) that the commission has put in there as we've discussed on numerous occasions, relative to holding somebody criminally liable for something in the reporting. During

the discussion with Representative Gardner over that, both Mr. Neslin and Mr. Sherman indicated that on a case-by-case basis, they might decide whether or not to proceed with any type of criminal prosecution against somebody if Rule 206. b. (4) was taken out. What concerns me about that, and what I'm coming back to on this, is either we need to leave Rule 206. b. (4) in there or strike the entire Rule 206. b. because I'm not comfortable with the agency that promulgates the rules and oversees the regulation now inserting themselves into the law enforcement and district attorney position with regard to criminal activity. Do you understand my point in that? I don't think it's proper for the commission to be taking that position where they are writing the rules and enforcing the rules criminally at the same time. Mr. Neslin said let me begin by saying I don't know that we object to leaving Rule 206. b. (4) in. We included it as part of the rules and I don't think we object to that.

Senator Brophy interrupted and said a lot of times, Mr. Neslin, your answers get fairly lengthy and I like the first part of your answer a lot and it lines up with the point I was making: Either we need to leave that in there or take the whole thing out. Leaving it in stays in bounds with what the commission did and wants to do but taking the whole section out gives me a lot more comfort. Mr. Neslin said you may not like the rest of what I have to say. I do disagree with your point because I think that all agencies that adopt regulations, which may have statutory authority to criminally enforce those regulations, end up having to exercise prosecutorial judgment about that. That applies to our commission and it applies to probably most agencies in the state. I would disagree that there's any kind of conflict of interest or appearance of impropriety for our commission exercising a decision down the road about whether to recommend a criminal enforcement of a violation or not.

Mr. Sherman said I would like to emphasize that we do not have any objection to leaving this particular provision in if the Committee elects to do so. Senator Brophy said I like that answer a lot too.

Senator Veiga said Mr. Neslin did not have an opportunity to tell the Committee anything before questions, so at this point if you want to proceed with whatever you have prepared I think that would be appropriate. Mr. Neslin said I'll be brief. The point I wanted to make is that the rules under consideration we believe lawfully and responsibly implement the 2007 legislation, address the increase in oil and gas development that we've experienced in the state, and update our prior rules where that is appropriate. As directed by House Bill 1341, the rules provide additional protection for public health, safety, and the environment through new requirements that operators disclose to the state and medical professionals the identity of chemicals used on-site downhole, that they avoid drilling new wells next to public drinking water tributaries, and that they install emission control devices on certain types of production equipment where it's located close to a home or school. As directed by House Bill 1298, the rules

minimize adverse impacts to wildlife by providing for the DOW to work with operators and surface owners on site-specific mitigation for sensitive wildlife habitat and for operators to avoid drilling new wells in the most critical habitat where it's technically and economically feasible to do so. In this way, we hope to maintain our wildlife resources and avoid the listing of additional species under the federal endangered species act. As directed by House Bills 1298 and 1341, the rules provide for consultation by the CDPHE and the DOW in limited circumstances. This consultation will result in the submittal of recommendations to the commission; it does not delegate any permitting or decision-making authority to those other agencies. As directed by both statutes, the rules provide for a timely and efficient permitting process through measures such as limiting the duration of consultation to 40 days, expediting approvals under certain circumstances, such as where a CDP has been prepared, and allowing operators to obtain expedited commission hearings if decisions are not timely made. As I mentioned, if we're able to add the additional staffing that this legislature has authorized, we hope to substantially reduce our average current permitting time from more than 60 days down to 35 to 40 days on average by the end of this year. As directed by House Bill 1298, the rules encourage landscape level planning through operator-initiated CDPs, which will facilitate early and collaborative review and expedite regulatory approval. To date, 21 operators have begun work on the development of these plans, which would generally address their operations during the period of 2010 to 2015. Consistent with our broad, preexisting statutory and regulatory authority, the rules provide for enhanced transparency by notifying surface owners, adjacent landowners, the CDPHE, and the DOW of permit applications, and providing the public with 20 days to submit comments. This is similar to the process used by other states and local agencies in Colorado to approve proposed projects and we believe that it will help us to make better informed decisions and enhance the program's credibility. Also consistent with our broad statutory and regulatory authority, the rules avoid a one-size-fits-all approach by tailoring numerous requirements to the individual circumstances of the location or the region. This includes rules concerning permit applications, public notice, drinking water protection, odor controls, and wildlife habitat protection. These rules match regulatory protection to the impacts or the resources to be protected, so the requirement will apply very differently in Garfield county than they will up in Yuma county and they'll apply very differently in La Plata county than they do in Las Animas county. Finally, again consistent with our broad statutory and regulatory authority, the rules provide for variances, waivers, and exceptions in appropriate circumstances. This has long been one of the hallmarks of the commission's regulatory program. If you think about it, it is critical in regulating an industry as diverse as oil and gas, which really spans the state, and as dynamic as oil and gas, where we've seen a transformation in a decade's time from one well per pad to out on the west slope where we're seeing 20 to 30 wells per pad and where those kind of multi-well pads are now the rule and not the exception. This will continue under the amended rules and it will allow us to

implement win-win solutions that allow energy to be developed while doing a better job of protecting the environment and other resources.

Mr. Neslin said if I could briefly elaborate on a couple of the points made by Ms. Shpall in response to the Noble Energy memo. Ms. Shpall made the essential points and I would just point to some additional authority in the rules that answer these questions. There were questions or concerns about whether the surface owner's right to a hearing was in some way inconsistent with the reasonable accommodation doctrine, as codified in House Bill 1252. I would note in the Statement of Basis and Purpose for the rules, we address that issue. The Statement of Basis and Purpose is part of the rules under Colorado law and it states that in terms of the hearing process, surface owners may not request hearings merely to oppose oil and gas development or to raise issues involving reasonable accommodation or contract interpretation. It states further that the commission cannot, for example, remedy issues related to the interpretation or enforcement of surface use agreements or other contracts between surface owners and operators governing surface use or the application of the reasonable accommodation doctrine codified in section 34-60-127, C.R.S. So, we don't see an overlap between the surface owner's right to request a hearing to allege a significant impact to public health, safety, welfare, or the environment or in violation of our rules and the surface owner's separate rights as a property owner under the reasonable accommodation doctrine. With respect to the ability of the CDPHE and DOW in limited circumstances to request a hearing, again, the Statement of Basis and Purpose provides that the commission urges and expects the CDPHE and DOW to exercise this procedural right - the right to request a hearing - judiciously and to request a hearing only where significant health, safety, welfare, or resource protection issues or policies are at stake. It's very clear that neither the DOW nor the CDPHE anticipate frequent recourse to requesting hearings from the commission, but it is important that they have the right to request a hearing in limited circumstances for two reasons. One, House Bills 1298 and 1341 direct that they should have the right to consult with the commission. Permitting decisions are made at the staff level and that may not have been clear during the earlier colloquia. We issue the permits at the staff level, so if the other two agencies don't have a right to elevate that permitting decision to the commission, then in fact they are not receiving an opportunity to consult with the commission itself; their consultation rights are limited to consulting with the staff and that is not, in fact, what the legislation provided. Second, it ensures a level playing field because we did broaden the operator's right to request a hearing as well. This may also not have been clear. Under our prior rules, operators had very limited recourse to the commission to request a hearing. They could not, for example, challenge conditions of approval they thought were arbitrary and capricious, except in very limited circumstances. We broadened that and allowed operators to challenge any of our permitting decisions and any of the conditions we impose with the commission. Reciprocity we think is important and if the operator can challenge our decision to

impose a wildlife condition, for example, we believe the DOW should have the right to request the commission to review our decision not to impose such a condition. Last, in its material, Noble Energy suggested that the rules would allow any person, either a nearby landowner or any member of the public, to request a hearing. That is not correct. The Statement of Basis and Purpose speaks specifically to that issue. It states as amended, Rule 503. b. will not allow nearby landowners or members of the public to apply for a hearing. I'm prepared to stop at that point.

Mr. Sherman said I hope we can have a few minutes for Director Remington at the DOW. Senator Veiga said not at this time. At this time we are going to move into the witnesses as I previously discussed. We are going to move to opponents first and then we'll move into proponents subject to maybe some time limitations depending on how long we go on.

2:41 p.m. -- Curtis Rueter, Environmental and Regulatory Manager for the Northern Region, Noble Energy, Inc., and Susan Aldridge, Attorney, Beatty & Wozniak, testified before the Committee. Mr. Rueter said my background is engineering. I have a degree in chemical engineering, not legal issues. You may ask why bring an engineer to speak to the Committee? I think it's because we want to approach some of these rules from an operator's perspective and provide what we think are some common sense interpretations of the General Assembly's past actions and how we feel some of these rules are going beyond the legislative intent. Noble Energy has concerns about two specific issues found within the 300-Series and 500-Series of the rules. Of the 172 pages adopted by the commission, these concerns are limited to specific language in only two or three pages and primarily around the consultation processes and roles of surface owners. While we believe the adopted consultation process prior to a decision by the commission to grant a permit reflects the language and desire of the General Assembly on this policy, we think certain of the rules go well beyond the pre-permit consultation process that were outlined in the bills. We already heard earlier today Mr. Morris talk about the language in House Bills 1298 and 1341. I think you've heard a number of times the language regarding timely and efficient processes as well as the language in House Bill 1341 to provide the CDPHE an opportunity to provide specific comments. [The Committee members received a chart labeled "COGCC Permitting Process.] This is a graphic of the permitting process that's embodied in the new rules. It starts off, we think, fairly simply. The operator prepares the technical background information, the Forms 2 and 2A, in the rules and we submit that to the commission. This is very consistent with past permitting processes in the commission as well as other permitting processes I have experience with where basically we submit the technical information and they need to make a decision on the permit. It then goes to the commission and they have 10 days to review the permit and basically verify that we have submitted all the information they need, so it's administratively complete. Once it is administratively complete, then they post it to

the commission web site. This, again, is an existing process. The new part of the rules is that it's posted for a public comment period for 20 days with the potential of extending that to 30 days under certain circumstances. During this 20-day public comment period, any of the agencies that have been discussed earlier, the CDPHE and the DOW, as well as local governments, can request a consultation. If that consultation is requested, then concurrent with that public comment period, there's a 40-day consultation period. At the end of that, those agencies - whoever is doing the consultation since they will not all necessarily be involved in any particular consultation - make their written recommendations to the director of the commission. Then, the director approves the application for a permit to drill (APD) or makes his or her decision on the APD and may include conditions of approval on the permit, consistent with the recommendations made by the parties during the consultation. If, during the consultation all of the parties - the operator, the surface owner, the consulting agency - agree, then the conditions of approval are very easy. Everyone agrees, we add those, we all move on. If there's a disagreement, though, then it's left to the director's professional judgment about what to do in terms of imposing conditions of approval on the APD. At this point, the APD is issued, and we believe the process up to that point is very consistent with the language of House Bills 1298 and 1341 in terms of a timely and efficient process for consultation, an opportunity for the CDPHE to provide specific written input, and it meets the timely and efficient process in terms of that whole process will take on the order of around 60 days as Mr. Neslin mentioned earlier and potentially less as we move forward. This is a process that we as a company can work with. It has a defined time frame, it provides for consultation and input, and it meets the spirit of House Bills 1298 and 1341. Where we feel the new process moves beyond the legislative intent in those bills is in setting up the appeal period. After the APD is issued now, there's a 10-day appeal period, whereby the DOW, the CDPHE, the local government designee, or the surface owner can appeal the issuance of the APD. If the APD is appealed, then it is suspended and it goes to notice in the newspaper for 20 days and then the case will be taken up at the next regular meeting of the commission. Since the full commission meets only monthly, that imposes an approximately 30- to 60-day delay on that. In addition, if a protest is not appealed, there is also a 30-day period during which any aggrieved party, not necessarily one of those parties - it can be any member of the public as we understand it who can show a grievance - can file for judicial review of the APD. This is another step that goes beyond the legislative intent embodied in House Bills 1298 and 1341. Those two things taken together set up an opportunity for repeated appeals by either the agencies and/or any aggrieved party, potentially total strangers not related to that case, to appeal an APD. This is a new portion of the rules we think goes beyond the legislative intent embodied in House Bills 1298 and 1341. The part I missed is when it's posted to the web site, we're also required to give notice to the surface owner and the adjacent surface owner. Again, the notice to the adjacent surface owner is a new requirement in the rules that we think goes beyond the intent

embodied in Senate Bill 237 and House Bill 1252. Although I would agree with Mr. Neslin's characterization that under the broad police powers of the commission they are not prevented from doing that, our simple position is that the General Assembly spoke clearly on the surface owner issue in House Bill 1252 and in Senate Bill 237 and that these things that modify that relationship or that go beyond what the General Assembly clearly stated in its policy are inconsistent then with what the General Assembly said. In every other setting that I'm aware of, and many people in this room know I've spent my career working in environmental issues related to energy production, air quality, water quality permitting, and domestic water well permitting, if you live in a rural area, permitting is basically a technical or administrative process. Essentially, the agency defines the requirements, you as the applicant certify that you meet the requirements, and the agency issues the permit. If there are particular situations where they need to add conditions of approval, they do that. This would be the first process I would be familiar with whereby third parties have a right to appeal the permit to this extent, although local government designees currently have the right to appeal APDs but those other parties do not. None of the other permits that I'm aware of also provide within the rules of the agencies for specific judicial review of permits. I spoke to the surface use agreement material already, but one concern associated with that is that Noble Energy and most companies execute surface use agreements (SUA) with the vast majority of their surface owners. Again, that has been codified in House Bill 1252 as well as Senate Bill 237 within the Wattenberg area. When we're unable to get an SUA with a recalcitrant surface owner, procedures have been put in place through those previous bills as well as the commission procedures to allow us to go on to a process called "bonding on" so the mineral owner is not deprived of their right. This appeal right after the approval of the APD process provides, we think, yet another leverage for that recalcitrant surface owner to deny the rights of the mineral owner. In conclusion, our case is really very simple. We believe that the post-APD issuance appeal process and the judicial review is beyond the intent of the timely and efficient process for consultation. Up to the issuance of the APD we think is consistent with House Bills 1298 and 1341. The new rights given to surface owners and notice given to adjacent surface owners are issues the General Assembly had an opportunity to address in 2007 and specifically chose not to. They did not intend to extend those rights and so we think that goes beyond the legislative intent as well. That concludes our prepared testimony and I'd be happy to answer any questions. Ms. Aldridge is here, since I'm the engineer, to help me answer if the Committee has legal questions.

Representative Gardner said I need it simpler than that. Can you point me to the rules that you believe are rules where the commission has exceeded its statutory grant as interpreted and then let's cut to the chase and say exactly why? Mr. Rueter said in your briefing booklet are some of the specific rules we've highlighted. Rule 305. b. and specifically Rule 305. b. (2), Rule 503. b. (7), Rule 501. c., and Rule 305. e. are the

principal ones. There is also some general language under Rule 509. This is where it gets complicated. If you change Rule 305. b. (2), which allows them to file the appeal to suspend the APD, and then you change Rule 503. b. (7) on some of that, it trickles through in other places. There are lots of places that deal with the appeal process and give those agencies rights, give those agencies notice, and so forth, and so there's kind of a trickle down effect. Those are the specific places where those rules, from my perspective at least, are initially highlighted in the material. He asked Ms. Aldridge if she had anything to add?

Ms. Aldridge said I think clearly Rule 503. b. (7) and Rule 501. c., the judicial review provision that effectively extends the rights to anyone that can make an assertion that they have been aggrieved or affected to seek review in the court, and that clearly becomes problematic and is not consistent with the intent that was recognized in House Bill 1341 nor was it in House Bill 1298.

Mr. Rueter said Rule 305. e. is the notice to the adjacent landowner.

Representative McGihon said I have had several discussions with you and others about this right of appeal. In the statement of intent, it was pointed out that it says, as amended, Rule 305. c. will not allow nearby landowners or members of the public to apply for a hearing. That limits a portion of the appeal, would you agree? Ms. Aldridge said with respect to that provision, it would limit it to surface owners to request a hearing before the commission, but what it doesn't do is deal with the Rule 501. c. that then extends the right to anyone who can contend that they have been adversely affected or aggrieved based on the issuance of an APD and that's where it can also become problematic.

Representative McGihon said yet we know that no one who doesn't have constitutional standing can bring an action under Rule 501. c. regardless. Ms. Aldridge said that's accurate but we have experienced, even under the old rules, situations where there have been parties that have come before the commission contending that they were aggrieved or affected in some fashion, whether they were surface owners or not, and it has created delay, which is going back again to the timely and efficient process not being had if we now incorporate the language to include surface owners and adjacent owners who can request hearings and/or who can claim at a judicial level that they have issues with the rules, or the ADP more importantly.

Representative McGihon said I'm just trying to clarify then that you think Rule 501. c. exceeds the statutory authority because it does not set forth a timely and efficient process. Ms. Aldridge said that is accurate but I also believe that it exceeds the intent because nowhere in House Bills 1298 or 1341 was it ever anticipated that the surface owners would have a right to appeal an APD. The reason I say that is because even

Ms. Shpall said something to the effect of during this oil and gas boom we were very concerned about the community and the affected parties and yet at no point did House Bill 1341 incorporate language that stated that those who must be consulted included surface owners. It was specific as to the CDPHE and the DOW, so to go beyond that to now include surface owners in Rule 503. b. (7) and then to include other adversely affected or aggrieved parties in Rule 501. c. (3) does exceed the authority and goes beyond the intent of House Bill 1341.

Representative McGihon said I guess what I'm really hearing is two different versions about the rule, because when I read the Statement of Basis it says that those people do not have a right under Rule 503. b. but under Rule 501. you do say they have a right and I haven't found anything under the Statement of Basis on Rule 501. c. so I'm hoping someone will send me a note where I can look for that. Mr. Rueter said that an adjacent surface owner does not have a right to appeal through the appeal process, which is I think what you're referring to in the Statement of Basis and Purpose. But, since the judicial review is very broad for any aggrieved party, it's easy to envision a scenario where an adjacent surface owner, who's now been given notification and everything else, says that's going to disrupt my view or I don't like my neighbor anyway. You can go a lot of different directions with how an adjacent surface owner might try to insert himself or herself into the process.

Representative McGihon asked would it be fair to say that you think the rules are in conflict in some way or that Rule 501. c. just exceeds the authority then? That's your argument that Rule 501. c. adds parties not intended to be added for appeal rights. Mr. Rueter said Rule 501. c. makes APDs subject to judicial review for the first time ever and I don't believe it was anyone on the industry side's expectation or understanding through any of those bills that APDs would now become subject to judicial review, so we believe it goes beyond legislative intent.

Representative Roberts said what I think I hear you saying is you understood that the CDPHE and the DOW with the bigger interest of the state would have the ability to get engaged here but that the surface owner, because it's a private party and because there is House Bill 1252 available for accommodation although not with adjacent landowners, but that you're seeing sort of an inconsistency here in terms of Rule 503. allowing the surface owner to raise an issue when in theory that was a right reserved to the DOW and the CDPHE. Is that what you're saying? Mr. Rueter said yes, but not exactly. House Bill 1252, in our interpretation and understanding, did not give the surface owner a right of appeal, so we would say that giving the surface owner a right of appeal goes beyond that. We would say, though, that House Bills 1298 and 1341 did not give the DOW and the CDPHE the right to appeal either. It did give them the right to consult prior to the issuance of an APD, but that did not give them the right to appeal either. We would disagree with the appeal rights of all three of those entities.

Representative Roberts said and House Bill 1252 wasn't part of these other two bills, so I wasn't meaning to suggest that. So, you would argue that there shouldn't even be an appeal right for the DOW or the CDPHE under the two statutes that we are talking about. Mr. Rueter said that's correct, just because of the language around timely and efficient consultation and in House Bill 1341 the opportunity for the CDPHE to comment. We think when you move to the appeal you go from consultation and comment to almost a review and approve, that they get that second shot at the whole process. They're not simply providing input anymore under a common sense definition of consultation, but rather they're having almost in a sense a veto authority to say we don't like the director's professional judgment in issuing the permit and we want to appeal that.

Senator Veiga said we heard from both Ms. Shpall and also Mr. Neslin that their interpretation of consultation under the statute meant that if you're going to consult with the commission, in fact you really have to provide that opportunity to get to a full hearing. In other words, absent that, the consultation would have no meaning whether it was the DOW or the CDPHE who would be consulting with the director. I guess the first component of the question is do you agree or disagree with that assessment and then the second component of it is if you bought that assessment or that line of reasoning, even if you don't, and then the DOW or the CDPHE could actually request a hearing, then does it not naturally follow from former Rule 514. that's sort of now adopted into Rule 501. c. that they all then would have standing to appeal? Mr. Rueter said I'll address the first part of that and let Ms. Aldridge handle the second part of that because I'm not sure I followed that well enough. My plain reading, where it says give the CDPHE an opportunity to comment in the commission's decision-making processes, in this case the decision-making process we're referring to is the issue of an APD and it's a technical and administrative process that has always been carried out by the commission staff, I think the reasonable interpretation at the time the legislation was adopted is that it refers to the staff process.

Ms. Aldridge said I don't have anything to add.

3:04 p.m. -- Ken Wonstolen, Attorney, Beatty & Wozniak, representing the Colorado Oil and Gas Association, testified before the Committee. He said the association is an oil and gas business trade association representing a wide range of the oil and gas business in Colorado. I will try to speak to the statute and I'd like to start where you just left off on this issue of Rule 501. c. and the judicial appeal. I think we have to recognize that it really isn't within the domain of the commission, a regulatory body, to state or determine who has standing to appeal in the courts. That, of course, is going to be a matter for the courts to determine as to who has standing to appeal. It really doesn't matter what the commission says in its rules, the courts will determine who has standing to appeal and the commission has no jurisdiction in that respect.

Representative McGihon said if I could interrupt you and just clarify that the courts will determine who has standing to appeal and Rule 501. c. just recognizes that and that right of appeal is under the APA. Mr. Wonstolen said I think what is under the APA as well is, in general, the right to appeal the actions of state agencies. I think the relevant issue with respect to particularly the adjacent landowner here is that because the commission has essentially said the adjacent landowner interest is so important here that we are going to require that the operator provide actual, not just instructive, notice of the operation to those adjacent landowners. We should understand they're not just adjacent in terms of contiguous property lines but proximate landowners. Because they have required that the operator provide that actual notice, I think they've almost created a presumption for those folks that enhances their ability to go to court and say we must be directly and adversely affected or aggrieved because after all the commission required the operator to provide us with this notice, in addition to which the rules also allow or grant the right to those proximate landowners to extend the public comment period and that's an automatic right they're granted. I think when we put those two things together, you have perhaps eased the path into the courts for those proximate landowners.

Representative McGihon said to bring you back to the orange card and what about that in any specific rule do you think where the agency exceeded their statutory authority or violated the constitution? Mr. Wonstolen said if I can defer that adjacent landowner question, I have kind of a sequence to go through here, but I will come back to that.

Mr. Wonstolen said I wanted to start off with just a couple comments on the Office's memo from Mr. Morris who did a commendable job. I'm not sure where the Committee is heading with this issue of the compliance checklist, but I like either of the two options I've heard you discuss, which is either to leave subsection (4) in there and take the approach that Senator Mitchell suggested that this checklist doesn't rise to the level of document that's covered by the statute or the approach from Representative Gardner or Senator Brophy to strike the entire provision if you deem you must strike (4) and have the commission go back and repromulgate that rule in a fashion that makes it clear that's not the kind of record or account that Senator Mitchell was talking about, and I think that can be accomplished in fairly easy fashion. Secondly, with respect to the striking of Rule 306., on the basis that it placed the obligation to consult on the wrong party, I agree with that assessment of Mr. Morris and I think it's important to understand the significance of that change, although it's somewhat subtle. Under the rules as they exist today, for instance, if the operator is planning to drill a well, he's required to go on the commission's web site and look at what's called a sensitive wildlife area map and if they fall within the sensitive wildlife area map boundaries, then it's up to the operator to initiate a consultation with the DOW to see what sorts of conditions of approval they might recommend. By putting the onus on the DOW to initiate the consultations, you've shifted the dynamic

considerably. Instead of the operator going hat and hand, if you will, to the regulatory agency and say may I drill the well and under what conditions will you allow me to do it, it's really now the onus is on the DOW to prioritize those applications that it sees coming through the door in areas of wildlife concern and to go to the operator and landowner and say we would like to discuss with you our concerns about wildlife. That may seem a bit subtle in terms of who initiates and where the burden lies, but I think it's a significant change and an important one that the industry supports, so we commend that portion of Mr. Morris' memorandum to you.

Mr. Wonstolen said I'm going to then turn to this issue of the back-end appeals that Mr. Rueter and Ms. Aldridge were talking about. This is in regard to Rules 503. b. (7) B., D., and E., and those are the rules that grant the right to the surface owner and to the two state agencies to appeal the decision of the director of the staff to the commission. I think I heard Ms. Shpall and Mr. Neslin both say if we didn't have this appeal right to the commission then those agencies lose their opportunity to consult with the commission as opposed to the staff. Well, I would suggest to you that invoking an adjudicatory hearing, an evidentiary hearing, before the commission in a quasi-judicial setting is not a consultation with the commission. It goes well beyond the consultation so I don't find that point persuasive at all. With respect to the surface owners, I think the relevant issue is what are the duties of the commission with respect to surface owners? They're very well-defined in the act. In section 34-60-106 (3.5), C.R.S., the commission is to administer a program of financial assurance to secure surface owners who are not secured by an agreement with the operator against unreasonable crop losses and land damage. That's one duty of the commission with respect to surface owners. The second duty is in section 34-60-106 (14), C.R.S., which authorizes the commission to require operators to provide advanced notice of drilling activities to surface owners. That's it. With respect to other obligations to surface owners, Representative Roberts' bill, House Bill 1252, covers the relationship between the two property interests, and disputes that arise in the context of House Bill 1252 go to the civil courts and not to the commission. Essentially, instead of following these limits with respect to surface owners, the commission in these rules has empowered surface owners with the right to suspend the issuance of the drilling permit, because we have to understand now, when we talk about these appeal rights, this means the permit does not issue. There's a 10-day period built in there for the parties with standing to make that appeal. They have now empowered surface owners to suspend the issuance of the permit by alleging either that the director didn't follow his own law, which would be an unusual case, or, and this is a fairly broad and vague allegation, that there is a potential adverse impact to the public health, safety, welfare, and the environment or wildlife. That's a fairly broad authorization to allow the surface owner to come in and make that allegation. I believe that this General Assembly has not previously and did not in House Bill 1341 direct the commission to in effect deputize surface owners to come in and allege that the law is being violated by the staff or to

have surface owners bringing forth general concerns of public health, safety, and welfare. You have instead directed the commission to get that input from the CDPHE and the DOW, respectively. Therefore, I believe that is a statutory rationale for striking Rule 503. b. (7) B. With respect to the two state agencies, and this is just to reiterate what you've heard, first we have two issues. Is it timely and efficient to provide them with a back-end appeal? Is it timely and efficient, for that matter, to have every drilling permit in the state of Colorado sit for 10 days after the director has made the decision to approve the permit and conditions of approval, to see if one of the parties with standing to appeal intend to bring that appeal? That's one issue. Secondly, I think in terms of House Bill 1341, the obligation was to provide the state agencies with, and the words from the statute are, an opportunity to provide comment. I do not believe an opportunity to provide comment translates into the right to suspend the issuance of a permit and force an adjudicatory proceeding in front of the full commission. Those are the reasons I suggest those provisions in Rule 503. b. (7) should be considered and stricken.

Representative Roberts said going back to the surface owner and the appeal rights. I think the phrase you said, which I think I understood, was the surface owner deputizing, essentially. This process proposed means they go beyond being the individual surface owner to, on behalf of the state of Colorado in a sense, arguing for wildlife and public health issues. Whereas, the CDPHE and the DOW have that authority to act on behalf of the state, but we're now taking an individual and sort of expanding their ability to speak. I wanted to confirm that sense of what you were saying, but secondly, can you tell me what rights would a surface owner have if dissatisfied with the director's decision? Would that be under the APA that there would be arbitrary and capricious? Is there some recourse there for a surface owner to disagree? They've made their concerns known, either on the public health or wildlife issue, and the director does not see eye-to-eye with the surface owner, is there already a recourse for that surface owner to disagree? Mr. Wonstolen said I think you do have a right. What I'm suggesting is that the rules still allow the surface owner to give them the right to suspend the issuance of the permit and take them to a hearing, in effect, make them the agents of the state with respect to those issues they've been authorized to bring forward. Even in the case where you may have had the CDPHE consult on a permit and make recommendations and have some agreement between the operator and the staff of the commission and the staff of CDPHE that the public welfare issues have been addressed, you have a surface owner come in and second guess that decision, essentially, get another bite at that apple, and force the parties into an adjudicatory proceeding. With respect to your second question, I think the surface owner is very likely to have the ability to convince the court that that owner has standing to appeal a decision of a regulatory agency that affects the property interest of that surface owner. I think that's consistent with House Bill 1252 where any of the property disputes between the two parties are directed to the courts, rightly so, and not

to the commission.

Mr. Wonstolen said I'll move on to the next issue here. The next issue I'd like to address is Rules 305. c. and e. and these are the rules that in tandem provide first that it's the burden of the operator to identify those proximate landowners within 500 feet of the proposed surface location and granting those proximate landowners the automatic right to extend the public comment period from 20 to 30 days. There are some other rules that mention the adjacent landowners that are just kind of conforming language. The issue is that we have to start from the premise that the oil and gas right is a property right that is independent of the state's police power. The owner of that right has some inherent right to develop their property right. The state may condition the exercise of that property right through a reasonable exercise of its police power. This body, over the years, starting in 1994 and with an amendment in 2001, has placed some condition on the exercise of that independent property right relating to notice. In 1994, in Senate Bill 177, this body authorized the commission to require the operator to provide advanced notice of operations to the surface owner on whose property the well is drilled. In 2001, this body acted again and added the local government whose jurisdiction the well is drilled to the burden of notice that you authorized the commission to put on the exercise of the property right. My position is that by going beyond that and including in the burden that must be met before you can exercise your property right a notice to those proximate landowners, it goes beyond a specific directive of this body to the commission. While the commission, in the Statement of Basis and Purpose, points to the general public health, safety, and welfare authority, if that's the case then there are no bounds whatsoever on the commission's authority. A rule is not deemed to be within the statutory authority of the agency merely because it's not contrary to a specific provision of the statute. The fact that the legislature did not say "only" to these members doesn't mean that, ergo, the authority exists to go beyond those members. Moreover, I think as we talked about several times, the General Assembly has directly addressed the impact of oil and gas on landowners. In 2007, the same session as those two bills, the accommodation doctrine imposed on operators by House Bill 1252 flows only to the surface owner and a rule that empowers other nearby landowners to bring their own parochial property concerns or their NIMBY concerns into the well permitting process interferes with the ability of the surface owner and the operator to make location decisions pursuant to surface use agreements. Therefore, I believe there is a rationale to strike Rules 305. c. and e. relating to notice to adjacent landowners and granting them the right to extend the comment period.

Mr. Wonstolen said the next issue I wanted to get back to is this issue of the applicability of these rules to federal lands, which you've had some discussion on already. This is a matter of some considerable controversy and has been throughout the proceedings. You've been pointed to a specific statutory provision and I'd like to

refer back to that. Section 34-60-120, C.R.S., says as to lands of the United States, the article shall only apply to the extent necessary to protect the correlative rights - that's not the issue here - and to carry out the provisions of sections 34-60-106, 34-60-117, 34-60-118, and 34-60-122, C.R.S. Notably, that list of statutory sections which are applicable on federal lands does not include section 34-60-128, C.R.S., where the entire "Colorado Habitat Stewardship Act of 2007" from House Bill 1298 is codified. I think you probably haven't heard quite the fine distinction here that exists with respect to the exercise of state authority on federal lands. State authority on federal lands is limited to the police power found in the protection of public health, safety, and welfare. By its very nature, by the terms, by the title of this act, the "Colorado Habitat Stewardship Act of 2007" is really not founded or grounded in public health and safety; it is grounded in land management. It is, in effect, a land use statute and that's a very different type of application of state law. If we go back to the letter that Representative Gardner read from to some degree, that letter on June 6 recognizes the distinction between the police powers and the land management powers and indicates that several of the rules not limited to the wildlife timing restrictions that Mr. Neslin talked about - Rule 513., geographic area plans, Rule 1000-Series, reclamation rules, Rule 1209., restricted surface occupancy areas - are areas that regulate land use planning and may be preempted under the applicable statutes. I think both in terms of the fact that section 34-60-128, C.R.S., which is where the "Colorado Habitat Stewardship Act of 2007" is codified, is not listed in those sections applicable to federal lands and with respect to this distinction between a habitat stewardship act as land management as opposed to public health and safety, that provides you a reason to rethink the applicability of these rules to federal lands.

Representative Roberts asked what are the practical implications of the jurisdictional issues from an operator standpoint? Mr. Wonstolen said the federal system is very comprehensive in terms of having on-site inspections and having an environmental review, a NEPA review. It can drag out as Mr. Neslin suggested for months. However, there is a provision in federal law, the EPCA, the energy policy act of 2005, which says absent some special environmental issue, the BLM is directed to issue permits in 45 days. One of the things the BLM has to do is make what's called a documentation of NEPA adequacy when you apply to do a well on federal lands. If they find that there is NEPA adequacy, then you're not into this months long process, you're in the 45-day process. You can get into a substantial environmental analysis. The BLM, obviously on its lands, believes it has the ability to manage those lands, including the wildlife resources and the habitat on those lands. I think if you look at the letter Representative Gardner has, if the federal agency believes that there is some conflict between the two schemes, the federal agency will advise the operator to ignore the conflicting state regulation and potentially put the operator in a box or bind between two competing state agencies. It's not as simple an issue as may have been painted for you.

Representative Gardner said I'm trying to decide how to deal with Rule 201A., which is the effective date of the amendments. Don't be concerned to tell me I'm completely wet about this. There's an effective date for the federal lands and there's an effective date for all other lands, and my sense is that for the reasons you cite, there's not real resolution of these things except in the real world where you have federal and state interests and a landowner trying to work all these things out. What is the practical effect of having separate effective dates for federal land and all other land? Mr. Wonstolen said they're designed to be a month apart and for that month you've got additional uncertainty with respect to operating on the federal estate. We're less than two months away now from May 1, and whether or not that's going to be sufficient time to have some memorandum that harmonizes the two jurisdictions, I don't know at this point. I think industry in general in the rule-making was of the opinion that the wildlife rules in particular and some of the land planning rules should not be applied to federal lands under case law. It was our position that essentially these rules cannot be legally applied to federal land, regardless of whatever memorandum the two agencies may strike. That was an underlying position the industry had throughout the rule-making as to the land management portions of these rules.

Representative Gardner said I think we're all sort of struggling with this. By having a date that it's applicable to federal lands, is the concern that by implication every rule is applicable to federal lands and it somehow implies that for attorneys and regulators and others, whereas if it were silent about the matter, I think we'd be at the status quo? Is that a fair way to look at this? Mr. Wonstolen said I think that's a reasonable way to look at this. I couldn't cite you to the page in the Statement of Basis and Purpose, but I think you heard from Mr. Sherman and Mr. Neslin that they believe it's black letter law that these regulations, virtually in their entirety with some small exceptions, will be applied to federal lands and it was important that they do so. We have somewhat of a fundamental disagreement I think between some lawyers interpreting the case law and the way the Department of Natural Resources interprets that case law. I might, if I could, just address this in the context of what Mr. Morris told you about the issue of this no specific grant of operation in derogation of specific grants. I think there's two points to look at here. Although section 34-60-106 (2) (d), C.R.S., provides general authority for the commission to regulate to protect wildlife, it does not authorize the commission to apply those wildlife regulations to federal lands. If you look at section 34-60-120, C.R.S., that is not a grant of authority to the commission; it's a limitation. It says only the following sections apply on federal lands. I think there's a good argument. Obviously lawyers can get on both sides of this to say that section 34-60-120, C.R.S., as a limitation applies absent some clear legislative intent saying all these rules should apply to federal lands.

Mr. Wonstolen said I have only one more. This is an issue you haven't heard about yet, but you may hear about some more, particularly when you hear from the agricultural

and landowner organizations. This relates to this issue of landowner consent to wildlife conditions of approval and the effect of the withholding of that consent on well permitting. The relevant rule here would be Rule 1202. e., which is the one that addresses the issue of obtaining landowner consent. The words of that rule on their face don't properly describe the effect or the impact of the withholding of the consent and for that you have to go into the Statement of Basis and Purpose, where the commission states that if the surface owner does not consent to a permit-specific condition recommended by the DOW. I think that language is a bit revealing in itself, that it's recommended by DOW. It doesn't say approved and adopted by the commission. I think you can understand that. The commission doesn't have wildlife experts and it is going to rely on the recommendations of its sister agency and it would be very unusual for the commission to countermand those recommendations. The Statement of Basis and Purposes goes on to say if the surface owner does not consent, the director may withhold the permit for approval. Now, that results in a consequence related to landowner nonconsent that I do not believe was intended by the General Assembly, which is the denial of the ability to develop a mineral property right whether owned by that landowner or by a third party. In essence, the landowner consent requirement of House Bill 1298 has been held hostage to a recommendation by the DOW and it has become a precondition to the drilling of a well as opposed to a precondition to the imposition of a wildlife restriction. Now, there's also, in terms of the wording of Rule 1202. e., another purpose that would be achieved by striking that rule. Rule 1202. e. says that landowner consent is required with respect to variances or differences from those requirements imposed in Rules 1203. and 1204., which are general operating conditions. It does not include within that list for which landowner consent is required Rule 1205. Rule 1205. is what's called the restricted surface occupancy (RSO) areas. According to the commission rules now, a wildlife measure that results from a well being located in a sensitive wildlife habitat on the one hand is deemed to be permit-specific and therefore requiring the consent of the landowner, but an oil and gas location that is located in a restricted surface occupancy area is deemed not to be permit-specific and therefore does not require landowner consent. I can't find any logical basis to make a distinction between conditions imposed because of being on one map and conditions imposed by being on the other map. Even with respect to these RSOs, you're looking at a particular animal or a particular habitat feature on a particular parcel of land with respect to a particular oil and gas operation and to say that's not permit-specific I don't find convincing and I don't think the landowners will find that convincing. Therefore, if you were to strike Rule 1202. e., you would remedy both this issue of suggesting that the landowner consent is a precondition to the drilling of a well and leading to the potential denial of that property right and you have the commission be forced to go back and repromulgate this procedure and incorporate landowner consent into the wildlife restrictions across the board.

Representative Gardner said I just want to make sure I understand that. Under Rule

1202. e., if I understand what your saying, the practical effect is that, and this comes based on the Statement of Basis and Purposes as well, a surface owner who may have some objection to having drilling done in his backyard for sort of obvious reasons and says no I don't want that there, I want it on the south 40 where it won't disrupt my other activities, could then find themselves, because some wildlife habitat is on the south 40 with the DOW saying that's not okay there and we're going to hold up your permit, thus leaving this landowner who wants the drilling for economic reasons, they perhaps own a royalty interest, in a kind of dilemma that the DOW has prevented them having drilling and now they're stuck with having the drilling in their backyard. Is that a scenario that could occur under this rule? Mr. Wonstolen said I think that's the simplest case you talk about, where you have a unified estate between the surface and the minerals, the landowner leases the minerals to a company in order to develop those minerals, and enters into a surface use agreement and says here's where I'd like my surface use under House Bill 1252. Maybe it turns out they want that location four-tenths of a mile from a grouse lek because it gets it out of the alfalfa field but it puts it into the edge of the sage brush. In that case that would be an RSO and the surface owner requirement wouldn't even been necessary. The operator could just be excluded from that area. For a sensitive wildlife habitat issue where the commission says consent is required, you got the loggerheads between that and the DOW doesn't give and the surface owner doesn't give and essentially you've held hostage their consent to the DOW wildlife condition. What's interesting and what has to be kept in mind is that absent the existence or the fact of oil and gas, the surface owner is generally able to use their property in a manner they want to. There is nothing that would stop the surface owner from going out and bulldozing out sage brush habitat and planting hay or alfalfa and the DOW would have no say about that. By the mere existence of the oil and gas operation where the commission rules have been put up, they allow the DOW to reach onto that surface and have a great say about what happens and potentially prevent the development of the minerals, whether it be that surface owner's minerals or some third party's minerals who's not even engaged in this debate between the agencies and the surface owner.

Representative Gardner said to carry that one step further so I'm clear, the reason that would exceed the statutory authority in your view is what and as simple as you can make it for the Committee? Mr. Wonstolen said I did not read House Bill 1298 to say that the surface owner consent requirement can ever be a precondition to drilling the well. When push comes to shove, I believe House Bill 1298 said the surface owner has the last say about how their land is developed.

Representative Gardner said so in other words, you believe that Rule 1202. e. thwarts the legislative intent of House Bill 1298 in giving surface owners the last say over where drilling would take place. Is that a fair statement? Mr. Wonstolen said that's my reading of it. Obviously, there are other readings of it.

3:39 p.m. -- Scott Hall, CEO, Black Diamond Minerals, LLC, testified before the Committee. He said I'm a very small company and I don't have a lot of resources to hire lawyers or wildlife biologists, but there's two concerns that I have with these new rules. One of those concerns has to do with the economic impact and the economic study that was done. Senator Veiga interrupted to say that we're here to discuss whether these rules were promulgated with statutory authority. We're not here to discuss whether it's good or bad public policy for the state of Colorado. Our task is very limited, so I am only going to allow testimony relative to our charge here as a committee.

Mr. Hall said thank you.

3:41 p.m. -- Jim Walker, Petron Development Company, testified before the Committee. He said the board of county commissioners, Yuma county, asked that the Committee get copies of their letter to the governor. With that said, I'm not an attorney. In fact, I'm probably the most hated person in this room right now. I am a small oil and gas operator. There were some perceptions presented to this Committee a little bit ago by the Department of Natural Resources and by the attorney general. Might I have an opportunity to give my perception? Senator Veiga said it's a little bit hard for me to say what perceptions you refer to. I will candidly admit that relative to Mr. Harris and Mr. Neslin, I gave them probably a little bit of leeway to give a history of the implementation of the rules. Having said that, I am intending to stay very strict, that our charge here is very limited. We have a ton of folks signed up. If I start allowing people to get off task we will never get to the task of this Committee. I don't know what your intention is, but I will say I'm going to stay pretty firm to task here.

Mr. Walker said the small operators try to have input into this process. With that said, what I intend to testify to is the conflicts in the 900-Series rules. There are reasons and stories that lead up to that and if I get off task I will accept correction. Under the commission act, section 34-60-102, C.R.S., does make reference about fostering rules, responsibility, etc., while avoiding waste. They're not talking about waste of sludge, mud, dirt, or chemical, but they're talking about wasting the natural resource of oil or gas. I believe in a demonstration I'll have here, that waste is already occurring by the unsurety of the implementation of these rules. In addition, that act states specifically under section 34-60-106, C.R.S., that the commission has the authority to regulate oil and gas operations as to prevent significant - which is a word that keeps getting missed - adverse environmental impacts on any air, water, soil, and biological resources resulting from oil and gas operations to the extent necessary - and only to the extent necessary I might add - to protect health, safety, and welfare, including protection of the environment and wildlife resources, taking into consideration cost effectiveness and technical feasibility. That is where the 900-Series rules starts running into trouble with the act. In the 900-Series rules, as an example, the imposition of the remediation

standards are far more stringent than those imposed by the CDPHE for other industries including clean-up of leaking underground storage tanks at the corner gas station. In addition in the 900-Series rules, what we must do is we must prove a negative. By a substantial margin there must be substantial proof. Substantial proof in these rules is virtually undefined. To what degree and what type of proof would be acceptable? There are no specific tests defined. By the way, let me back up just a hair. In the 900-Series rules we are talking about and what I'm working toward, is water disposal pits and that sort of thing. With that, under the substantial proof there are no specific tests defined, no standard of proof is identified, tests that have been suggested in a broad and vague manner either don't exist or weren't designed for this type of application and would be extremely costly with no guarantee that would satisfy the regulators. In northeastern Colorado, specifically Washington and Yuma counties, there currently exists two studies that demonstrate unequivocally that the aquifers are safe and that zero problems or events exist or have occurred.

Senator Veiga said I'm going to try to bring you little bit more back to task. You did start out talking to us about section 34-60-106, C.R.S., and I thought you were going to make an argument relative to the rules going beyond the scope of the statutory authority. Mr. Walker said I'm trying to make a cost-effectiveness argument here.

Senator Veiga said if I missed that, I apologize. Mr. Walker said that's alright and that is one of the areas I'm trying to go. Tests that have been suggested in a broad and vague manner either don't exist or are not designed for this type of application and would be extremely costly with no guarantee of the satisfaction of the regulators. In Washington and Yuma counties specifically, there are two studies that demonstrate unequivocally that the water aquifers are safe and there's been zero events of contamination or a problem with those. These are the commission's own Ogallala aquifer study and the Stelbar oil and gas study. The commission has been, shall we say, reluctant to accept these as meeting the substantial proof requirements. If these studies do not stand on their own and do not satisfy the commission, how am I to expect to do better as a small operator? Therefore, as thick and expensive liners may be the next step that might be required, these become solid waste. Solid waste now enters me into a different area and a different agency for disposing of waste materials on my lease. This rule here, that rule there, that rule there, I think they start running into each other and they must be disposed of accordingly. I think the CDPHE can explain that regulation to you a little better. In any event, there becomes a whole new set of rules administered by a different agency that has neither regulated this industry in the past nor understands the science of our industry today. Finally, when I can't meet these burdens of proof and I'm now required to tank my water and put it in tanks, no longer pits or lined pits, I have asked this question to everybody and I am asking it now: I do all the wonderful things and I put in tanks, my tanks fill up with water, where do I go with my water? These rules do not allow me any place to dispose of my

water and that is where the 900-Series rules literally do not afford a manner in which I can comply and there's got to be something, statutory or constitutional. You're regulating me out of business by providing me something that I cannot do. The commission will tell you we can variance this, we can variance that. I keep hearing from the commission variances. If we have to issue lots of variances there is probably a problem with the rule. I have asked that question to the commission, I asked it to the director of the commission, and they don't know. The only response I got from one of the staff members in the numerous times I've asked the question was Jim, that's not a fair question to ask me. I don't think that's a fair answer to give me from the regulatory body. Now I have a chance to become educated on these rules through the commission's training sessions. There's a problem, just like the rule-making process was for the small operator. There are ground rules set that eliminate my chance for open and responsible dialogue on the applicability of the rules. My prime example, no questions will be allowed during the training session. I struggled with that.

Senator Veiga said I really have tried to give you some flexibility but I think we're getting pretty far afield here. Mr. Walker said with that, on the waste side of it, it's been reported by state agencies and members that permitting is at record levels or seem to be going that way. I say to you that the permits are about ready to fall off the edge of a cliff. We'll see after April 1. That's what I'm waiting for.

Senator Brophy said I appreciate and I think I followed completely your explanation of why you think the 900-Series rules are both not cost-effective and not technically feasible. You mentioned the waste side and this is something that I've been concerned about, but I don't know that you got far enough into this to satisfy one of my concerns, so I'm going to ask you right now. If we can't solve the issue with what to do with the water that traditionally would go into these pits and evaporate off, will that cause wells that have these pits associated with them to be prematurely abandoned? Senator Veiga said I'll allow Mr. Walker to answer your question and I have allowed the Committee to sort of broaden the scope a little bit of our inquiry, but I don't see how in the slightest that relates to our charge of looking at whether the rules meet statutory authorization.

Senator Brophy said Mr. Walker specifically mentioned section 34-60-107, C.R.S. The statutes direct the commission to prohibit the waste of oil and gas. If these rules aren't technically feasible and aren't cost-effective and that causes wells to be shut in prematurely we are wasting that natural resource, specifically that natural resource in Yuma and Washington counties where he operates. Mr. Walker said let me be very specific as it is to me being a small operator. Fifteen percent of my properties are currently shut in anticipation they will not be economical under these rules. We're looking at another 10% that will possibly, depending on how these rules get rectified. That will be a natural resource loss. Yes, they will be prematurely plugged and that

I do believe is an example of the 900-Series rules running directly in contrast to the charge of the commission act.

3:54 p.m. -- Stan Dempsey, President, Colorado Petroleum Association, testified before the Committee. He said our association represents major integrated oil and gas and independent companies, covering every aspect of oil and gas operations, including development, production, transportation, refining, and marketing. Our members have been active participants in the commission rule-making process leading up to the consideration today of your Committee. Our involvement dates back to legislative consideration and adoption of House Bills 1341 and 1298 during the 2007 General Assembly. Last year, we were party to the rule-making and represented our members before the commission as the rules were developed and eventually adopted by the commission. Our association identified several issues which we do not believe were correctly adopted by the commission during its deliberations. We have consistently raised our concerns about these matters with the commission and with the legislature this session on related bills which were introduced. With your indulgence, I'd like to take a moment to describe these in detail. First, Rule 201A. imposes commission rules on operators working on federal lands and leases. We do not believe the General Assembly authorized the application of state rules on federal lands nor do we believe this is legally based upon a long line of U.S. Supreme Court cases which have overturned the application of state land use rules on federal lands. At a minimum, we believe this rule was adopted beyond the scope of the commission's statutory authority. Worse, we believe it is an open invitation to embroil the state of Colorado in unnecessary litigation with the federal government at a time when the state's budget situation can ill-afford expensive and time-consuming lawsuits. While this may strike you as an esoteric matter, it is not. One example will suffice to show you the practical problems this will create for our members who operate on federal leases. Federal rules prohibit drilling any closer to streams than 125 feet without a variance of commission rules and the commission rules prohibit drilling any closer to streams than 300 feet. It is unclear which rule a federal operator must adhere to to avoid federal enforcement action. In case there's any doubt, the federal regulatory regime is a rigorous, lengthy, and expensive process which takes into account all of the matters with which the commission rules address. Overlapping and conflicting rules simply invite unnecessary litigation. I think it was helpful for Mr. Sherman and Mr. Neslin to present you with this letter from BLM and I'll just very simply say this clarifies to us that there will not be an MOU that we anticipate being done that would accompany the imposition of rules on federal land by May 1 when the letter says we hope to begin more formal discussions. This is the beginning of March, I suspect the federal MOU is going to take a lot longer than a month and a half. That greatly concerns us, so we urge the Committee to remedy this by deleting that portion of Rule 201A. Second, Rules 1202 e. and 1205. both circumvent legislative intent to allow landowners to consent to wildlife mitigation on private property. During consideration of House Bills

1341 and 1298, the legislature clearly directed the commission rules to be developed in a way which allows owners of private property the right to consent before the imposition of wildlife mitigation on the surface of their lands. Instead, the commission has developed general wildlife mitigation rules which are in direct conflict with the legislature's intent. There are several problems with those rules as adopted. First, it places wildlife and wildlife protection above private property interests, those surface owners, and mineral owners. Further, it grants to the director of the commission powers which were not conferred upon him or her to decide whether wildlife trumps mineral development or vice versa. This jumpball authority is contrary to the commission mission and is unacceptable to owners of private property across the state. Third, it allows a recalcitrant landowner to stop mineral development by not agreeing with the proposed wildlife mitigation in sensitive wildlife habitat. The surface owner consent provisions of the commission rules conflict with the scheme established statutorily and under the common law relative to the enjoyment of mineral rights, the accommodation doctrine, and wildlife protection. Thus, we urge the Committee to remedy this defect by deleting Rules 1202. e. and 1205. Fourth, as pointed out by the Office's memo, Rules 306. c. and 1202. clearly exceed the commission's statutory authority by requiring operators to initiate consultation with the DOW and oil and gas development which may involve wildlife resource matters. Our members believe this creates two significant problems. First, as adopted, the rules directly conflict with the statute passed by the General Assembly. Worse, as adopted, the rules violate the legislature's directive to establish a timely and efficient procedure for consultation and permit review and approval. We urge the Committee to remedy this defect by deleting Rules 306. c. and 1202. Finally, Rules 503. b. (7) B., D., and E. exceed statutory authority by allowing surface owners, the CDPHE, and the DOW to appeal director decisions. The plain language of House Bills 1341 and 1298 intended for the CDPHE and DOW to serve in an advisory, not adversarial, role. That automatic right to appeal by the agencies creates a very adversarial relationship. This rule creates further opportunity for the surface estate to dominate the mineral estate by allowing a surface owner to delay the issuance of permits. Commission policies provide surface owners with ample opportunity to participate in decisions regarding well locations through on-site consultation and this rule compounds uncertainty around permit approval timelines. We urge the Committee to remedy this defect by deleting Rules 503 . b. (7) B., D., and E. Thank you for the opportunity to provide you our input into the rules and how they conform with the statute.

Representative Roberts said one of the rules you said you wanted deleted that I'm not sure I've heard dialogue on is Rule 1205. What is your basis for killing that? It exceeds the authority? Mr. Dempsey said we believe the legislative intent was to allow landowner consent to wildlife mitigation on private property. I think Mr. Wonstolen also went through this as well. We believe that House Bill 1298 made it clear that these conditions could not be imposed upon a private property owner without their

consent.

Representative Roberts asked do you have the rules? Specifically, I'm struggling to see in Rule 1205. It says requirements in restricted surface occupancy areas. Mr. Dempsey said it might be a situation where another witness might be better qualified to talk about this. We wanted to give you our general view on that.

Senator Veiga said let me just ask Mr. Wonstolen to come forward. I thought that was Rule 1202. you were referencing but maybe there's some confusion. Mr. Wonstolen said I think what I suggested to you was that because Rule 1202. e. does not require landowner consent for this - it only says with respect to Rules 1203. and 1204. - it's essentially saying consent is not required for Rule 1205. Mr. Dempsey is just tying the two together for you.

Representative Gardner said with respect to Rules 503. b. (7) D. and E., in which the CDPHE and DOW could be applicants, it seems curious to me that state agencies themselves can be parties to another state agency action. I don't know if that exceeds any statutory authority or not, but it is interesting because the commission is itself a state entity and has a state permitting process and so forth. It seems to me that Rules 503. b. (7) D. and E. basically have allowed them to become separate parties. I have a state agency as a party to an action before a state agency, and I just wonder if you have any thought about that or has anybody given any consideration on the propriety of the state sort of taking issue with itself almost or begging itself to take an action? I have dealt with those sorts of things in the federal government and while there are many, many hands to different federal agencies, the holding in the federal government is one department can't be a party in front of the other department. I just wondered if you thought about that at all or if you have any concerns about that. Mr. Dempsey said I think the first thing I would emphasis is that House Bills 1341 and 1298 talked about consultation. I don't think they ever talked about these two agencies becoming parties, as we understand that. I've seen it happen before and it makes a difficult situation to have an agency involved in another's rule-making. Once you're a party to a rule-making, you're afforded certain rights and privileges as well as responsibilities, including judicial review. It's hard for me to imagine that what the General Assembly intended was to have an agency with the possibility of seeking judicial review regarding what was supposed to be consultation. I think the idea was to get these agencies talking together and I think that's the intent of the statute.

Representative Gardner said I'm just a simple guy. The commission itself seems to me to be an executive branch agency, the DOW seems to be an executive branch agency, and the CDPHE is an executive branch agency and so suddenly we have possibilities for multiple executive branch agencies to be parties to an action in front of another executive branch agency with a landowner. I'm just wondering about the propriety and

constitutionality of agencies being parties in front of a branch. It's one thing to go to the courthouse - it happens all the time - between an executive branch agency and private parties, but this is a rule-making. Maybe I'm just dreaming this up but I have seen that in the federal context you can't be a party against yourself. Mr. Dempsey said I guess the other distinction I would make is that on this commission, you have two voting members of two executive branch agencies and I think the idea that the General Assembly had in House Bill 1341 was to encourage collaboration and communication by having those executive directors participate. I think that, through this rule-making, that existed. Where I've seen an executive branch agency participate in another executive branch agency, there was nobody from that agency on the citizen commission that housed the agency participating in that rule-making. In this case, you'd have a situation where you have, say the DOW, whose executive director is sitting in the commission. How does that work in terms of conflicts, how does that work with the ability to participate, how do you resolve those issues?

4:09 p.m. -- Sue Jarrett, Rancher from Yuma county, testified before the Committee. She said I represent myself and myself only. I was a person with party status to these proceedings. I have maintained my party status as a pro se party, doing the best I can with my years of activism and legal review and participating in numerous public hearings in the stakeholder process throughout the better part of 10-11 years now. I would like to speak to some very prominent issues and to some motions that I raised on the legality of many of the questions that you all are asking here. I'm going to start as a landowner first, which was why I got party status. Many years ago, I had a pipeline go through my ranch and I went before the previous commission, raising surface rights issues and contractual issues on permitting and requirements. Throughout that process I'd become aware of this commission and part of what it does and I listened to House Bills 1298 and 1341 - in fact I actually testified on House Bill 1341 - as they were adopted by the body. House Bill 1298 to me was very important in that we received landowner consent in there and I worked with people to make sure that landowner consent was part of House Bill 1298. As I participated through these proceedings, landowner consent became my first and foremost number one issue as a landowner, that if I would lease mineral rights on my land where I own mineral and surface, that if I chose not to have a wildlife assessment on my own land that the commission could force the leaseholder - the oil and gas company - to do the assessment without my consent. That has been repeatedly raised at most of the hearings every time we talked about the wildlife issues of how the landowner consent comes into play. I have been told that permits would be denied if I did not consent to an assessment of wildlife on my land. That's my private property rights and if I do not want the wildlife counted on my land, I believe that ends it. No more. They're out. They don't come in, they don't assess it, and it doesn't stop the permit. This issue is still on the table of where our landowner consent comes in and where it doesn't. On the flip side, being the activist and environmentalist I am, I looked at the wildlife maps

and said okay, let's take the other approach. If I as a landowner want to use the wildlife assessment that somebody does and I want to get party status and I want to challenge my neighbor from being able to drill his well beside my property because say I have prairie chickens on my land and they're not allowed to drill within two miles of the prairie chickens lek, I cannot only affect my landowner adjacent to me, but I can potentially affect landowners two miles away that I'm not even adjacent to. As we work through the process, I raised that issue to say that is part of how I got my county commissioners and stakeholders to sit down and start talking about the wildlife maps and assessment are what may give standing to people to challenge permits that aren't even adjacent to their property, let alone near their property. Understand, you can use rules to benefit you or harm your neighbor if they continue to allow these wildlife assessments to stop drilling permits, whether it's on your own land or your neighbor's land. As a landowner, I still want landowner consent. If I say no consent, you aren't assessing the wildlife on my land, end of story. The next issue I want to address goes to questions and motions I raised, and at this time I'm going to provide you with handouts of those motions. I will not read them into the record. I will tell you why they are relevant and I will tell you what they do as far as what you're doing today. I will do them very briefly in the order that I filed them. On June 10, 2008, as a party status person I traveled to Grand Junction to the public hearing over there. I was denied access to place a public objection on the record to raise issues of conflict of interest and, this is my phrase, the sheriff writing the laws he's going to enforce. He gets to write them, he gets to enforce them, he gets to choose who gets to say what, when, where, and why. I raise that issue because when I testified in support of broadening the commission and making the CDPHE and Department of Natural Resources part of that commission I did not understand they had voting rights. I thought they would be there in consultation only. To have voting rights and to actually have the Department of Natural Resources executive director chairing this whole process gave him the authority to limit and control who testified, what you said, how you said it, how long you were up there, if you got questions asked. He got to write the rules of how we participated. When I tried to verbally place that objection, I was escorted from the room and I had to go sit in the hallway, so I call this motion a handwritten motion. I raised statutory challenges in my handwritten motion on a potential conflict of him writing the rules and then him having to enforce the rules. I raised statutes and to date I have never had a response to that motion. The one response I got on some of my motions was the fact that this was a quasi-legislative body drafting these rules, which I totally understand, versus a quasi-judicial body. Understand, these guys writing these rules are also the judicial body that enforces them and you go before them for appeals and hearings and if it is their staff there, then what role do they play? Like an attorney, is that not a conflict of interest when his own clients are testifying? I raised that very early on. That was followed up by a typed motion, which is my motion regarding the conflict of interest issues, that they were administrative staff, they were there to follow the governor's directive as his appointed

staff and you can read what all I said in that. I think I made it very clear. The last issue I'm going to raise goes toward the legislative bill that I did pick up and I have read and reviewed. This goes toward having been involved in an initiative that was passed by the people. We gave a statutory deadline of when rules had to be promulgated. That statutory deadline we were forced as stakeholders and party status to adhere to, to meet, to get our job done, and to get the process done. On July 16, as I sat through this bill, numerous times it had been raised to bifurcate this process, address that this body had given this commission a directive to adopt certain rules by a deadline. The morning of July 17, I presented the third motion that I handed to you, which was the failure of the commission to meet statutory deadlines by July 16. I raised this because - it's on page 4 of the legislative handout - these rules were not adopted, they were not passed, they were not acted upon by July 16. That is a violation of statutory law. That harmed me as a party status person by making me continue to drive to Denver to participate to protect my party status rights, through numerous additional hours and time, where they did not meet the statutory authority of House Bill 1298, 1341, nor the extension bill, which I testified on, which was House Bill 08-1379 carried by Representative Curry where I was very clear that I didn't think it could happen by July 16. It did not happen by July 16 and therefore I put that on the record. Needless to say, they continued it; numerous days and hours continued this. Right there in and of itself is a reason why these rules are out of order in my opinion as a pro se lay person. One final issue I have to raise is to respond to a contractual interference of how departments of the government interfere in my contractual rights by giving them standing. If I enter into a surface use agreement - and I have very specific language in my surface use agreement that says you will comply with existing rules, you will meet my criteria as a landowner to restore and reclaim the land and that reclamation relies on state requirements of them meeting 70% of restoration - in my surface use agreement I say you will be in compliance with all of the state permitting authority. On surface use agreements they have to get what's called a stormwater discharge permit that comes from the CDPHE. That makes them a party to my contractual agreement. If they fail to do their due diligence and come out and inspect my property and they release their stormwater permit form their contractual right as a state agency, and yet that restoration has not been fully completed, and I try and take that to court, we now have a conflict when the company comes up and says we're released, the state said we met the 70% requirement, she says we don't, me and the company are in conflict with a third party state agency who's made a determination without an inspection. An expert opinion was applied by the company and an expert opinion was provided by me, they were in direct conflict, I got no hearing, and my property was released and I have an interference in my contractual rights which we are fighting over, over a state agency taking an action allowed without doing their due diligence, without doing their inspections, and without formally following up on numerous complaints. That's an interference in contractual rights. Thank you, I appreciate your indulgence and time.

Senator Veiga said we are now moving to proponents and I realize some of the proponents have been downstairs so maybe we can start letting them know we are going to move in that direction.

4:21 p.m. -- Michael Saul, Attorney, National Wildlife Federation, testified before the Committee. He said I have represented a number of wildlife, sporting, and conservation groups throughout the rule-making process, including Colorado Wildlife Federation, Colorado Mule Deer Association, Colorado Bowhunters Association, Audubon Colorado, and Colorado Trout Unlimited. I'd like to confine my comments to a couple of matters of statutory consistency and legislative intent that have arisen over the course of the past couple hours of testimony. I'll begin by stating our support for the opinion offered by the Attorney General's office that the final rules are consistent with statute and legislative intent and also noting that we would support the potential changes proposed by the commission to Rule 306. c. and to the incorporation by reference rule. Specifically, I'd like to address two constitutional and statutory issues that have been raised by industry attorneys. First, the relationship between House Bill 1298, the landowner consent provision, and the wildlife rules, Rules 1202. e. and 1205., and the second issue I'd like to touch on briefly are some of the arguments about federal preemption and the scope of the commission's jurisdiction as applied to federal lands and minerals. It's our position that the final 1200-Series rules adopted by the commission, including Rule 1202. e. on the scope of landowner consent and Rule 1205. governing avoidance where technically and economically feasible of critical restricted surface occupancy habitat, are entirely consistent with House Bill 1298 as codified at section 34-60-128, C.R.S. I'd like to just turn to two provisions of the statute because I think the discussion has only covered one of them and it's important to bear in mind the two things that section 34-60-128, C.R.S., provides. Section 34-60-128 (3) (b), C.R.S., recognizing the possibility that wildlife mitigation may affect surface owners, does establish a unique degree of protection for the rights and preferences of surface owners by providing for commission consultation and consent of the affected surface owner or the surface owner's appointed tenant on permit-specific conditions for wildlife habitat protection. Such conditions shall be discontinued when final reclamation has occurred. As an initial matter, I'd like to note that those words "permit-specific" are present in the statute and the presumption is the statutory language is there for a purpose, and it's our position that the commission's distinction between permit-specific conditions, i.e., conditions of approval that are applied to particular lands following the consultation process, and standards of general applicability, which include both some of the operating standards of Rules 1203. and 1204. and the avoidance of certain critical habitats required by Rule 1205., are general standards for wildlife protection and those fall under section 34-60-128 (3) (d), C.R.S., which states that the commission shall promulgate, in consultation with the wildlife commission, standards for minimizing adverse impacts to wildlife resources. I'd just like to note that in the face of a great deal of input from a variety of stakeholders,

including industry, wildlife and sporting interests, and landowners, the commission has greatly modified the approach of the wildlife rules from its initial approach which included a wide-ranging set of timing rules that would be applicable to a wide range of habitats. Based largely on feedback from industry and landowners, this was modified in favor of a more flexible approach. For the vast majority of all affected and regulated habitat in the state, they prefer a consultative approach which aims at achieving consensus solutions among the agencies, operators, and landowners. Only two limited categories - one being operating as opposed to deciding restrictions, for example, bear proofing dumpsters or requiring disinfection of certain hoses that might carry whirling disease to trout streams, and the Rule 1205. avoidance of restricted surface occupancy areas - fall under the general standards. The vast majority of any wildlife mitigation measures to be attached as conditions under these rules would indeed fall under the surface owner consent requirement. Those remaining categories are consistent with the statute and necessary to the mission of minimizing significant adverse impacts.

Mr. Saul said the second issue I'd like to touch briefly on is the federal preemption issue. There are really two points I'd like to make there. You've heard discussion of the supreme court case of *California Coastal Commission v. Granite Rock*, which is really the governing case in these issues of application of state police power regulation, which this unquestionably is, to federal land. The distinction that case makes is between regulation of land use and regulation of environmental effects. There may by some cases where that line is a blurry one, but I would submit that the final rules as adopted by the commission fall unquestionably far on the environmental regulation side of that line and thus, absent some specific operational conflict that makes it impossible for a regulated party to comply with both federal and state law, they are not preempted on federal land. I would just draw your attention once again to the portion of the existing commission act, section 34-60-120, C.R.S., which governs application of the commission's jurisdiction to federal land. I would strongly differ with Mr. Wonstolen's characterization of what that provision means for these rules. He correctly pointed out that section 34-60-120 (1) (a), C.R.S., states that as to lands of the United States, this article shall apply only to the extent necessary to permit the commission - and the operative provision here is - to carry out the provisions of section 34-60-106, C.R.S. I would submit that the amendments to the rules, particularly the wildlife rules in the 1200-Series, fall squarely within that section 34-60-106, C.R.S. Section 34-60-106 (2) (d), C.R.S., recognizes the commission's long-standing authority to regulate oil and gas operations so as to prevent and mitigate significant adverse environmental impacts on any air, water, soil, or biological resource. The "Colorado Habitat Stewardship Act of 2007", section 34-60-128, C.R.S., does not enlarge or constrict that authority. It merely gives guidance to the commission and instructs it to enter into this rule-making process to set up standards and consultation procedures. The actual imposition of permit conditions arises squarely under section 34-60-106 (2)

(d), C.R.S. and therefore is clearly extended to federal lands by section 34-60-120 (1) (a), C.R.S.

Representative Roberts said I appreciate the point you're making, but I think the part I'm having trouble reconciling is the timely and efficient that's in House Bills 1341 and 1298, the repeated reference to timely and efficient. When I'm looking at section 34-60-106 (2) (d), C.R.S., the authority you were citing, it says taking into consideration cost-effectiveness and technical feasibility. I don't know that they're really in harmony the way you're suggesting because there's some additional considerations in these two new pieces of legislation that go beyond what this is. I'm still struggling with that federal jurisdiction issue because even if I follow what you're saying, I think section 34-60-106 (2) (d), C.R.S., does not directly address some of the new language that's in the two new bills that we had. Mr. Saul said I would respond that in my view there are perhaps two separate questions here. One is the question of whether the new rules and permitting processes are indeed timely and efficient. We would submit that they are and indeed that the commission has heard, entertained, and deliberated vigorously about extremely extensive testimony on that issue of cost-effectiveness and technical feasibility and that the rules have seen numerous significant changes, including the elimination of even presumptive rules on the timing of drilling within wildlife habitat for the very reason of wanting to accommodate concerns raised during the extensive stakeholder process about cost-effectiveness and technical feasibility. As to the preemption question specifically in section 34-60-106 (2) (d), C.R.S., that language of taking into consideration cost-effectiveness and technical feasibility has been there since before House Bills 1298 and 1341 and I don't think those alter what I think is a clear conclusion that section 34-60-120 (1) (a), C.R.S., extends conditions imposed under that section 34-60-106 (2) (d), C.R.S., provision to federal lands.

Representative Roberts said but I think you missed my point or maybe I wasn't very clear. I recognize cost-effective and technical feasibility was in there first, but I see timely and efficient as over and above cost-effective and technical feasibility. If we go back to section 34-60-120, C.R.S., and the one you highlighted that was particularly relevant is section 34-60-106, C.R.S., I'm just saying this preemption issue does not suggest timely and efficient if what we've heard today is that we're talking about an additional six months on top of the 45 to 60 days at the state level and we don't have a clear commitment from the BLM that they are going to accept these rules. I'm just wondering if you have any additional information on that particular point? Mr. Saul said let me try and offer two answers, neither of which may be satisfactory. One is that I need to concede the limits of state authority. The state can only go so far in creating guarantees of timeliness and efficiency for its own processes. It cannot compel its federal counterparts to complete their permitting processes within a date certain. They're subject to their own set of laws. I would argue, and this is a hope more than

a certainty, but insofar as these rules and particularly their wildlife provisions encourage comprehensive development plans, I think there is an opportunity for some increased efficiency. One difficulty that faces the federal agencies is that in many cases they have jurisdiction over only part of the area of either a field and/or a particular habitat. In other words, there may be both federal and private surface and the opportunity to engage in comprehensive drilling plans under these rules may actually create some potential opportunity for increased efficiency in joint plans that cover both federal and nonfederal lands. Again, that is a goal rather than a certainty.

4:38 p.m. -- Michael Freeman, Colorado Environmental Coalition, testified before the Committee. He said I'd like to address four particular legal arguments that were raised by some of the opponents earlier today. The coalition and other groups actively supported the 2007 legislation that led the commission to revise its rules, and we have been deeply involved in every step of the commission's rule-making process. The coalition's members are also in different parts of the state directly affected by the oil and gas development boom we've seen in recent years. I'm here to testify in support of the amendments to the rules and our view that they are well within the rule-making authority of the commission. The rule changes promulgated by the commission meet the General Assembly's directions in House Bills 1298 and 1341 and fall within the scope of the commission's existing authority. As you heard earlier today, the Attorney General's office has confirmed that these changes were a lawful exercise of the commission's statutory and constitutional authority. We support that conclusion as well as the conclusion of the Office that 97 out of 100 rules fall within the commission's authority. With regard to specific issues, I'd like to address four of them. I'd like to begin by saying that I was surprised to find myself in agreement with Noble Energy that virtually all of the permitting process up to the issuance of the permit is within the commission's authority. That's how we feel, we think it's pretty clear, and we are very happy to see members of industry agree with that. We do disagree with them on one issue relating to the permitting process and that's the rule authorizing the commission to require that permit applicants give notice of the application to landowners within 500 feet of the oil and gas location. This requirement does not exceed the commission's authority and again I note that the attorney general and the Office found that there was no problem with this part of the rules. The act itself states in its legislative declaration that it's in the public interest to regulate to ensure oil and gas development is consistent with public health, safety, and welfare. Part of protecting the public health and welfare is giving people in the area a chance to participate in the process. Landowners living near a location can't participate in the process or submit comments unless they give notice that there's an applicant and an application is submitted. This is really just an issue of transparency and recognizing that landowners in the vicinity of an oil and gas well do have a legitimate interest in participating in the permitting process. I'd also note that under the act, section 34-60-105 (1), C.R.S., authorizes the commission to do whatever may be reasonably

necessary to carry out the provisions of the article. We think that statutory language is pretty clear and it's controlling here and it authorizes the commission to require this kind of notice. I'd also note that similar requirements are really common in a variety of other contexts, including contexts where an applicant wants to exercise a property right. I noticed they're common in land use approvals and mining applications, all of which raise some of the same concerns the industry does, but I think in the modern administrative state, it's taken as pretty much accepted that it's not unreasonable to require public notice and an opportunity to comment on applications of this nature. The second issue I'd like to touch on is a couple of issues relating to the administrative appeals process that were raised by industry. The first one is the right of the DOW and CDPHE to request a hearing on permit approvals. Again, we think this does not exceed the commission's authority. House Bills 1298 and 1341 don't address consultation with the commission staff. They require and provide for consultation with the commission itself. The right of appeal that is recognized in the rule just implements that direction. The commission recognized that the most timely and efficient approach for that consultation is for it to generally occur at the staff level, which is in almost every case where that consultation will end. But, the rules have to provide some mechanism for the CDPHE and the DOW to elevate their concerns to the full commission in certain exceptional situations. That's all that this rule does. It allows the other two agencies to elevate their concerns to the full commission, which is exactly what the statute provides for. In fact, if the rules didn't allow for the agencies to file an administrative appeal or elevate their concerns to the full commission, the rules would actually be disregarding the requirements of the statute. I also note that it was reasonable for the commission to conclude that the most efficient and timely way to provide for consultation with the full commission was to use the existing hearing and application process to allow the other agencies to elevate certain issues. The CDPHE and the DOW agree with this approach and of course the commission does, too. Again, I note that this is another example of where both the attorney general and the Office found that there is no problem here under the statutory or constitutional authority.

Senator Schwartz said with respect to the last issue before you move on, you talked about exceptional circumstances and I guess I'm looking for that we have sufficient criteria in place that in fact defines the exceptional, that this is not just another mechanism that will extend the time frame and extend recourse within the department itself against certain permit applications. From my perspective I need to have an understanding of that limitation and the exact application of exceptional. Mr. Freeman said both the right of the CDPHE and the DOW are specifically circumscribed to issues that relate to their particular areas of authority. I think the CDPHE can only appeal where issues involve public health, safety, and welfare. The DOW can only do so where it's raising issues relating to minimizing adverse impact to wildlife resources. That I think prevents them from essentially using this as carte blanche to raise any

issues or slow the process down unnecessarily. I'd note that during the hearing process, the executive director of the CDPHE who was on the commission made it very clear that he thinks these appeals will happen only in the most exceptional circumstances and will be very rare. I'd also note that the hearing process is actually really quite expedited. I think there's only a 20-day notice period for public notice and it's supposed to happen on a very expedited basis. I think it's unlikely to be used that way in the first instance and also isn't going to get much in the way of delaying any of that.

Representative Roberts said since you're on the appeal period, I would like to know how you would see a justification for the inclusion of a surface owner in addition to the DOW and CDPHE and the local government. Where is the authority for that as opposed to these state or local governmental entities? Mr. Freeman asked if Representative Roberts is asking for the statutory authority?

Representative Roberts said the legal basis. What's the basis for inclusion of a surface owner when arguably the surface owner is within the group of people that the state agencies are representing? Mr. Freeman said the statutory authority is under sections 34-60-108 (7) and 35-60-105 (1), C.R.S., which give the commission the authority to allow any interested person to have a hearing. I'd also note that with regard to surface owners, the commission again circumscribed that right pretty strictly. It indicated that it would only allow appeals within the commission's jurisdiction to remedy. The Statement of Basis and Purpose made clear that what that means is a surface owner cannot appeal an issue that's covered by the existing surface use agreement. It doesn't allow them to essentially use the appeal process as an end run around their own contractual obligations.

Representative Roberts said but I'm just thinking of practical realities. If the surface owner has an issue of wildlife or public health that's valid, wouldn't the CDPHE and DOW make that appeal? I'm struggling to see why we would have one more person or one more entity in that role. Mr. Freeman said I think the commission struck a balance there probably for a couple reasons. I think first, it recognizes that the surface owner is the member of the public who is likely to be most directly affected by a well. There are many people who possibly, under certain circumstances, will be adversely affected by a well or drilling operations, but the surface owner is very likely to see direct effects. Second, I think there's a recognition that while the surface owner can ask the local government designee or ask the CDPHE and DOW to take that appeal, there are no guarantees that will happen. Those agencies run up against severe resource constraints. I know that a lot of the local government designees are completely overwhelmed and can only take, if any, very, very few appeals like that. The DOW and the CDPHE both indicated that they would exercise that kind of a right only in the most exceptional circumstances. I think the commission concluded it was

appropriate to not require surface owners to depend on some other government entities to protect his or her own rights.

Representative Roberts said but House Bills 1341 and 1298 were specific to public health and wildlife, whereas House Bill 1252, which is really tangential and not part of this, focused on surface owners alone. We're mixing apples and oranges and I can see the recalcitrant surface owner now having the ability to interfere with timely and efficient administration of these rules. Mr. Freeman said I'd like to offer two responses to that. First, again, I think the opportunity for using the rules to impede the permitting process is limited or not available at all where there is an existing surface use agreement. The surface owner can't use the appeal process to try to essentially relitigate issues that were resolved by that contract. With regard to the surface owner protection act, I think it's important to remember that the language of that statute makes very clear that it was not intended to be the exclusive, controlling source of authority on the relationships between surface owners and mineral owners and it expressly does not preclude other remedies or rights on behalf of the surface owner. Section 34-60-127 (4) (a), C.R.S., says the surface owner protection act does not preclude or impair any person from obtaining any and all other remedies allowed by law. I think that's a clear indication that the legislature did not intend to preclude the commission from allowing other remedies in appropriate circumstances.

Mr. Freeman said I've touched on most of what I had to say regarding surface owner appeals and the commission's authority to allow those. I would note, with regard to the timely and efficient issue, the rules only allow 10 days to file an administrative appeal of a permit. That's an extraordinarily short time period and is much shorter than allowed for numerous other kinds of administrative appeals in other contexts. The commission took the timely and efficient requirement very seriously here and imposed that really strict timeframe. I'd also note that allowing administrative appeals by surface owners is not a new or radical concept. It's allowed in a whole range of other contexts, like zoning permits, air and water discharge permits, water rights, and liquor licenses. This is really just a standard part and, in fact, a really narrowly defined part, of a modern administrative regime. The final point I'd like to touch on is just the argument that Rule 501. c. exceeds the commission's authority by describing the right to seek judicial review of an APD or other act by the commission. The commission rules don't govern whether a person can seek judicial review. That's controlled by the APA and by the courts. I think Mr. Wonstolen made the same point. As I read Rule 501. c., all it does is recognize that judicial review is governed by the APA and a person's right to do so is governed by that act and those lawsuits can be filed in appropriate circumstances. I would note that the implications of the argument they're making are really far-reaching and possibly are advocating what may be an unconstitutional outcome. What the industry is arguing is not only does an adversely affected person not have a right to file an administrative appeal, which is the case

under the rules now, putting aside surface owners, an adjacent landowner, or an adversely affected member of the public, but their argument seems to be that a person cannot seek judicial review of a drilling permit and, in effect, simply has no recourse at all if they're adversely affected by a commission's decision. I think that's a remarkable outcome and raises serious constitutional questions. Again, I think it's another reason why this rule clearly doesn't present any problems with the commission's authority.

Representative Levy said with giving a department of the state of Colorado the ability to request an appeal in front of the commission, do you believe that would give them standing to seek judicial review of that decision? Mr. Freeman asked if Representative Levy is saying whether allowing an administrative agency the right to seek an administrative appeal with the commission would them give then standing to file a lawsuit for judicial review?

Representative Levy said that's my question. Mr. Freeman said I frankly have not researched the issue. I'm not in a position to answer that. My guess is it would be governed by the same law that applies for any other lawsuit in that in most cases, it's highly unlikely that one agency would be able to sue another agency, but again I have not done the research and I'm not in a position to offer an informed opinion on that.

4:56 p.m. -- Lance Astrella, Attorney, Oil and Gas Accountability Project and North Fork Ranch Landowners' Association, testified before the Committee. He said the one issue I'd like to address is the statutory charge under House Bill 1341, that the commission take into account cost-effectiveness of the regulations that impact the environment, air, water, and soil. I believe they have done this and I believe that the effect of the regulations will be to reduce costs, and let me explain to you why. For 30 years, I practiced energy law, and for the last dozen years, I just practice law on behalf of clients that are nonindustry members. I represent hundreds of landowners around this state, large ranches, small rural landowners, real estate developers, agencies of municipal government, and agencies of county government, all with respect to the environmental impacts of oil and gas development. In connection with that experience in having sat through all of the stakeholder meetings, having sat through the public hearings, and participated in them on behalf of clients, you've heard testimony about how fair and comprehensive that process was and it was indeed that way. How that will affect cost is this: For at least the last 10 years, landowners have bypassed the commission. When there is a problem, they go straight to court because they didn't feel that they could get a fair shake with this commission. I think with the proposed rules of House Bill 1341 and the comprehensive process that was involved with those proposed rules there's a different perception that the nonindustry public has. I think it's resulted in a great deal of confidence in this commission. How that saves costs is this: You end up in court, it's expensive for industry, and it's expensive for the

landowner. It's also inefficient. As you well know, it takes year to get the trial and years on appeal. In addition to that, there's a certain efficiency with having all issues decided by one agency, they have the expertise and so forth, and you don't have inconsistent results. That, coupled with the fact of the increased confidence that the nonindustry public has with the commission will result in less adversarial hearings, I believe. For that reason, I would encourage the Committee not to make unnecessary modifications to the rules as written.

Representative Roberts said for the Committee's benefit, Mr. Astrella and I worked closely together on House Bill 1252. I want to go to the appeal rights of the surface owners. Under House Bill 1252, we were trying to deal with private, as opposed to the public, interest under the CDPHE and DOW. I've yet to hear something that makes me feel that this is within the scope of House Bills 1298 and 1341, that there was an intent there, because these bills were all passing at the same time but there was no discussion of the surface owner, as I recall, in House Bills 1341 and 1298. I feel like we gave a lot of attention, through House Bill 1252, to that interest in the whole picture. Can you give me any legal basis how it's within the intent of House Bills 1341 and 1298 to have the surface owner have, as some people have said, a second bite at the apple, when we also have to square the timely and efficient language in this whole scenario? Mr. Astrella said I didn't follow all that, but let me say that we're involved in considerable litigation on House Bill 1252 now that involves the private ownership of land and the excessive use of land. That is how I view the principle thrust of that statute. I think the point I was making today, and I may or may not be answering your question, is there are a lot of other issues that can be, and I believe will be, addressed through the commission as opposed to in court and those are particularly environmental issues as they pertain to air, water, and soil. I don't know if that answers your question but that's the best response I can give you.

Representative Roberts said I guess my point was that House Bill 1252 was laser-beamed into the surface owner's right and that was something they could contract with an operator on. I see House Bills 1341 and 1298 more in the public domain and the people who lead the state of Colorado have representatives on wildlife and public health. I can understand the appeal process they may want after the director comes out with a decision they don't agree on, but I don't understand how it's square with these bills that the surface owner would have that ability to again call a halt when they've been through either the surface use agreement process or a process that is representing not only them but the whole state of Colorado on public health and wildlife. Mr. Astrella said I can only address how I see it. Like I say, if it's a land use issue, in other words, an excessive use of land, I rely on House Bill 1252, which I believe is in the domain of the court. If it's a regulatory issue that governs air quality, water quality, and soil, I believe that the impacts of those are best addressed in an administrative process. I don't see necessarily why that would give a surface owner a second bite at

the apple. It may give them two forums from which to make a choice about where to file the case, but I'm not sure it gives them a second bite.

Representative Roberts said because I would assume the DOW or CDPHE would make that case for them. If they have a valid public health or wildlife claim, I would assume our state agencies would say you're right, we've got to make that case. But the landowner is not underneath CDPHE or DOW. They're a separate entity so even if DOW is satisfied, and CDPHE is satisfied, the surface owner, under this current scenario, has their own individual right to make this appeal. It's beyond the scope of what we were presented with our memo and you've asked us to go with what the memo says, so this one is holding me up from being able to follow along with your recommendation because that's where I see them acting independent of public health and wildlife as represented by the state. Mr. Astrella said I think I follow you but I don't have an answer for you.

Representative Levy said did I understand you correctly that you have litigated on behalf of surface owners some of the issues that this new set of rules is trying to work out through an administrative process? Did I understand that correctly? Mr. Astrella said that's correct.

Representative Levy said if surface owners are given an administrative appeal right through these rules, would that then require them to exhaust that, to use that remedy before they could go into court? Is that correct? Mr. Astrella said without looking at the specifics I guess what I'd say is you would have to select whether you are going through the administrative process or bypassing it and going to court directly on a trespass claim, for example.

Representative Levy said I guess where I'm going with this, and I guess I hadn't been thinking of a completely independent cause of action like trespass, but in my experience with this kind of process if you've got an administrative appeal to an administrative body, you've got to exhaust that remedy before you can go to court. Mr. Astrella said I don't agree with that. I think a trespass action is a trespass action. I guess my only point in my testimony with regard to bypassing the commission in the past and maybe not selecting that route in the future is that I think these new rules are comprehensive enough and the public has enough confidence in this commission that they will bypass the court route and go directly to the commission and choose the administrative route.

Senator Brophy said you started off your testimony talking about the cost-effectiveness of these regulations from the point of view that you have as a person representing the antagonistic surface owner versus mineral rights owner and company's perspective. I appreciate that, and I think you raise a valid point about the cost-effectiveness in

relation to that very narrow interest, but it appears to me that the vast majority of the drilling activity in the state occurs in a situation where we don't have that antagonistic relationship between the surface owner and the mineral rights owner. In a lot of cases the surface use agreement is done and in place and working quite well. Out in my area, a lot of times the surface owner and the mineral rights owner are the same person, so we don't have that. My point is that I think your assertion about the cost-effectiveness is only applicable to a tiny percentage of the permits that we see in this state. I think Representative Levy correctly raises the point that if they have to file the administrative action first and then end up going to court, it actually might drag it out and kind of negate your argument in the first place. Mr. Astrella said what I was testifying was I think they would do an administrative action in many instances in lieu of litigation, not both. I agree with you. I wouldn't call it a small percentage, but there is a large number of cases that do not have controversy, either because of the environmental conditions of the land or there's just no issues, but when there are issues, they're very serious. They can affect a lot of areas and one of the reasons you don't see a lot of these issues raised is just the fact that people don't want to be in 2 or 3 years of litigation or can't afford it.

Representative Levy said I just wanted to say that I wasn't trying to suggest actually that this right of appeal would drag this process out. I think my feeling would be that if you had a claim that related to something that had been considered in the permit-issuing process as opposed to a wholly separate civil action based on trespass or some other entirely different legal theory, that if you have a right of appeal, the doctrine of exhaustion of administrative remedies would require you to do that appeal to the administrative body and then any avenue for judicial review would be limited to a review on the record under the APA, as opposed to having the opportunity to entirely relitigate it de novo in district court. I actually think we're agreeing that this does shorten the process and expedite review. Mr. Astrella said I agree with your assessment of that.

5:09 p.m. -- Jo Evans testified before the Committee. Ms. Evans said I'm representing just myself today and I am in support of House Bill 09-1292 as written. I am not a lawyer, I am a recovering lobbyist. In the 22 years I was registered down here as a lobbyist, I worked on probably 27 or 28 different takings bills. I had planned to testify in prepared testimony on only one aspect of this discussion, and that is the role of property rights and wildlife regulation under the commission rules. I had not seen your orange card at that time and I am not entirely sure that my testimony is what would be helpful to you at this time or not, so I ask you that question.

Senator Veiga said in a vacuum that's difficult for me to say. Our charge is this: We are here to look at whether any of the rules promulgated by the commission exceed statutory authority and, to a certain extent, are unconstitutional. You've heard

arguments about federal preemption and other things. To the extent your testimony falls within sort of that gamut, then obviously it's certainly appropriate. What I was trying to make very clear is that we're not here to discuss the good or bad of the public policy decisions made by the implementation of these rules. That's for a different legislative committee and not ours.

Ms. Evans said I'm not sure. Let me say that the commission rules have done a very good job of recognizing and honoring the three distinct classes of property that are germane to this issue. Those would be the property rights of the mineral owner, the property rights of the surface owner, and the property rights of the public, for by law, our law, this state, wildlife belongs to the state and therefore to the people of Colorado. You heard earlier Mr. Morris quoting section 33-1-101 (1) and (2), C.R.S., that speaks directly to the fact that wildlife belongs to the state and that the commission would then be required - if the DOW is required, then the state is required - to manage wildlife and their environment and to protect them and to manage them for the use and benefit and enjoyment of the people of this state. They've done a good job on that and we strongly support that. Nobody really likes to be regulated. As James Madison said, if men were angels, we would not need government. They aren't and we do and we need regulations, and I think the regulations before you represent a long hard effort and are a balance. The remainder of my testimony was going to be specifically to the origin of property law and was based on the premise that property has never been an absolute right. It is a fundamental right, it is sacrosanct, it is important, it's part of our being as American citizens, but property rights have never been absolute. The concept of property evolved at the same time that regulations on property evolved going back to English common law before 1200. I'm not sure you need that, so I'm going to stop right here.

5:13 p.m. -- Joe Feller, Senior Counsel, National Wildlife Federation, testified before the Committee. He said, in light of the way the hearing is proceeding I have very little testimony. I am a professor of law at Arizona State University where I teach natural resources law, water law, and property. I'm on leave this academic year and I'm serving as senior counsel to the federation in its office in Boulder. The reason I'm here is that my teaching and writing in the area of natural resources and property law deal extensively both with constitutional takings issues, allegations that regulations are takings of property, and with federal preemption of state law and questions about that issue. I came here today principally because there have been allegations that these commission rules are unconstitutional because they constitute a taking of private property. I think it's quite clear that they do not constitute a taking of private property and I came here principally to answer that allegation, but that allegation has not been pressed before the Committee that I have heard today. I think that rather than give rebuttal testimony on an issue that really hasn't been raised, I'll just offer to answer, if the Committee would like to ask me any, questions either about the constitutional

taking of property issue or about the federal preemption of state law issue, which I think has been dealt with quite well already by my colleague Mr. Saul. I'd offer to answer any questions the Committee might have on either of those issues.

Representative Gardner said on the issue of constitutional regulatory takings, I read Professor Epstein's book, *Takings*. Do you generally agree with him or not? Mr. Feller said let me say I have great respect for Professor Epstein, but Professor Epstein has advocated a more expansive rule of takings than has been adopted either by the federal courts or by the Colorado courts. I would have to say that although he presents a persuasive case on what he believes the law of takings ought to be, the case that he presents is not the law of the United States and is not the law of Colorado.

Representative Gardner said since you raise the issue, I scratch my head because I am familiar with the law of the United States and Colorado slightly, but not as expert as you in the area of regulatory takings. What is the case, in all academic candor, to be made for regulatory takings here? That is to say, let me make clear what I'm getting at: Are there any instances where there could be regulatory takings by the commission, because I've not found one under the law of the United States? Mr. Feller said I think it's very unlikely. One could always create a hypothetical scenario. If the commission were to say we are never going to issue any permits to drill anymore, all APDs are denied, I guess that could raise constitutional takings issues. But, that's not what these rules tell them to do. That's not by any stretch of the imagination what these rules say they're going to do. Since they are not doing that, the rules don't tell them to do that, then I don't think it's very likely that there will be a serious takings issue.

Representative Gardner said what if the practical effect of a set of rules is such that a permit is never issued? Would that constitute a regulatory taking? Mr. Feller said if the practical effect were that a permit is never issued, then that could constitute a regulatory taking, but let me say first of off, if you read these rules, they seem designed to avoid denial of permits. For example, Rule 1205., which has been the most controversial, talks about avoiding operations in restricted surface occupancy zones. The first line of Rule 1205. is operators shall avoid restricted surface occupancy areas to the maximum extent technically and economically feasible, which means if you need to drill in a restricted surface occupancy zone, that it's the only way to get out the oil and gas, you can. The rule seems designed to avoid denials of permits. It says we're going to move you to areas where it has less impact on wildlife to the extent we can, but when push comes to shove, you got to do what you got to do to get the oil and gas out.

Senator Schwartz said I find this to be interesting because I think it is at the crux of the whole issue of oversight and this intersection between our wildlife being the property of the state and private property and to what extent do we have the ability to monitor

this resource on private property and protect the wildlife. We were talking about those species that are in danger of being listed and to what extent do we have the right to use the interests of the state on those private lands. Mr. Feller said constitutionally, the state has very broad authority to regulate the use of private land and also for that matter to occasionally enter private land for the purpose of promoting the health, safety, and welfare of the public, which includes wildlife protection. Wildlife protection is part of the welfare of the public. There was testimony today where someone said if I don't want wildlife counted on my property, that wildlife should not be counted. As a social or political argument, you can accept that argument or not, but as a constitutional argument, it's not correct. It is not a taking of property for the government, for example, to go onto someone's property temporarily to count the wildlife there. That is not a taking. Whether it's good or bad, we're not here to discuss. There is just over a century of Colorado and federal court precedent that those kinds of government intrusions onto private property are not constitutional takings.

Ms. Evans said to Representative Gardner's question, the rule of law is probably clearest stated by Justice Scalia in *Lucas v. South Carolina Coastal Council*, which is an absolute law. If you put a regulation in place that takes away all opportunity to get any value out of your property, that's a taking. Short of that, a condition on it is not.

Representative Gardner said since we're on that, say I take 90% of the value of someone's property. It's open range land and it has limited use and underneath it are mineral rights worth millions, but I regulate them where they can't get that so what they have is $400 an acre. That's not a taking under the current law, is it? Mr. Feller said let me answer again that we're having an academic discussion here because that's not what the rules that are currently before the Committee do. There have been cases where property value losses as much as 90% have been held not to be takings. The courts don't look only at the amount of diminution in property value. That's an important element but they look at other elements. They look at elements, for example, as to the character of the government action. If the government action is a physical invasion of property, then it's more likely to be held a taking than a simple regulation and here we're dealing with regulations not with physical invasion. To the extent that the government is dealing in an area that has traditionally been heavily regulated, it is less likely to be held a taking. For example, here, regulations of well locations are not new. The commission already does things like issue well spacing orders. There are setback requirements. You can't drill a well too close to a home, school, or hospital. The courts have said where there is an expectation that a land use is going to be regulated, then there's also an expectation that there will occasionally be changes in those regulations that render them more stringent. Where there's an expectation already of extensive regulation, it's very unlikely to be held a taking. Again, we're talking about constitutional limits here. Whether it's a good idea to regulate property, that is strictly beyond the scope of what I can testify about.

5:25 p.m. -- Kent Peppler, President, Rocky Mountain Farmers Union, testified before the Committee. He said my other full-time job is that I'm a fourth generation farmer from Mead, Colorado. I'm a surface rights owner, with mineral rights. I'm a surface owner, with partial minerals. I'm also a tenant farmer with no rights at all. I have farms that are leased and developed. I have land with no leases on them adjacent to people that have leases. My family has worked with mineral developers since 1972 and I've been my family's representative since 1981, and I might add I've negotiated with many developers, including AMOCO, Kerr-McGee, and Anadarko. We currently and always have gotten along with them just fine. I tell you all this to let you know that I've had quite a bit of hands on experience with this industry from a farmer's point of view. To Rocky Mountain Farmer Unions's position on these rules, we feel the rules reflect the legislative intent of the bills passed in 2007. The union is okay with the rules as they're written and if there are any problems with implementation we hope to be involved in fixing those problems. I think this situation reminds me of when I was a young man fresh out of college and I was in the yard underneath my beet digger, tinkering on it, trying to get it ready to go onto the field and the neighbors' trucks were flying by loaded with sugar beets and my dad drove in the yard and he said would you quit fixing on that thing, button it up, it's time to dig beets. I guess that I'm here to ask you to get these rules going. With my involvement in the union, we've watched these bills from their inception. We've testified at hearings, we've gone to a multitude of meetings, community meetings and hearings, and rule-making procedures and quite frankly my members feel like the rules procedures have worked. We worked with the Department of Natural Resources quite a bit. I'd like to talk about Mike King and his crew a little bit. Our members feel like they've listened very well, they've been responsive, and that they've motivated some changes to help this process along. We feel like the rule-making procedure has worked very well. We know this legislation isn't perfect.

Senator Veiga interrupted to say we are trying to stay pretty tight. Mr. Peppler said sure, I'll finish up. These rules obviously have competing interests and at the end of the day I think we know that these rules sooner or later are going to go through. Our position is let's get them out in the field and get going.

5:30 p.m. -- Tara Meixsell, Landowner from New Castle, Colorado, testified before the Committee. She said in 2007, the General Assembly enacted House Bill 1341, which called for increased attention to the impacts of public health and welfare from oil and gas activities and which is part of the commission's mission. The law directed the commission to adopt rules that would foster the balanced development of gas and oil with protection of public health, welfare, and the environment, and the commission's rules do just that. The commission's rules respond to the legislature's direction and are consistent with the "Oil and Gas Conservation Act" and would address many of my concerns for the oil and gas industry. I traveled here today from

the western slope prepared to give you details about my neighbors near New Castle who have suffered many impacts from oil and gas activities. Many are left with permanent and severe health damages. I won't go into detail about these things unless I'm asked to do so, but these are the subjects that would be addressed by the commission's new rules. Rule 805. b. requires equipment near homes or schools to control odors. This rule would prevent some of the health impacts I've seen as called for in House Bill 1341. Rule 205. requires drilling companies to maintain a chemical inventory and would allow the commission and physicians to know what chemicals they're dealing with when accidents happen. This rule will help protect public health as has been called for in House Bill 1341. Rule 317B. requires oil and gas companies to maintain a 500-foot setback from drinking water streams and to conduct baseline testing and monitoring to ensure that drinking water is not impacted by oil and gas. The rule will protect public health as is called for in House Bill 1341. I support the commission's rules and urge the Committee to approve them in full. I have additional testimony, but due to time issues I would like to submit a written copy.

5:33 p.m. -- Kim Weber, Landowner from outside of De Beque, Colorado, testified before the Committee. She said the last few years I worked in an industry that sold gravel. Our majority of sales came from the oil and gas industry. Due to the decline of gas prices and the corresponding drop in rig counts, I was laid off a week before Christmas. In 2007, the General Assembly enacted House Bill 1341, which called for an increased attention to the impacts on public health and welfare from the oil and gas activities. The law directed the commission to adopt rules that would foster the balanced development of the oil and gas with protections of public health, welfare, and the environment. An example of balanced development would be Rule 317B. This rule calls for a 300-foot buffer zone around streams. The buffer zone includes development but also recognizes the need for clean water and healthy fisheries. Our towns rely upon tourism and agriculture during the 1980s, after the oil shale bust, and we will depend on these traditional economic drivers when the industry leaves again. Rule 317B. as well as others will provide safeguards for these economic drivers and is consistent with House Bill 1341. Because I live near an existing evaporative waste pit facility, I believe that Rule 904. will help protect public health, adhering to House Bill 1341. Pit lining requirements will reduce chemical leaching into surrounding soils and waterways. When the commission began the rule-making process I became involved. I felt the original draft of the rules were common sense safeguards to Colorado residents, the wildlife, air, and water quality. After reading the final draft of all 151 pages, it is clear to me that industry's input was taken into account. Although I'm disappointed to see some of the changes made weakened those protections for my family, I am extremely pleased to see that the commission worked together with all stakeholder groups including the oil and gas industry, to create this set of rules that we can all live with. These rules respond to the legislature's direction and are consistent with the "Oil and Gas Conservation Act". The rules will address many of the concerns

within the oil and gas industry. I would like to extend my deepest appreciation to the Chair and the Committee for taking time to hear my words and I would like to ask each one of you to please vote yes and pass these reforms.

5:36 p.m. -- Michael Smith, Landowner, testified before the Committee. He said the passing in 2007 of House Bill 1341 is a good passage and a good bill. The commission rules now will protect more of the Colorado citizens' health and welfare. Development in my area has brought to my home an existing and ongoing happenstance of noise, which could be diminished by Rule 802. Lighting from the portable lights used lit up the inside of my home brighter than the sun during the drilling and fracking procedures. Because they were aimed several times directly at my house, this new Rule 803. could help with this intolerable happenstance. My family is also inundated on a daily basis by odor air pollution, which has made us sick to our stomachs at times and visitors are struck by headaches and often go away nauseous. This should be helped and hopefully diminished by Rule 805. In closing, my property value has been seriously compromised, possibly would not even be able to sell, by the close proximity of this industry and drill rigging process less than 400 feet from my front door. Rule 306. c. should be enforced to improve the relationship with neighboring surface right owners. Rule 1003. on interim reclamation would improve also my situation and possibly bring value back to my property.

Senator Veiga interrupted to say I appreciate that you think these rules are beneficial to you but our focus really is whether the rules were authorized by statutes and I just ask you to stay on task relative to what our charge is. Mr. Smith said I have two more lines. The commission rules I've addressed would prevent the adverse impacts on my health and welfare as called for in House Bill 1341. I support the commission's rules and urge the Committee to approve them in full.

Senator Veiga said I will remind all the witnesses that really our task is just to determine whether the rules promulgated exceed statutory authority or not so if you can, please direct your comments to that charge.

Mr. Goodwin said there was supposed to be a fourth person and he as left his testimony here to give to the Committee.

5:39 p.m. -- Gopá Ross, Landowner, North Fork Ranch, testified before the Committee. She said my water well was impacted by initial coalbed methane (CBM) drilling in July 2006. The oil and gas rules currently up for review by this Committee fall within the broad statutory authority to adopt rules that foster the responsible balanced development of Colorado's oil and gas resources I believe in a manner consistent with the protection of our public health, welfare, and the environment and wildlife resources. With regard to House Bill 1341, I want you to know that recently

the landowners in North Fork Ranch were informed within the last couple of weeks that four groundwater monitoring wells installed on a North Fork Ranch subdivision in 2006 in the fall have high levels of methane now. This refers back to the House Bill 09-1292 compliance checklist and Rule 206. I believe that requirements to protect surface water, drinking water, and supply areas and requiring a chemical inventory are very important, with regard to the fact that we are always wondering when these things in the water will get to us. We don't know what's in the water. We don't know why these high levels of methane are in the monitoring well. Many of us are 800 feet from these CBM wells and monitoring wells. As residents, we are concerned about our health and so we don't feel safe drinking our water, with good reason. There are problems with the chemistry in that water now. We don't know why and we're not going to make allegations as to why. Comprehensive drilling plans would have been a good idea on our ranch, which is Rule 216. It would likely lead to the identification of potential impacts and minimize the adverse impacts to our public health and safety. A list to identify a plan and to know that we were there, especially part 3 [I think she means Rule 216. c. (3)] with overlaying maps showing gas well locations and where the water wells were that were registered with the state engineer's office so that we would not have direct impact. Water well sampling, Rule 608., would have been a very good idea previous to drilling in our area.

Senator Veiga interrupted to say I am just going to ask if you can focus on whether particular rules exceed statutory authority or not, which is our task. I appreciate that you find these rules beneficial, but that really is not what we're charged here to decide. Ms. Ross said I really believe that the commission rules respond to the legislature's direction and they're consistent with the conservation act and I think they would address many of the issues that have occurred on our ranch.

5:43 p.m. -- Brett Corsentino, Dairy Farmer from Walsenburg, Colorado, testified before the Committee. He said I'm just glad that Colorado has come up with new rules, because basically, they've ruined us. [He held up a picture.] This is what our crops look like now, this is what happens when there's no rules in place.

Senator Veiga interrupted to say you have got to stay on task to what our charge is. Mr. Corsentino said like I say, there's a lot of good rules I think we need to have implemented and it would have helped from this kind of stuff happening.

5:44 p.m. -- Dick Goodwin, Landowner, testified before the Committee. He said the rules are consistent with the statute authorizing them. The new rules may not be the most perfect, but they're most certainly a giant step forward. I ask you to protect the health, welfare, and safety of the citizens of Colorado and to approve these new rules.

5:45 p.m. -- David Baumgarten, County Attorney, Gunnison, testified before the

Committee. He said it's most important for me to begin by clearly stating the intent of Gunnison county. That intent is identified in the first sentence of the first paragraph of the county's oil and gas regulations and you'll find them to be an analog to your own organic legislation. That sentence says the goal of the board of county commissioners of Gunnison county is to provide a framework for the responsible exploration and production of oil and gas resources in Gunnison county in a manner that conserves other natural resources, that is sensitive to surrounding land uses, and that mitigates adverse impacts to and protects the public health, safety, welfare, and environment of Gunnison county. My presentation today also is informed by my practice as a county attorney for 20 years and from previous practice as a public defender in Brooklyn, in-house counsel for state agencies, my own private practice, and my practice as a mediator. My respectful suggestion to you is to examine three aspects of the commission's rule-making: Why the rule-making was conducted, how it was conducted, and what the rules contain. Examination of these three aspects will lead to a conclusion that the rules are consistent with the statutes authorizing their promulgation. When we focus on why, we must look at House Bills 1298 and 1341. These two bills directed the commission to promulgate rules that would balance the effective extraction of oil and gas with the protection of public health, safety, and welfare, including protection of the environment and wildlife resources. The bills also reformed the membership of the commission so it would contain a very broad spectrum of interests, including three members with substantial experience in the oil and gas industry and one member who would be actively engaged in agriculture and also a royalty owner. When we look at how, the commission staff began with interest group roundtables, organized and conducted in the winter of 2007 and mid-spring 2008. They were professionally facilitated and professionally staffed on an almost weekly basis over two to three months attended by a number of participants in an attempt to identify the issues, consistent with the foundational statutes and informed writing of the draft rules. These were arduous, open, lengthy debates, conversations, and caucuses. There was then circulated a draft of the rules, comments were solicited, and attention was paid to them. The commission issued its first formal draft and in June initiated its formal hearing. These were attended by 150 persons and entities as formal parties. At those rule-makings and after the numerous comments and oral testimonies, there were lengthy, substantive clarifications and revisions, significantly modifying the initial draft and these themselves were subjected to intense further hearings. On August 7, the commission postponed its own deliberations so it could have abundant deliberations. The commission had those and unanimously adopted the rules. When we look at the what, it's of paramount importance to note that the newly adopted rules did balance extraction with protection of public health, safety, welfare, the environment, and wildlife. The attorney general has so opined and so has the Office with three slight exceptions. One issue that continues to raise passionate advocacy at both ends of the spectrum has been the rule regarding state regulation of the impacts of oil and gas operations on private lands vis-à-vis wildlife. While one end of the

spectrum argues that such type of regulation is a radical departure from custom and may indeed be illegal, I would respectfully take the middle ground and state that such regulation by the state and its subdivisions, like the county, is a normal and widespread practice. Such regulation is authorized by statutes, such as section 24-65.1-101, C.R.S., et seq., better known as the 1041 statute and, in particular, section 24-65.1-104 (11), C.R.S., in which this legislature identified impacts on wildlife by development be a matter of state interest, making those rules consistent with the organic legislation. A second statute would be section 29-20-104 (1) (b), C.R.S., which authorizes local governments to protect land from activities which would cause immediate or foreseeable material danger to significant wildlife habitats or would endanger a wildlife species. Gunnison county regularly relies on those two statutes, consults with the DOW pursuant to our own regulations, and those regulations were adopted, again, pursuant to those statutes. Government regulation regarding impacts of oil and gas operations on wildlife has been reviewed and upheld by the Colorado Court of Appeals and by the Colorado Supreme Court, most recently in a 2006 case titled *Board of County Commissioners of Gunnison County v. BDS International, LLC*, in which a previous iteration of the commission intervened against Gunnison county. Please remember that this case predated the authorizing legislation and was not disturbed by it. If a Colorado county can regulate the impacts of oil and gas operations on private lands, one assumes the state can also. A second issue is whether the commission can regulate oil and gas operations on federal land. There are two cases I would cite to you. The first is the seminal case *California Coastal Commission v. Granite Rock*, 480 U.S. 572, a United States Supreme Court case from 1987. This case authorized the government to place environmental controls on federal lands. The second case, again, is the *BDS* case, in which the Colorado Court of Appeals found and the Colorado Supreme Court chose not to accept on cert that a county can regulate oil and gas operations on federal land. Again, if a Colorado county as a subdivision of the state can do so, one can reasonably assume that the state itself can do it. A third issue is to whom notice of a proposed permit must be given. A suggested foundation to answer that issue is found in a case called *Williams Natural Gas Company v. Mesa Operating Limited Partnership*, 778 P.2d 309. It is a Colorado Court of Appeals case from 1989 in which the Court of Appeals approved wide notice to be given by the commission because the business of the commission extends far beyond the boundaries of the property involved. Gunnison county provides notice of requested land use change permits to adjacent properties, neighboring properties, and the public at large. We do so so that county decisions regarding public health, safety, welfare, the environment, wildlife, and the impact on property rights of persons other than the applicant are reasonably informed and not made in a vacuum of information. I would urge you that broad notice also comports with the legislative intent. Based on my 20 years of experience as a county attorney, and the testimony that I heard before the commission, broad notice is the norm, if not ubiquitous, requirement of Colorado counties. I would respectfully urge this Committee to consider the consequences of a wholesale rejection

of the new rules. I can think of three options, none of which would be in the public interest. The first option would be that the commission initiates and conducts a new rule-making of like intensity and duration to which they just concluded. The second option would be that the legislature initiates and conducts hearings of its own that wouldn't necessarily be followed by commission rule-making. The third is that the prior rules remain intact and unchanged contrary to your own instructions. If there is an individual rule or a component of an individual rule that you find not to be consistent with the statutes, Gunnison county urges a surgical identification of the narrowest fix necessary to harmonize the rule with the statutes. That is, please do not throw out the baby because of a problem with a small portion of the bath water. I would not be doing my duty as an attorney for Gunnison county if I did not state that there remains the opportunity for disagreement between counties and the state regarding preemption of local authority. While the two organic statutes and the rules themselves state that local authority is not preempted, explicitly or implicitly, such a controversy can arise. However, Gunnison county thanks the commission for the new rules that establish for us an opportunity to resolve issues in a nonlitigious, collegial manner with abundant protections of procedural and substantive due process. We have confidence that this Committee will recommend acceptance of the newly adopted rules.

5:56 p.m. -- Rachel Richards, Pitkin County Commissioner and Vice-chair of the Northwest Colorado Council of Governments Water Quality and Quantity Committee (Q2), testified before the Committee. She said Q2 was a party to the rule-making and we were pleased with the outcome of the hearings and the process leading up to the hearings. In particular, we're supportive of the commission recognizing local authority in the newly adopted rules. We also support the findings of the Office that the rules are within the commission's rule-making authority and do not conflict with statute. I would like to say that in our county hearings, we regularly consult with the DOW on all land use actions. We've actually incorporated their wildlife maps into our county code and if any decision is closer to align we go to the next level and ask for on-the-ground consultations with them so that we can fulfill our 1041 powers, which are both a responsibility and a charge by the state to protect wildlife interests. I think it's been said before that wildlife are a public resource, they're owned by the public of Colorado, and we look to the DOW as our trustee to protect that wildlife and to give us expert opinions. In the course of this afternoon's testimony, I've heard other objections and the one about asking the DOW should they or should they not through this original enabling legislation change the rules and are they allowed to consult or be part of an appeal process is very confusing to me because the authority of the commission is the power to make and enforce rules, regulations, and orders pursuant to the article, to make the rules that allow for a process with an appeal, and to determine who gets to speak at the appeal, and this seems very clear cut to me. We've talked a lot about efficiency and timely and efficient, and it seems it would be a very

inefficient process to not allow people with expert testimony to speak during an appeal process. I understand the need for timeliness in granting permits to the industry and the operators, but I think we need to take both of those terms and look at the other side of the coin. We want an efficient process for protecting the health, safety, and welfare of the public. We want an efficient process for taking care of the wildlife concerns moving forward in perpetuity. When you talk about disturbing areas that have been undisturbed for centuries, ecosystems that have been in balance and undisturbed for centuries, then an appeal process and a permitting process that may take 60 days or longer if there is that type of appeal is still very timely when it comes to protecting someone's drinking water that they will be relying on in perpetuity. You have to put in context the question of timeliness: Is it more important to be very timely yet be inefficient in the protection of the public health, safety, welfare, and natural resources? I serve on our Colorado roundtable basin, the 1177 process for the Colorado River, and we all know how scarce water resources and water supply are in Colorado and how many people depend upon the Colorado River. I think it is very important that we take the time necessary in issuing the permits to make sure that surface water is well protected, that our aquifers are well protected, and that we're not left with clean-up costs and burdens on local communities the way we were from the mining era many, many yeas ago. In terms of process and public involvement, we regularly hear from neighbors, affected landowners, tenants, and the public at large in a process that only leads to transparency, engendering trust in public, and good public relations. It's time to allow that sort of public input in the oil and gas hearings as well when there is an appeal. Also, the question has come forward about denial of permits and is that a taking in a larger context which you are all well familiar with from today's hearings. I can only relate to a small example in a community such as ours that if someone were asked to build according to the uniform building code and they submitted plans that did not conform to those for foundation or electrical work or something like that, we would deny them the permit. It would not be a taking. If you can reasonably comply with the conditions of a permit and refuse to do so, that does not make it a taking.

Representative Roberts said I guess the appeals part is where I'm going. To me what's interesting on this is we have a new make up of the commission and it includes the executive directors of the CDPHE and the Department of Natural Resources. One of the members has to have experience in environmental or wildlife protection. I guess maybe it's a comment as much as a question, but in light of the new make up of the commission, to me it seems the appeals that we're talking about are not as consistent with that timely and efficient language particularly because those members are on the commission, so not only do they have an opportunity to make written recommendations to the director, presumably they are verbally communicating to everybody. I see it as different from what you described because in a situation where you don't have input as the process is set up, in this case they do. Ms. Richards said I can appreciate that concern. At least how I'm envisioning this process going forward

is it's very likely the agency would have a different person with perhaps more expertise in a given area testify in a specific case or circumstance, then the one who sits regularly as a member on the commission. Someone may be the wildlife biologist and someone may be the river hydrologist and there may be a series of different expertises within the agency that would be called into question and give testimony during an appeal. I also just really think that the appeal process is not a burden; it's going about getting an efficient answer, it's going about getting an efficient outcome in the decision-making. They are to be involved in the consultation and an appeal process is literally part of a decision-making process. It is how the final decision becomes rendered, so to have them involved throughout the entire process I believe would be the correct path.

6:04 p.m. -- Randy Feuerstein, Shareholder and Director of Dufford & Brown, P.C., testified before the Committee. He said our firm represented in the oil and gas rule-making proceedings two trade associations that deal with the development of the surface here in Colorado. The first is the CAHB, which is the Colorado Association of Home Builders and that particular association is a statewide trade association that has in excess of 3,000 members. The other trade association is the NAIOP, the National Association of Industrial and Office Properties, and they deal with the development of property for commercial and office building uses. We have a client in the commercial sector and the other client represents builders and developers who build the American dream for Coloradans. In a spirit of disclosure, I wanted to say that I am a church lay leader with Ms. Haskins at First Plymouth Congregational Church and we're currently in different leadership roles there and we have served in many leadership roles also for many, many years in the past, so I know her very well and she knows me very well. At all stages, we participated in the stakeholder meetings before the rule-making proceedings actually got formerly going. We participated in pre-hearing conferences with the commission and with all parties, we presented evidence, we presented alternatives. I see many of you are looking through some of the alternatives that we presented in terms of slides. We focused primarily on the interests of the surface owners and trying to protect the rights of the surface owners, relying primarily on one concept of that. This I think goes to Representative Roberts' question. You were looking for authority to give surface owners appeal rights to the overall commission from a decision that Mr. Neslin or his staff may have made. I think you need to look at due process. We primarily relied on due process because procedural due process is necessary to provide notice and also an opportunity for hearing. That's the gravamen and the crux of due process and I think that would help you in your particular analysis or the questions that you have about why it should be permissible to have the surface owner actually have administrative appeal rights to the full commission. I'll get to that a little bit later. We always started with the premise that the surface owner is the party in these proceedings that have the most stake in oil and gas activities on their property. They are the ones that may have leased, maybe a

predecessor leased to the oil and gas operators, they may not own any minerals, they may own minerals, or there might be some split estates, but they are the ones that are directly and potentially most adversely affected. They own the land, and they're there when the rig comes out and drills, they're there when the pits are covered and filled back in, and they're there when the related equipment is placed - the tanks, the separators, the pipelines, the roads. Other areas are disturbed for purposes of access to the minerals because we all know you can't get to the oil and gas unless there are areas of a few acres provided for each drill site to access those particular minerals. They are affected at that stage. They're also affected when the oil and gas operators come back four or five years later and have workover rigs come in to refrack the well. And then maybe 25 or 30 years down the road, these wells end their useful life and then there's reclamation. So, they're affected by the reclamation. Hopefully that will take the property back to the way it existed at the time the wells were originally drilled. Beyond that, if the reclamation doesn't work they're also adversely affected. From our standpoint, from the standpoint of the surface development community, those surface owners are the most potentially adversely affected by oil and gas operations and that's why we participated. We participated to ensure that notice and opportunity for hearing was provided at every stage of the proceeding - permitting stages, consultation stages, inspection stages. We advocated strenuously for notice and opportunity for hearing. Let's talk about the issues you'd like to have the people who testify focus on, the legislative authority. We do disagree with the position of Noble Energy and also the other industry representatives with respect to giving a surface owner these administrative appeal rights because we believe that section 34-60-108, C.R.S., is the provision that provides for the commission having the ability to prescribe rules and regulations on practice and procedure. We look at the application and the issuance of drilling permits as a procedure that's involved that will ultimately lead to disturbance on the ground. That 150 pages of rules that you've been looking at, those rules aren't just designed to implement House Bills 1298 and 1341. As Mr. Neslin and Mr. Sherman testified, they also updated the rules, revamped them since they hadn't been revamped for a number of years, and so that's why you have 150 pages and maybe not just a few pages that would have otherwise implemented House Bills 1298 and 1341. That's why I think you have to look beyond House Bills 1298 and 1341 for this particular statutory authority and go to section 34-60-108, C.R.S. They may prescribe rules on practice and procedure. Then, let's look at the other things that Noble Energy argued. They said Senate Bill 237 deals with notice to a mineral owner for land use changes and it also deals with the ability to obtain approval of a plat if you cannot get a surface use agreement. That doesn't really drill down into a practice and procedure, so again, we have to go back to section 34-60-108, C.R.S. House Bill 1252 was the codification of the doctrine of reasonable accommodation and it deals with the private interests of the operator and the private interest of the landowner to reasonably accommodate one another. There was a time when the mineral estate was thought to be paramount or predominant in Colorado, but that's changed. Now each estate owner

has to reasonably accommodate one another. I think when we're talking about these rules outside of the context of House Bills 1298 and 1341, we can look at them as being an update to the rules or a revamping of the rules because they had the opportunity to change or add rules to implement the environmental statutes and the wildlife statutes. When we look at an application for a permit to drill, Form 2, or an application for a permit to have a facilities location, new Form 2A, those things I think from the due process standpoint require notice to the surface owner, consultation, a party status, and appeal rights. Our position, contrary to what industry has advocated and what Noble has said, with respect to Rule 503. b. (7) B., which is the appeal rights for the surface owners, is we think that particular section should be adopted as proposed and as promulgated by the commission. I agree with a lot of what Mr. Freeman had to say about appeal rights for surface owners. I also agree with a lot of what Mr. Astrella had to say about the appeal rights of landowners. What I'm trying to do here is just hammer home the point that I believe that those appeal rights are part of procedural due process that should be afforded to the party potentially most adversely affected by what happens on the ground, on their land.

6:14 p.m. -- Josh Joswick, San Juan Citizens Alliance in Durango, testified before the Committee. He said prior to working with the alliance I was a three-term county commissioner in La Plata county. I also participated in this rule-making process and since much of what you have heard today is interpretations of whether or not these rules fit within the scope of review by this Committee, I would like to use my time to offer my interpretation of this point. In 2007, the legislature decided it was important to recompose the commission and to have this new commission rewrite its rules. What you are considering today is what I see as the successful culmination of that directive. I think it is important to remember that this is not just a successful two-year effort. It falls within the scope of what was intended that meets legislative intent. It is important to remember that people, myself included, have been coming to the legislature for the better part of 20 years asking for what House Bills 1341 and 1298 ask for and that is oil and gas development to be held accountable for its impacts on our wildlife, our air, our water, our neighbors, and our communities. In 2007, the legislature finally heard what the people were saying and the commission heard what the legislature said that it wanted the commission to do. The results are rules that you are considering ratifying today. The commission has done what it was tasked to do. I would like to add that on the issue of timely and efficient consultation versus comprehensive review, both are equally important and in my mind not mutually exclusive and I believe these rules strike an accommodation of both of those, which is what I always took to be one of the intents of the legislation was to strike a balance or to at least achieve a better balance. To do this, the commission used a valid process, which was inclusive, in which all affected parties participated. If you were not aware of what was going on, then you were not paying attention. The commission itself heard dozens of hours of testimony, held extensive hearings on poundage of material, both pro and con, and arrived at these

rules using compromise, good judgment, and common sense. A very diverse commission voted unanimously 8-0, and that included industry representatives on the commission, to adopt these rules. You may hear as this proceeds from lawmakers claiming to offer solutions to concerns they have with these rules. Please understand that the commission compromised again and again during the rule-making process and in front of you is the best possible compromise and still fulfills the intent of the legislature when it passed House Bills 1341 and 1298. What you have before you is the good product that gives the legislature what it asked for and was developed in a good open process and I ask you to please accept both this product and process and validate what has happened here, and that is concluding 20 years of working to make an industry accountable.

6:18 p.m. -- Steve Torbit, Regional Executive Director, National Wildlife Federation, Rocky Mountain Office, testified before the Committee. He said I have a Ph.D. in wildlife ecology from CSU. I've worked for both the state of Colorado and the state of Wyoming for the state wildlife agencies. I've also worked for the fish and wildlife service. Like a lot of folks I've changed my testimony today as we've narrowed down on this. What I'd like to do is give an illustration of how the timely and efficient parameters of the rules can be met through the consultation process. The federation supports these rules and believes they're consistent with the legislative intent of House Bills 1298 and 1341. There has recently been conducted and published in our neighboring state of Wyoming a study about oil and gas development and mule deer. That study has done many things and, among the two most important things, it confirmed that oil and gas development can in fact and does in fact have an impact on wildlife, a measurable, quantifiable impact on wildlife. After a seven-year study, an independent research outfit, funded by the oil and gas industry, demonstrated that the deer herd declined by 30% and the trajectory was still down. The good news is that the same study verified that some of the techniques that the industry was using in some areas of the field minimized those losses. Central gathering systems, liquid collection systems, directional drilling, and minimizing human disturbance on that winter range reduced the impact of the development on those deer herds. This is the kind of information that the DOW, through the consultation process, can provide to the developers and to the surface owners to meet the intent of the law, which is to minimize any adverse negative impacts to wildlife. This information is available. If it's allowed to be used, it will be timely, it will be efficient, we know the industry can do it, it's technologically and economically feasible. This is what we're after. Finally, there's been a lot of discussion about federal preemption and I'm certainly no lawyer but I did work for the feds and two state agencies dealing with oil and gas development over 30 years. I strongly encourage the legislature not to hitch their wagon to the federal government. In a recent decision in Idaho where a federal judge remanded a sage grouse decision back to the fish and wildlife service, he specifically cited the failure of the BLM to protect sage grouse and conserve sage grouse with the way

they're implementing oil and gas development as the reason for a large part of the decline of sage grouse in the eastern part of this range, which Colorado is. At the federation, I am personally working very hard to avoid the need to list sage grouse and other species. Take charge, put the ball in Colorado's hands. We can do a good job and we can avoid the need to list.

6:21 p.m. -- Gary Graham, Executive Director, Audubon Colorado, testified before the Committee. He said he's been with Audubon for six years. Prior to that, I was the director for wildlife in Texas for four yeas. I'm here to testify about how Audubon supports the final rules and how they meet the legislature's intent to minimize adverse impacts to wildlife from oil and gas activities through timely and efficient establishment of standards and consultation. As a member of the stakeholder meetings, I really wanted more species on the list for protection and more enforceable protections, but the Department of Natural Resources staff and the commission staff, in an effort to achieve better balance declined many of those requests and focused on a consultation process as an alternative to the more restrictive process that I had advocated. We ultimately agreed to the consultation process because of the high credibility that the DOW staff brought to the process and their ability to protect the species especially within the restricted surface occupancy areas and the sensitive wildlife habitat areas, while being more flexible in their approach to specific drilling plans. Consultation with the DOW is fundamental to the entire set of rules, and as Mr. Torbit mentioned it will decrease the probability of federal listing of those two grouse species. I can talk about those a lot, but I'm going to defer to the guidelines you presented and not do that at this point. We think that the rules are consistent with the original intent of the bill and support their passage as written.

6:23 p.m. -- John Woodling, Colorado Trout Unlimited (CTU), testified before the Committee. I was with the DOW as a fisheries and habitat biologist. I retired in 2003 and since then I've worked with CTU in several areas including this. CTU also took part in the meetings to develop these regulations. It's my belief that these rules and legislation, as far as the 1200-Series, of House Bill 1298 do reflect the legislative intent. There are real and true impacts to gas operations. They're also cumulative. Regulation will allow gas development to continue while protecting wildlife resources. What I'd like to talk briefly about is that of fish. The rules as written are restricted to designated cutthroat waters and gold medal waters. These rules provide protection for genetically pure Colorado River cutthroat populations. There's a grand total of seven of those populations in northwestern Colorado. Of those seven populations, five are on lands that are being developed by the gas industry. It's to absolutely nobody's benefit that this species be federally listed. It has been listed and petitioned for protection a couple, three times. Neither the DOW nor the gas industry want this to happen. There are several ways that gas development can impact fisheries. One is by spills. There was an accidental spill of 8,000 gallons a couple days ago up in the Rifle

area into a stream. Fortunately, nothing reached the water. Spills kill streams. I can give you examples. Erosion is the largest problem in the United States. Erosion is also a large part of a problem in northwest Colorado. There are other issues such as point sources and sediment. The current rules don't provide protection in many of those areas. The proposed rules do provide certain things such as stormwater management plans, which will go a long way to reducing sediment. That was the extent of the point I was trying to make. There are other examples also that I can elucidate that I will not. I have seen impacts on some of these trout streams, Battlement Creek and Beaver Creek. Adoption of these regulations will allow for the DOW to consult with industry to protect species.

6:26 p.m. -- David Nickum, Executive Director, Colorado Trout Unlimited, testified before the Committee. He said in the interest of the Committee's time, I will simply make myself available along with Dr. Woodling on any questions that relate to aspects of the rules like on aquatic research and their consistency with the statute.

Senator Schwartz said there was an assertion made earlier today that other land uses do not undergo the same degree of oversight or scrutiny when it comes to these endangered species. In your experience, to the extent that there is sufficient oversight by the state and the federal government when it comes to these key species that we must, in fact, protect, do you feel that the rules that are considered here with respect to wildlife and one industry apply even handedly to others?

Senator Veiga said I'm going to allow a really brief response because we're getting really far afield from what we're charged to do here. If anyone can in one sentence provide a response, otherwise that really is pretty far afield from what our task is here. Mr. Torbit said number one, the scale of development we are seeing in the west, from Montana to New Mexico, for oil and gas is unprecedented. We are having continental-size impacts to the wildlife across the west. Number two is that a federally listed species is subject to two enforcement provisions. One is a take permit and it doesn't matter who you are or what property it's on, if you kill even accidently an endangered species you're liable for take. The other thing is a section seven consultation which the federal agencies invoke only when there is a federal action. Other states are looking at very similar rules. A similar bill to House Bill 1298 has been introduced in the Montana state legislature. This is a western problem.

6:29 p.m. -- Jay Miller, City Council member, City of Rifle, testified before the Committee. He said I came today to deliver the city of Rifle's support for the implementation of the new oil and gas rules under consideration. I'm going to read a brief portion of our mayor's letter to the majority caucus chairs. It says on behalf of the city council of the city of Rifle, I register our support for the new rules for oil and gas development adopted unanimously by the commission. We encourage you and

your colleagues to reject proposals to weaken or block the implementation of the new rules as they are needed to protect the health, safety, and welfare of Colorado's citizens and our wildlife. Thank you very much for your consideration and feel free to contact me with questions or concerns, and it's signed by Keith Lambert, Mayor. I think it's important to note that my presence today illustrates the heightened level our council has for the protection of our air, water, and ground against pollution. Yesterday, at 10:30 a.m., we had a truck roll over on our main street, spilling thousands of gallons of condensate down the street for three blocks and in the stormwater drains before the first responders could contain it. This is the second incident that's occurred in Rifle in less than a year. Our city is under assault and we encourage you to pass these rules.

6:31 p.m. -- Troy Bredenkamp, Executive Vice President, Colorado Farm Bureau, testified before the Committee. He said I come before you to air our concerns with the rules regarding their compliance with the intent of the General Assembly and also that they exceed statutory authority, particularly with regard to House Bill 1298. We were involved in the statutory process on both House Bills 1341 and 1298 from the start. We had party status throughout the rule-making process. We have thousands of members that not only have surface rights, they also own the mineral rights, or they own both. We come at it from all sides. With regard to House Bill 1298, the National Wildlife Federation spokesperson earlier talked about the consent provision. It would be important to point out that the consent provision is tied directly to the wildlife conditions and not necessarily with respect to whether a permit gets issued or not. I believe that was the intent of the legislature and I don't think it's being complied with in this particular rule. Frankly, we did not conceive the concept that the surface right could deny access to the mineral, but if you read through this rule that does happen from time to time and it is a possibility. We do support the Office's recommendation of February 25 with regard to the commission's responsibility to consent. I think it's important to get the consent issue on the right foot. As it is written now, it would be the requirement of not only the developer or the surface owner to consent and we feel that's going to be a very expensive process and that the intent of the legislation was to have the commission and/or the DOW be the ones that are consulting on their wildlife issues. With that we would urge you to adopt that recommendation. With regard to constitutional takings, I'm not an attorney, but I will tell you that whenever you are impeding someone's property right, whether it be a surface right or a mineral right, and they do not have the ability to utilize that property as they seem fit, I don't know if that meets the constitutional or legal definition of taking, but you are taking someone's property. Under House Bill 1252, there is a way for that surface owner to recoup some of that through compensation through the surface use agreement process. I see nothing regarding compensation with regard to taking for wildlife considerations through either House Bill 1298 or House Bill 1341. With that, we would urge you to adopt the staff recommendation.

Senator Veiga said I apologize, I don't think I had you down as an opponent or I would have moved you up in the order.

6:34 p.m. -- Terry Fankhauser, Colorado Cattlemen's Association, testified before the Committee. He said we're in the same classification as the Colorado Farm Bureau. We're opponents to certain portions of the rules. The association has been around for about 140 years in this state. We represent the preponderance of private landowners in Colorado related to the beef industry. My testimony will be brief. We do support changes outlined in the Office's memo related to Rule 306. c. that of consultation. We do also believe that those should be part and parcel to Rule 1205. whereby landowners have to request consultation there as well to protect their property rights, that being the restricted surface occupancy areas. We believe, as the Colorado Farm Bureau does, that House Bill 1298 talked about consent to wildlife stipulations. We don't seek consent to drilling or permitting to drill. We only can seek consent to practices applied to our land, not practices applied or the rights of property owners. House Bill 1252 provided us an opportunity as landowners to empower ourselves as the surface owner, with or without mineral. It provided for a surface use agreement to be arrived at between the company and the landowner. We believe these rules, though, go so far as to abrogate that contract and our rights and create a subservience to the property right for wildlife. One thing I would mention also on the takings piece, all takings conversations I've heard today are strictly academic. As attorneys, many of you are, you'll understand quite well that that's in the hands of the courts to decide. My concern is that landowners will suffer in this interim until the courts do decide if the hardship provided by these rules is a takings of private property right owners.

Senator Veiga said those are all of the witnesses I have signed up to testify. Here's how we're going to proceed. We're still sitting as the Committee on Legal Services. At this time we will open it up to motions from our staff recommendations and others. Our staff has kindly provided us with a cheat sheet.

Representative Levy said I wonder if we could ask Mr. Sherman and perhaps Ms. Shpall to come up for purposes of asking some questions that some of the testimony may have raised since they were before us. Senator Veiga said let me tell you what my preference was and if that doesn't satisfy your needs, obviously I will accommodate a change. My thought was to invite Mr. Morris back as the one who's provided the legal analysis on behalf of our staff to address a staff perspective and his reason as to why he felt any of the individual rules met statutory authority or not.

Representative Levy said I do have a couple questions about how, particularly the appeal procedure, might actually work in practice. I guess I would want to have more information as I try to deliberate on these questions. I wouldn't want to reopen all the issues. Senator Veiga said nor would I. Do you have any preference for who you

would like to come up to try to answer your questions?

Representative Levy said maybe I should ask the question and they can decide who can answer it. I've not been very good at asking the right person the right question. My question has to do with this appeal procedure and I guess I have several. I heard the testimony earlier, I don't know if it was Mr. Sherman or Mr. Neslin, that the Statement of Basis and Purpose does effectively limit the scope of the landowner appeal. I'm reading through here and I guess I'd like a little more explanation of how they believe this actually does limit it so that it really pertains to landowners' specific concerns. That's one question I have. The other is that this appears to call for quite a bit of discussion on the part of somebody, and I don't know who, in determining which grounds for appeals are appropriate to go forward. I don't know who is going to make that cut and how they're going to make that cut and what process would be used to determine that initial cut is appropriate?

Representative Roberts said while they're contemplating that, I'm trying to understand the scope of what our decision is today. How much is legislative intent versus how much is it that the statutes that exist today allow a certain rule? Senator Veiga said relative to what our process is, the staff has from Ms. Haskins an explanation of what our process is and we do have the memo from March 5.

Debbie Haskins, Senior Attorney, Office of Legislative Legal Services, addressed the Committee. She said I'll take a stab at it and then you may want to have Mr. Morris come back. Whenever our staff is looking at a rule issue that we bring to you, we are looking at all of the statutes that relate to those particular rules. When we were doing the analysis on this particular set of rules, we were looking at the two bills that were passed from 2007, but we were also looking at the statutes that govern the oil and gas permitting process. It's broader than just the two bills from 2007 and Mr. Morris, I believe, mentioned that earlier in this presentation.

Representative Roberts said I follow that. My question is how much, in strict legalese, is this within the verbiage that says you can promulgate these rules and for those of us who were here and know what we believe to have been the legislative intent as presented in committee and on the floor, how much of our scope today is legislative intent behind the bills that you reference? Ms. Haskins said I guess what I would have to say is I think that's a decision that this Committee has to decide and how you want to interpret the statutes when you are looking at a particular rule issue.

Representative Roberts said with the issue of legislative intent which a court certainly would be looking at, we're not the court, we're a legislative committee, so I'm still trying to figure out how much to be influenced by what I knew from 2007.

Mr. Neslin said I'm happy to try to answer Representative Levy's questions. As I understood it, you were asking about how does the Statement of Basis and Purpose limit the rights of the surface owner to request a hearing and then who makes that decision at the commission and how does that decision get made. Let me provide my perspective and then see if Ms. Shpall or Mr. Sherman want to add to what I've said. The Statement of Basis and Purpose says that surface owners may request hearings only where they allege noncompliance with commission rules or statute or potential adverse impacts to public health, safety, or welfare. Surface owners may not request hearings merely to oppose oil and gas development or to raise issues involving reasonable accommodation or contract interpretation. The latter statement, that surface owners may not request hearings merely to oppose oil and gas development or to raise reasonable accommodation or contract issues, does not appear in the rule itself. It does appear in the Statement of Basis and Purpose. Under the APA, the Statement of Basis and Purpose is part of the rule and so it has legal recognition and it would be treated by our staff, by our commission and subsequent commissions, and by a reviewing court as essentially the legislative history for the rule, which explains what the purpose of the rule is and how the commission intended it to apply. It's not simply a memo or some language that has no legal providence; this is important language. Courts, in reported judicial decisions in Colorado, rely upon Statement of Basis and Purpose language. Now, how do we apply this language?

Representative Levy said before you move on to that, I heard what you said and I understand that this is part of the law and part of what's applied. The part that I was concerned about isn't that they're going to go beyond the scope of what you're looking at in these permits, but the Statement of Basis says the surface owner's right to hearing will be limited to issues involving significant adverse impacts to public health, safety, or welfare, including the environment and wildlife resources that are within the commission's jurisdiction. That's a statement, and then it's reiterated, that they have to allege significant adverse impacts to the public health, safety, and welfare. That is about the broadest possible statement of what the scope of that appeal might possibly be - public health, safety, welfare, environment, and wildlife resources. I guess I'm not seeing that this Statement of Basis and Purpose appreciably narrows the scope of what is legitimately a surface owner's concern as distinguished from a DOW concern or as distinguished from CDPHE's concern. Mr. Neslin said there is actually similar language in existing Rule 508. i. relating to hearing requests by local governments, so there is some precedent for that kind of approach. The specific language that we adopted for the standard for a surface owner was language that, among others, the industry propounded to us and urged us to use for this purpose. The idea being, again, that the surface owner should be raising issues relating either to a violation of our rules or an adverse impact to public health, safety, and welfare, including the environment and wildlife resources. I appreciate that there's some breadth to that provision. We, in the Statement of Basis and Purpose, tried to narrow it at least with respect to certain

issues, like this contract interpretation or reasonable accommodation. Now, how this gets applied. I think initially if there is an issue as to whether a surface owner's hearing request falls within the scope of this definition, my recommendation initially would be that we would try to have the commission itself decide the first couple of these, so that we can have the commission provide direction to us on this and establish some precedent as to how this language gets applied by the commission. Once we've got some precedent, then I think that the staff can apply this. We have a full-time professional hearings manager who manages hearings. We have hearings officers who make these kinds of procedural decisions and I think some of these decisions can then be made at the staff level. Under either scenario, if the surface owner files a hearing request and we essentially dismiss it because we find that it's not raising an issue as set forth in Rule 503. b. (7) B., then that surface owner would have recourse through the courts should they wish. If the surface owner believes that we're arbitrarily and capriciously or otherwise improperly applying this regulatory standard, they could go to court and ask the court to reverse that.

Ms. Shpall said also, even though you haven't asked it just now, earlier you had asked about the DOW and CDPHE appearing before the commission as applicants for a hearing and there was some concern about that going on to judicial review. Under the APA, the people entitled to a review are persons who are affected or aggrieved and in the APA a state agency is not a person. I don't believe a state agency would have standing to go beyond the administrative level and that might be a reason to allow the citizen to appeal an issue and then go on to judicial review if they felt their concerns were not being heard by state agencies. It preserves their appeal rights even though the state agency cannot sue another state agency in court.

Mr. Neslin said if I might clarify briefly my prior answer. When I gave you the citation to where the standard for local government appeals is, it's actually Rule 508. j. (1) and that provides that a hearing that a local government is requesting must reasonably relate to potential significant adverse impacts to public health, safety, and welfare, including the environment and wildlife resources. It's a very similar standard that's been an existing standard on our books, in our regulations, for a number of years.

Representative Roberts said I just want to go back to the process you were describing a second ago. The DOW or CDPHE makes recommendations to the commission. The appeal can occur currently as proposed. The DOW, CDPHE, local government, or a surface owner - that's a second effort. [She referred to the Noble Energy flowchart.] If a protest is filed, and you're saying a surface owner can protest, the part that's disturbing to me, again, going back to the timely and efficient issue, is the block that says then it's suspended. The surface owner could stop the process for 20 days and then this next hearing at the commission and they also have judicial review available to them, at which point it stands and is not stopped. I just want to give you a chance

to tell me I'm reading the flowchart wrong or am I getting it right. Mr. Neslin said I think you're reading it correctly. I don't think it creates the kind of change that Noble Energy suggested. Under prior Rule 303. a. (2), people who felt they had standing could seek judicial review of our permitting decisions. That's been part of our rules for a long time. Someone who believes they're aggrieved by a permitting decision and who can demonstrate constitutional standing in court to bring an action can file a lawsuit. If they file a lawsuit, they can request a preliminary injunction or TRO so that the well is not drilled while the court is deciding their issue.

Representative Roberts said I follow that on the judicial part. I'm wondering about administratively it appears there's a stop that doesn't currently exist. Mr. Neslin said I think that is accurate. There is a 10-day period after we essentially make a decision. There's a 10-day period in which those parties who by rule were allowed to request a hearing from our commission have to exercise those rights. It's a 10-day period that they have to exercise those rights and request a hearing. If no one requests a hearing, then the permitting decision becomes final, albeit subject to judicial review. If someone requests a hearing, then we schedule a hearing as soon as we can. By statute, we have to provide 20 days published notice. That's part of our existing statutory authority, so that was not a policy decision as part of this rule-making. We have to allow for that. The commission meets monthly. The commission can conduct special hearings and has done so where there is a need to take prompt action. My expectation would be that someone challenging a permitting decision would get a hearing within approximately 30 days in most instances. There has been a subtext to this somehow when we issue permits people run out and drill the well right away. I've got to tell you that historically that's not been accurate. Getting a drilling permit is very important, but it's not sufficient in itself for someone to drill a well. There may be other regulatory approvals that they're seeking either at the local or the state level. They have to schedule their drilling rig, they have to schedule their work crews, they have to budget for that. In our experience, a relatively small portion of wells would be drilled within 30 days of the date or 60 days of the date we issue the drilling permit. This 10-day period in which someone can request a hearing we don't believe is going to be terribly consequential or significant in terms of delaying the process or creating an untimely process.

Senator Brophy said I appreciate that you indicated that the other state agencies wouldn't have standing. I'm just concerned that this language is so broad where persons who can demonstrate that they are directly or adversely affected or aggrieved by the conduct of the oil and gas operations. I want your assurance that's not going to grant just about any neighbor standing in these cases. Mr. Neslin said I think I can provide that assurance. With respect to the CDPHE and DOW, what Ms. Shpall explained is by law they cannot file a lawsuit, I think. They can request a hearing before our commission, but they can't take it to the next step of filing a lawsuit in state

district court. With respect to members of the public generally, or adjacent landowners specifically, I've pointed you to language in the Statement of Basis and Purpose, which states that the rules will not allow nearby landowners or members of the public to apply for a hearing and we included that language deliberately to answer that question.

Senator Schwartz asked a question [Her microphone wasn't on so the recording system did not record her question]. Mr. Neslin said with respect to hearings before our commission, there have been few such hearings during the 16 months that I've been the acting director. I would have to say under five. With respect to lawsuits, again, I would have to say that the number is probably under five during that period.

Mr. Sherman said I might add that relates to probably over 14,000 permits in the last two years.

Senator Schwartz asked another question [Again, her microphone wasn't on so the recording system did not record her question]. Mr. Neslin said we believe any increase would be modest. This was an issue the commission spent a tremendous amount of time and that the Attorney General's office spent a tremendous amount of time advising the commission on. There's a trade-off here and the Statement of Basis and Purpose talks about this. The industry was very vocal that they thought that only the operator and the local government should have the right to request a hearing. Environmental and citizen groups were equally vocal that they thought any adversely affected member of the public should have a right to request a hearing. As Mr. Sherman explained, we issued 6,000 to 8,000 permits a year and we're a volunteer commission. We don't want to overstretch our resources. We tried to take a middle ground of providing that the right to request a hearing would be expanded beyond what it was previously. We would allow operators to request hearings generally, which they couldn't do, we would allow the DOW and the CDPHE, in limited circumstances, to request a hearing and with the understanding that they would be very judicious in doing do, and we would allow the surface owner, in limited circumstances, to request a hearing. We believe that any result in increase in the number of hearings requests we get will be modest and manageable.

Mr. Sherman said I would like to second that and add we did discuss this at great length within the commission as part of this rule-making hearing. Again, I think we need to have an opportunity to implement these rules, but if people are abusing the process or we become the forum for every controversy that's out there, I assure you, we will be back to revise these rules. We always are looking at the worst case scenario. I don't think the worst case scenario is going to happen here. I agree with Mr. Neslin. I think it's going to be very, very infrequent that we get appeals of the director's decision.

Representative McGihon said I want to go back a question to the change in timing for these appeals. You say nobody drills a well right away. I would agree but I think that there is budgeting around it, so does the change in timing around the appeals process change the timing in terms of what the companies have to figure out for budgeting and drilling and all of that? Mr. Neslin said potentially, but we believe it's something they can budget and plan for. In other words, if we were talking about adding a delay of 180 days or something, I can see that being problematic, but we're talking about a 10-day period, during which someone has to exercise their right to request a hearing and if they do request a hearing, another 30 days. As we've explained, that will occur rarely. We believe that the impact on companies' business planning and business decision-making will be modest and manageable. Most companies are planning a year or two ahead of time in terms of preparing budgets and work schedules and so we believe this is something companies can and will plan for successfully.

Senator Veiga said at this time my preference is to move to the amendment phase. I am going to ask Mr. Morris to come back in case any of the Committee has questions or you can certainly respond from a staff perspective at this time.

Representative McGihon said I will look to staff for a little assistance on this. With the discussion on Rule 206. b. (4), I would consider, and maybe Mr. Morris can help us with this, based on the testimony we heard here today, to not repeal Rule 206. b. (4).

Senator Veiga said I know we've had a fair amount of discussion concerning this particular rule. Does somebody wish to make a motion relative to repealing Rule 206. b. (4)? Mr. Morris is here if you have any questions concerning his opinion or would like to make any comments concerning that particular rule.

Representative Gardner said I'm looking for some way to proceed here. As I understand the process at this point, to the extent we wish to repeal any rules, we should move to do so. Staff has provided us with at least in one paragraph here a motion to repeal the rules which Mr. Morris in his memo has recommended. I have some concern, and I think others have expressed it, about Rule 206. b. (4). If that was moved in its totality, I would ask for a severance, so I wonder if we shouldn't just sever Rule 206. b. (4) if it needs to be voted on and make that motion separately and let it be voted or just not move it at all.

Senator Veiga said I don't actually think we need to move them as a block. I thought Representative McGihon's comment was she didn't feel the need to move that particular one.

Representative McGihon said that is correct, so why don't I move the other three rules.

7:07 p.m.

Representative McGihon moved that the following rules of the Oil and Gas Conservation Commission of the Department of Natural Resources, concerning practice and procedure, as adopted by the commission on December 11, 2008, are repealed, effective May 15, 2009: The introductory portion to Rule 306. c. (1) (A) and Rule 306. c. (1) (A) (i), (1) (A) (ii), and (1) (A) (iii), concerning consultation; Rule 604. a. (1), concerning atmospheric tanks used for crude oil storage; and Rule 604. a. (10), concerning vent lines. Senator Veiga asked does everyone understand the motion? Representative McGihon said I ask for a no vote. Does that work? Ms. Haskins said I think you want a yes vote. This is a little bit different than your usual motion of move to extend and ask for a no vote. That's not really what we're doing at this stage. Representative Gardner said just so I understand, what has been moved is the repeal of the latter three rules on our list. Senator Veiga said that is correct. In other words, the staff recommendations from Mr. Morris, on the consult and the two incorporation by references, are what have been moved by Representative McGihon. She has not moved to repeal the subpart of the rule concerning compliance checklists. Senator Schwartz said just a little clarification: I'm looking at page 2 of the Office memo and I see that Rule 306. c. (1) A. is the only rule of Rule 306. that's included and I just want to know a little bit better about the other aspects of that and if Mr. Morris might walk me through the other rule sections of Rule 306. Ms. Haskins said drafting the rule review bill is very technical and in order to accomplish directing the secretary of state and the publisher with precision about what part of the rules would be repealed, we needed to get down to the level that we're on in this motion. That's why there's a little bit of discrepancy between the memo and the motion sheet. Senator Schwartz said I just wanted to make sure we weren't repealing anything beyond what we had discussed, so thank you. Ms. Haskins said the Committee would not repeal anything further than what was actually shown in Mr. Morris' memo on that particular rule. Senator Veiga said if you vote yes on this motion, you are voting to concur with Mr. Morris' recommendations about the repeal of certain rules, with the exception of Rule 206. b. (4) concerning the compliance checklist, which was not included in the motion. The motion passed on a 9-0 vote, with Representative Gardner, Representative Labuda, Representative Levy, Representative McGihon, Representative Roberts, Senator Brophy, Senator Morse, Senator Schwartz, and Senator Veiga voting yes.

7:11 p.m.

Representative Gardner moved that the following rule of the Oil and Gas Conservation Commission of the Department of Natural Resources, concerning practice and procedure, as adopted by the commission on December 11, 2008, is repealed, effective May 15, 2009: Rule 503. b. (7) B. Representative Gardner said this rule respects the

rights of surface owners and with respect to that, the duties of the commission with respect to surface owners I think are limited to ensuring that they receive advanced notice of the drilling and to administer the financial assurance requirement protecting surface owners without an agreement against unreasonable crop losses or land damage. I think the legislature made it very clear in House Bill 1252 that other matters relating to the coordination with and accommodation of surface owners' use of surface are to be governed by the reasonable accommodation act, House Bill 1252, and disputes are supposed to be handled by the courts, not the commission. With respect to Rule 503. b. (7) B., by allowing a surface owner to be an applicant in that situation, the commission has effectively empowered surface owners with the right to suspend the issuance of a drilling permit by alleging that the director's decision to approve the permit would result in a violation of the act or to allege that the operation would result in potential adverse impacts on public health, safety, and welfare and the environment including wildlife. That's the surface owner doing this. I believe, based on the testimony we've heard this afternoon, that the General Assembly did not intend or direct the commission to, in effect, deputize or empower surface owners to suspend the issuance of approved permits to drill. The fact is, House Bill 1341 did not even address surface owner involvement in the permitting process. As such, I believe this is an extension of rights to surface owners that was not intended by the statute and as such is beyond the authority of the commission. Mr. Morris said I think the relevant portion of the statutory authority is sections 34-60-108 (1) and 34-60-106 (1) (f), C.R.S., that essentially give the commission very broad authority to adopt rules regarding its own procedures, which I would have to say includes who has rights to ask for an appeal or hearing in front of the commission. That said, I think there are constitutional backgrounds to this in terms of who has standing. If this particular provision were struck, you would still have the Rule 503. b. (10), which is sort of the catch-all for anybody who doesn't fit any of the other categories. That rule says, for purposes of seeking relief or a ruling from the commission on any other matter not described in (1) through (9) of the rule, only persons who can demonstrate that they are directly and adversely affected or aggrieved by the conduct of oil and gas operations or an order of the commission and that their interest is entitled to legal protection under the act may be an applicant. I think that largely restates what the basis for standing is, that you're aggrieved by the conduct and you're entitled to legal protections. The surface owner, to the extent that paragraph b. doesn't talk about reasonable accommodation issues - it excludes those issues - is left with the issues relating to public health, safety, and welfare, including environment resources, and not compliance with commission rules. I think they could demonstrate potentially those things under (10), as well as under b. I think they're both authorized, given the very broad statutory delegation of authority to the commission, to determine their own rules of procedure. Representative Gardner said notwithstanding that, I think the comprehensive legislative scheme is such that it was not intended by the legislature that landowners or surface owners would be empowered in such a way. I respect your

analysis on the matter, but in looking at House Bills 1252 and 1341 and looking at them as a comprehensive scheme, I find it hard to imagine that the intent was to allow the surface owner to act qui tam with respect to the CDPHE, which is essentially what we've done with these regulations. What the commission purports to do is grant the surface owner the right to act in the government's stead with regard to public health and environment, but I think we could debate it all night. Representative Labuda said I just want Mr. Morris to confirm that I'm reading this correctly. Anything that is underlined is new language, and anything that is not underlined is language that was in the rules already. I'm looking at what is now subsection (10) of the rule. Am I correct? Mr. Morris said yes, subsection (10) has not been changed other than to change the reference of "(6)", because there used to be only six subsections. That's existing language. Representative Roberts said I wanted to respond to something Representative Gardner said. I think it's important for people to know that House Bill 1252 was not part of the comprehensive scheme. There was a wild card in the picture there and that would have been me as the sponsor. It didn't go in tandem. It was coincidental that there were three oil and gas bills and so as the Committee factors that in, despite saying that, I would say I agree with Representative Gardner that in passing the other two bills, I don't think there was an intent to double up on the surface owner's ability to stop things. What we were striving for in House Bill 1252 was a balancing act that's kind of been referenced. I just wanted to not let people think there was a trio of bills going together that should be seen that way. In fact, there were two together and then this one that happened to land in that same subject area. Representative Gardner said notwithstanding Representative Roberts' comments, and it may not have been her comprehensive scheme, but they were passed in roughly the same era and were considered by the General Assembly at the same time and so my reference to them as being part of a scheme is that the legislature looked at them, they passed them, they passed them in roughly the same time and framework, and it seems odd that the legislature would be acting at cross purposes with itself, although it might. Representative Levy said I guess I don't find those arguments propounded by Representative Gardner, which I have written in front of me as well, to be persuasive in that the reasonable accommodation statute I read as dealing with the respective rights of surface owners with respect to the mineral estate owner. I guess I share Representative Roberts' view that that sort of functions on its own. The "Colorado Habitat Stewardship Act of 2007", which was the genesis of these rules, really brings the surface owner in in an entirely different capacity and brings the surface owner in with respect to other sorts of decisions that the commission might be making with regard to wildlife, habitat management, groundwater protection, surface water protection, the whole host of other factors that may be considered by the commission that affect the surface owner's rights completely independent of how the surface owner and the mineral estate owner may reach an accommodation with one another. I think it's very, very important to allow the surface owner this opportunity to appeal, both to protect their own rights as one of the witnesses advocated for in the event that

conditions have been placed that they object to as a surface owner, and if they feel the permit has not sufficiently protected the habitat and wildlife values that they find on their own property. I guess I argue that we retain that rule. Senator Veiga said I would echo the comments made by Representative Levy. I don't see the passage of House Bill 1252 in 2007 as providing direction or maybe more appropriately, limiting the ability of the commission from enacting rules in this area. Absent what I think would be express direction on this issue from the legislature, which I do not find, then I look back to the broad general scope of authority that the commission has, more specifically section 34-60-108, C.R.S., relative to the practice and procedure element, and then back to section 34-60-105, C.R.S., which is just broad general authority relative to health, welfare, safety, and balancing act. Based on that, I will also be a no vote. I want to make sure the Committee is clear, Representative Gardner has asked for Rule 503. b. (7) B. to be stricken. A yes vote would mean the rule would be stricken, a no vote would mean it would not be stricken. The motion failed on a 4-5 vote, with Representative Gardner, Representative Roberts, Senator Brophy, and Senator Morse voting yes and Representative Labuda, Representative Levy, Representative McGihon, Senator Schwartz, and Senator Veiga voting no.

7:24 p.m.

Representative Gardner moved that the following rules of the Oil and Gas Conservation Commission of the Department of Natural Resources, concerning practice and procedure, as adopted by the commission on December 11, 2008, are repealed, effective May 15, 2009: Rules 503. b. (7) D. and E. Representative Gardner said these are the rules referring to the CDPHE and DOW as being applicants in the permitting process. Once again, House Bill 1341 directed the commission to provide a timely and efficient procedure in which, for instance, the CDPHE has an opportunity to provide comments during the commission's decision-making process. Once again, it was a timely and efficient procedure that was applicable to the CDPHE and the DOW. Instead of following that directive and legislative intent to provide comment on the drilling permit, the commission has empowered these two government agencies with the right to become applicants and parties to the process and to suspend the issuance of the permit and second-guess the director's own decision to approve the permit in an adjudicatory hearing before the commission. This goes beyond what was intended by House Bill 1341 and certainly doesn't result in a timely and efficient procedure. In fact, it probably ends up with a permit review procedure that is four to five times longer than the national average. Notwithstanding that, I think my largest concern and objection here is the constitutional concern of having an executive branch department with members on its commission and then having other departments as parties before them. It seems to present rather serious constitutional questions of how a division or department of the executive branch can be a party against itself with a decision before it. Mr. Morris said one section that I didn't mention last time, that was

added by House Bill 1341, is section 34-60-106 (11) (a), C.R.S., and that says the commission shall promulgate rules to establish a timely and efficient procedure for the review of applications for a permit to drill. That's a wide open grant of rule-making authority. There's nothing that clearly prohibits this, so it would have to be by implications or a subjective value determination that it isn't timely and efficient. Certainly that's some place where our Office didn't feel comfortable going and that's why we thought this rule was authorized. Representative Gardner said in the common law, the doctrine is the sovereign cannot sue itself. Not only can you not sue the sovereign unless they say so, but the sovereign can't sue himself. I'm wondering how does the executive branch become a party and an applicant in its own proceeding, basically taking itself to task before itself? I understand the comment idea, but it's this idea that these departments would be an applicant before a commission to enforce rules when in fact they're asking the governor to do this in essence. Mr. Morris said I would go back to the comment that Ms. Shpall made that what we're talking about here is an administrative process and not suing each other and I think there's case law that says what you said essentially, that the state can't sue itself and I think there would be reason to construe these rules to not give this administrative hearing right as a basis for finding that they have standing in a court of law. Representative Roberts said I can't ignore the fact that we put CDPHE and the Department of Natural Resources on the commission as a new change to get that voice there. Even though, as I understand it, there's written recommendations that go to the director, I just can't believe that the DOW and CDPHE would not have a lot of opportunity for input into the director in making those decisions. I come back time and again to the phrase that we used in these bills, "timely and efficient", and that appeals process I just really feel works counter to that, so I'll be supporting this motion. Senator Brophy said I want to go one step further and point out that the CDPHE director could essentially be appealing to himself on the board. They're already there, I don't believe they need this appeal right. Representative Levy said I'm going to be a no vote on this motion. As I understand the process, unless there is an appeal, this is an administrative process to grant a permit. An application is submitted, the staff person reviews the content, looks at the rules, and decides yes or no and imposes appropriate conditions. There's no involvement of the commission whatsoever unless there is an appeal. I don't see where else there would be an opportunity for the DOW or CDPHE to weigh in on this process. Granted they do sit on the commission, but the commission does not speak with reference to issuance of a permit. As far as timely and efficient goes, I'd say 10 days to file an appeal is pretty timely and efficient in my experience out there in the world. I'll be a no vote on this motion. Senator Schwartz said I guess I'd like clarification on the director of the Department of Natural Resources and the director of CDPHE who sit on the commission, their role as individuals and how incumbent is it upon them to in fact represent the expertise of their departments. I see some separation there in terms of the expectation that these individuals, although they carry the weight of being in the governor's cabinet, also may not be able to provide to the commission the in-depth

expertise that we have within those departments. I think that's too broad an assumption. Representative Gardner said I appreciate the fact that my colleagues here on the Committee have sort of understood that in fact on the commission there are representatives from these two departments. They're not there because they were somehow grabbed off of the street. They're there by virtue of their departmental position as representatives of their department. I don't question the idea that had the commission in passing its rules chosen to create some kind of comment and submission of expert reports and so forth with respect to the permitting process that that would be appropriate, but what we have done is created a situation where these parties are parties before a commission, before their own director, and I have to ask myself wouldn't it be appropriate at that point if the applicant is the DOW that that commissioner recuse him or herself from the decision because there seems to be a complete and total conflict. While it is an administrative proceeding, they are subject to notions of who is a party and conflicts. I think there is a serious problem. It could have been addressed by comments. I think this is the wrong way and I think the commission has exceeded its authority. Senator Veiga said for purposes of clarity, Representative Gardner has moved that we repeal Rules 503. b. (7) D. and E. He is asking for an aye vote, which would effect the repeal of the rules. A no vote would not repeal the rules. The motion failed on a 3-6 vote, with Representative Gardner, Representative Roberts, and Senator Brophy voting yes and Representative Labuda, Representative Levy, Representative McGihon, Senator Morse, Senator Schwartz, and Senator Veiga voting no.

7:35 p.m.

Representative Gardner moved that the following rules of the Oil and Gas Conservation Commission of the Department of Natural Resources, concerning practice and procedure, as adopted by the commission on December 11, 2008, are repealed, effective May 15, 2009: Rules 305 c. and e. Representative Gardner said this motion would repeal sections of the rules imposing a new requirement on operators to identify and provide notice to all landowners within 500 feet. We heard testimony about these provisions and the neighboring landowners with 500 feet. This would grant these nearby landowners the right to extend the public comment period on drilling permits from 20 to 30 days. Once again, House Bill 1341 did not authorize the commission to impose on operators the burden of identifying and notifying nearby landowners of pending drilling applications. Actually, House Bill 1341 addressed only the involvement of the CDPHE and the DOW in permitting decisions, not the public at large. To grant nearby landowners the right to extend the public comment period does not result in a timely and efficient procedure as required by House Bill 1341. In previous amendments to the act, the General Assembly has specifically authorized the commission to require that operators provide advance notice of drilling only to the surface owner on whose property the well is to be drilled an the relevant local

government. While the commission once again points to general public health, safety, and welfare authority as their basis for the rule, statutory and rule-making interpretation is such that a rule should not be deemed within the statutory authority and jurisdiction of an agency merely because such rule is not contrary to the specific provisions of statute. That proposition is found at section 24-4-103 (8) (a), C.R.S. The General Assembly directly addressed the impact of oil and gas operations on landowners in the 2007 session once again in House Bill 1252, and the accommodation obligation imposed on operators in that act flows only to the surface owner such that a rule that would empower nearby landowners to bring their concerns into the permitting process rather than having that done by DOW and the CDPHE is I think an unauthorized interference with the ability of the surface owner and operator to make their location decisions pursuant to the surface use agreement. Senator Veiga said I will be a no vote on this motion. I approach all of these the same way which is why I will likely be a no vote on all of the subsequent rules. As I look at this and as I read our staff opinion and I look at what we did in 2007, what I see we did was take a couple of discrete actions. I think all of us can sit up here and say we meant this or we meant that, but at the end of the day, quite frankly, I think there's 100 of us and you're going to get close to 100 different opinions about what the intent of the legislature was. House Bill 1252 worked out a surface owner's agreement basically and provided how those would be regulated and managed between the surface owner and the operator, but what it didn't address and what it was silent as to is anything with respect to adjacent landowners. I cannot look at that law in good faith and say somehow we intended to preclude anybody from acting in this other area when we expressly did not provide that. I guess I struggle with the general tenor of our debate here and how we're proceeding because absent a direction from this legislative body saying to the commission you cannot act here and in light of their very broad general authority to enact rules and balance the needs of the industry with the health, welfare, and the environment and specifically the direction we provided in House Bills 1341 and 1298 concerning additional concerns about wildlife and health and safety, I just don't see how we don't find that they have authority. That's more of a general comment and I chose to make it now. Representative Levy said I agree with what you just said as kind of being the basis for construing broadly the rule-making authority, but in addition I would say that while I didn't sit through 18 months worth of hearings throughout the state, I followed it closely enough to know that the commission heard substantial testimony from neighboring property owners, not just the surface estate owners, who had concerns about the quality of their drinking water, who had concerns about noise, odor, excessive light, rumbling of trucks, etc. I don't know how the commission could listen to all that testimony and then proceed with a rule that would allow issuance of permits and all the activities that they do pursuant to these rules without having given notice to those adjacent and surrounding landowners. I think we would have had this room filled many times over had the rule come forward without being inclusive. I will be a no vote. Representative Roberts said the Chair's comments earlier about what we

are to consider as this Committee is why I was asking the question about the inclusion of legislative intent and history. Based on the input from staff, as I understand it, we're sitting as a quasi-judicial but also quasi-legislative body and therefore, I am not to ignore what I know legislatively. That being said, in House Bill 1252 it was personally challenging for me not to include adjacent landowners. I wanted to but we purposely did not in part because we learned of the consequences to industry and what that would mean. It was deliberate that it wasn't there in House Bill 1252. I keep coming back to timely and efficient and while I appreciate the work of the commission in developing the rules, I think where we're drawn back to is what was intended and with an amendment or a new bill we could change the legislation that we passed. What was intended when we passed these bills, that's what I feel more constricted by. With that said, I will be supporting this one also. Senator Schwartz said everyone is entitled to their own interpretation of timely and efficient. I think given the long-term potential issues associated with the health, safety, and welfare of those impacted communities and individuals, I think we're asking very little time, and also given the other avenues of comprehensive drilling plans, the other avenues they can arrive at, I really struggle with a very narrow singular approach to timeliness. Senator Veiga said so there is no question, the motion is to repeal Rules 305. c. and e. An aye vote will be a vote to repeal the rules as requested by Representative Gardner. The motion failed on a 3-6 vote, with Representative Gardner, Representative Roberts, and Senator Brophy voting yes and Representative Labuda, Representative Levy, Representative McGihon, Senator Morse, Senator Schwartz, and Senator Veiga voting no.

Representative Gardner said at this time I would ask staff to distribute what has been prepared as amendment L.011. By way of explanation before I make the motion, this is somewhat unusual in that it refers to the effective date with respect to federal lands. I know the preference of this Committee is to repeal things in totality, but I thought it perhaps unwise to repeal the effective dates in their totality. What I prepared was an amendment, and I think I'm going to have to craft it into a motion, that basically removes the effective date for federal lands and makes all of the rules effective on April 1, 2009.

7:45 p.m.

Representative Gardner moved that the following rule of the Oil and Gas Conservation Commission of the Department of Natural Resources, concerning practice and procedure, as adopted by the commission on December 11, 2008, is repealed, as set forth and effective May 15, 2009: Rule 201A. only so much of the rule that provides for an effective date for federal land and substituting an effective date for the rules in their entirety of April 1, 2009. Senator Veiga said Representative McGihon, as an aside, was raising the question of whether this is an appropriate procedure to strike a portion of a rule. I actually have had discussions with individuals about this and I

think in this particular context, it is appropriate for two reasons. One, we do have history from our staff that this has been done before, i.e., a portion of a rule has been stricken, and then probably more fundamentally, as Representative Gardner pointed out, I think relative to this issue and federal preemption on the federal lands issue, I don't know how else you would get at or achieve this result if you felt like that didn't comply with constitutional or statutory authority without putting everything in a muck by basically doing away with the effective date of all the rules. For those reasons, I think the motion as made is appropriate. Representative Gardner said I would ask staff if I've got the motion framed right for what I intend to do? Ms. Haskins said I'm understanding that the motion you made is to repeal the words in Rule 201A. that relate to the effective date of May 1, 2009, for federal land with the result then that the remainder of the rules would be effective April 1, 2009. Is that a fair statement? Representative Gardner said that's a fair statement, but in some sense it's not the remainder of the rules at that point, it's the totality of the rules. Ms. Haskins said yes, I'm jumping ahead. Representative Gardner said I was troubled by this and you may recall I indicated to one of the witnesses that I thought that in some sense having an effective date for federal lands was both too much and too little because the issue of application of the commission rules to federal lands, especially those related to wildlife resources, is a matter of a great deal of controversy. For instance, there's a specific statutory provision in Colorado law that precludes the application, but there are other provisions that do apply. It seems to me that by having a separate date for federal lands, it sort of begs the question of their application. It almost, on the one hand, gives someone the ability to argue that there is an intent that all of these rules in their totality be effective for federal lands and at the same time, the purpose of doing this is so we can go and have discussions with the federal government and ask them what it is okay for us to impose them on. I think it likewise is almost a "by-your leave" to the federal government that I as a person who believes very strongly in state sovereignty do not want to give to them and there's consequence. I think we ought to just choose a date for all the rules and if we do, I understand that the commission may say we're still working on an MOU, but I heard them say over and over on another matter they dealt with things on a case-by-case basis, so I think they can go ahead and do so. I think this is just a better policy. Representative Levy said I need to ask for more clarification. I have the same memo Representative Gardner has that lays out the rationale for repealing the effective date and it explains that this would repeal the application of the rules to federal land. I'm not clear, maybe I've missed this and you've been talking to this all night. Explain to me why that is the effect of repealing this specific reference to the effective date. Representative Gardner said just because somebody hands me a piece of paper I don't take it at face value. I don't think the effect of my amendment is to repeal the application of the rules to federal lands at all. I think it leaves that as a very open question. Representative Levy said so what that does is repeal any explicit reference to the application of these rules to federal land and then it's subject to interpretation and working out through an MOU as to what applies and what doesn't

apply. You're taking out that specific reference so there's no implicit presumption, which may be redundant, that it applies to federal land. Representative Gardner said that's exactly right. I just want to remove the implication, or someone drawing the inference, that they do. Senator Veiga said this was one of the more challenging issues for me probably because I just don't understand it. Having said that, probably what was most compelling to me was the discussion about the reference to section 34-60-120, C.R.S., and current statutory provisions that actually apply the existing oil and gas rules to federal lands already. From a precedential perspective, we've already done this and certainly it is limited somewhat to certain statutory sections, but specifically including section 34-60-106, C.R.S., which has the broad additional powers of the commission, including specifically in subsection (2) (d), the provisions relative to wildlife and environment protection. From my perspective, I'll make first the statutory perspective, which I think we've done this, I think they have the statutory authorization ability to do so as we found in statute, and from a policy perspective - I said we shouldn't go there and we probably shouldn't - I don't necessarily like the idea of just leaving it up for grabs. I think frankly, and I know industry doesn't believe this because they've come to me sharing the same concerns, you're better off at least having an understanding and moving forward with the idea that the rules are going to apply, we're going to try to get an MOU in place and have some finality to that as opposed to determining on a case-by-case basis relative to federal preemption whether this particular rule applies or another rule applies. To me, that's crazy from a policy perspective. Representative Gardner said I agree with you from a policy perspective for the commission to leave that open on a case-by-case basis. I guess that's why they're doing an MOU and trying to reach some understanding about all of those things. I simply don't want it placed into the regulations that there's somehow this different treatment or inferentially that every regulation there does apply or anything else. I think it's a difficult point. I understand yours, but it seems to me that this different applicability date where you already have a lot of controversy that needs to be worked out is itself the creation of more controversy and question about the application. Representative Roberts said I expressed maybe enough times that this concerns me and it is in part because there is so much federal land in natural gas development in my area. On the other hand, I am going to take the testimony at face value that the BLM is serious about, hopefully, working this out and I like having a deadline. I think May 1 is more plausible than April 1 because they're the federal government and it's easy to slam the federal government because they deserve it. I would give them to May 1, so I will not be supporting this motion. Senator Schwartz said I don't pretend to have legal expertise, but it would seem to me that, to the extent the federal laws preempt the state laws, we could really do this even without the MOU. The MOU is simply a process piece. Correct me if I'm incorrect, but I don't think the date in the MOU is critical to moving forward because of what already could exist in legislation and federal statutes. To the extent that I misunderstand this, I don't see this as something that will make a lot of difference. Senator Veiga said I'm not going to

try to restate this motion, just understand that if you vote yes on Representative Gardner's motion, then you will strike the federal enactment date of May 1, 2009, relative to federal lands leave the enactment date of April 1, 2009, for the remaining rules. The motion failed on a 2-7 vote, with Representative Gardner and Senator Brophy voting yes and Representative Labuda, Representative Levy, Representative McGihon, Representative Roberts, Senator Morse, Senator Schwartz, and Senator Veiga voting no.

7:56 p.m.

Representative Gardner moved that the following rule of the Oil and Gas Conservation Commission of the Department of Natural Resources, concerning practice and procedure, as adopted by the commission on December 11, 2008, is repealed, effective May 15, 2009: Rule 1202 e., which concerns no permit-specific condition of approval for wildlife habitat protection being imposed without surface owner consent. Representative Gardner said I hope simply because we have a series of these that you won't be lulled into just voting as you have, particularly on this motion. This motion would repeal the section of the rules that essentially requires the commission to obtain the consent of the surface owner with respect to imposition of permit-specific conditions of approval related to protection of wildlife habitat. What's important about this, and it really only comes out in the Statement of Basis and Purpose and becomes clear, is this rule in some sense holds the landowner consent requirement hostage to the DOW demands. If the surface owner does not consent to a permit-specific condition recommended by the DOW, the director may withhold the permit or approval. That's what the Statement of Basis says. Recall the example of the surface owner wishing to have drilling done not in his backyard but in his south 40, but the DOW is saying that's wildlife habitat and then holding the surface owner hostage to where the drilling will take place. When you say that's maybe the right policy balance, realize that the surface owner, if he wishes to go and bulldoze all of the south 40, there would be nothing to stop him. This really is a significant infringement upon the surface owner's right at the expense of the DOW. What this motion would do is to repeal the section whereby landowner consent is limited to wildlife conditions of approval, and I would ask for an aye vote. Mr. Morris said I don't know that I have a lot to add on this more than what people have said, but I would say I don't know that this resolution is quite fully dependent on the Statement of Basis and Purpose. There is a rule specifically that authorizes the director to withhold consent based on a material threat to wildlife resources, which is Rule 303. m. (1). I would also point out that if the landowner does not consent, it's not simply the case that therefore there would be a withholding. The director would also make a determination of whether it makes sense to issue the permit without the wildlife-specific conditions based on the determination of is there a material threat to wildlife resources or not. Representative Labuda said I'm responding to Representative Gardner because I want him to know

that I'm not just voting by rote, but I listen to what other people say and I agree with it. On this one, I'm going to be a no vote because I see where you say holding landowner consent requirements hostage to DOW demands. The DOW is the property of the citizens of the state and I disagree that it is something that can hold something else hostage. I put that in very high regard, so I will be a no vote. Senator Brophy said this is the one where, in particular, the agriculture communities, especially where they own both the surface and the mineral rights and have a surface use agreement and are ready to drill in a spot that might be outside the edge of the field but their concern is the DOW could stop that action and force the drilling inside the field to protect some sagebrush land relative to sage grouse, for instance. That's one of the big concerns about this from a property rights standpoint for the agriculture communities and for that reason, I'll be asking for an aye vote. Representative Roberts said it's actually the split estate that concerns me on this, as opposed to when the surface owner owns the minerals. I think the mineral rights owner could end up left out and not able to get to their property. I will be supporting this motion. Senator Schwartz said I'll oppose this motion. The definition is sensitive wildlife habitat and we had previous testimony that all potential land use will be subject to the same degree of concern. It really is an issue that we are putting more at risk than that one well site, that should we have a policy that doesn't protect these species from being listed, we not only will have our oil and gas industry, but also our agriculture industry, threatened as a result. We have to take a reasonable approach to this, that we have a strict interpretation of sensitive wildlife habitat, we have good science that identifies those areas, and mitigation opportunities. I really feel that there's more at stake and we have other solutions for recovering those resources. I will be a no vote. Senator Veiga said the motion is to repeal Rule 1202 e. A yes vote would enact the repeal of the rule as requested by Representative Gardner. The motion failed on a 3-6 vote, with Representative Gardner, Representative Roberts, and Senator Brophy voting yes and Representative Labuda, Representative Levy, Representative McGihon, Senator Morse, Senator Schwartz, and Senator Veiga voting no.

Representative Gardner said I think I'll just pass on the 35 other motions.

8:04 p.m.

Senator Brophy moved that the following rule of the Oil and Gas Conservation Commission of the Department of Natural Resources, concerning practice and procedure, as adopted by the commission on December 11, 2008, is repealed, effective May 15, 2009: Rule 904. Senator Brophy said this rule is concerning one of the pit rules. I will take you back to the testimony of Mr. Walker from Petron Development. Rule 904. is one of the more controversial of the pit rules. It's one of them that barely passed the newly made up commission. Mr. Walker testified that in the case of a couple of these rules, there just isn't any way to prove a negative and as I recall here,

specifically that they weren't technically feasible, that the tests, for instance, didn't exist and it's certainly not cost-effective and will lead to the waste of oil and gas resources on the eastern plains. As you recall, he said that he expects to have to close in up to 15% of his wells if this rule goes into effect. Senator Veiga asked if it's Senator Brophy's intention that the commission somehow exceeded statutory authority relative to the implementation of the rule? Senator Brophy said yes, that's exactly it, because the statutes say we're supposed to avoid waste, the rules have to be cost-effective, and they have to be technically feasible. I believe this rule and the next one I'm going to move are contrary to all three of those statutory requirements. Senator Schwartz asked could the Committee benefit from a copy of this amendment? Senator Brophy said it's L.017. Senator Veiga asked if it's a written amendment? Senator Brophy said it's L.017, I handed it to staff. Senator Veiga said it hasn't been passed out, so why don't we see if we can distribute that. Senator Brophy said while you're at it why don't you distribute L.018? Representative Levy said so the amendment repeals Rule 904. in its entirety and this pertains to pit lining requirements and specifications. Is that correct? Senator Brophy said that's correct. Representative Levy said I have in front of me a memorandum. I think it was the DOW who produced this. It indicates that the requirements for production pits will not apply to pits in Washington, Logan, Yuma, Huerfano, and Las Animas counties until 2011 to allow the commission and CDPHE staff to work with operators and local governments to evaluate where pit lining requirements in those counties are necessary, etc. It seems as if for one thing that the commission and CDPHE acknowledge that some additional work needs to be done on pit lining in particular. I thought that balancing the cost and the benefits and the technical feasibility and all that was exactly what the commission was supposed to do. We may disagree with how they balanced it, but I don't see that as conflicting with their statutory authority. Representative Labuda said I remember testimony from some of the witnesses about the effects of current pits that are out there. This rule does not affect any existing pits, but just looks to the future. The rule does contain the language that it shall not apply to any pit in Washington, Logan, Yuma, Huerfano, or Las Animas counties, and those are the counties that are impacted by this rule, constructed before May 1, 2011, and that is two years away. I know that the scientific advances in all sorts of things can go very, very fast and I feel confident that by that time, there would be adequate liners available and if not, I'm sure the commission will hear about it and will make a change to this rule. I am going to be a no on L.017. Senator Veiga said just so we know, while L.017 was handed out, Senator Brophy stated the motion in the appropriate manner, so we're not really approving L.017. Representative Roberts said I just want to take this opportunity to say I actually supported the work of the commission and the bills as they were presented. This rule and most likely the next one is to me more technical in nature. I go back to did we give them the authority to issue these kinds of rules and I would say yes. I'll not be supporting this particular motion. Senator Schwartz said I will not be supporting. I have talked to some operators in this area and they seem to be able to manage their produced water and

fluids adequately at this point in time. I think that given the timeframe in the future that's available to creating some resolution should hopefully be satisfactory for those operators that are not able to be successful. I again respect the work of the commission. It's a complicated issue and may have some application to some and not to others. Senator Veiga said the motion by Senator Brophy is to repeal Rule 904. A yes vote will repeal the rule as requested by Senator Brophy. The motion failed on a 2-7 vote, with Representative Gardner and Senator Brophy voting yes and Representative Labuda, Representative Levy, Representative McGihon, Representative Roberts, Senator Morse, Senator Schwartz, and Senator Veiga voting no.

8:12 p.m.

Senator Brophy moved that the following rule of the Oil and Gas Conservation Commission of the Department of Natural Resources, concerning practice and procedure, as adopted by the commission on December 11, 2008, is repealed, effective May 15, 2009: Rule 910. Senator Brophy said Rule 910. concerns the concentration and sampling for soil and groundwater. I will acknowledge that with regard to Yuma and Washington counties this rule will not go into effect for a couple of years, but this is the rule that is not technically feasible because if you remember Mr. Walker's testimony, he said the tests that they're calling for in this case don't exist. That's why I'm asking for a repeal of Rule 910. Senator Veiga said I'll be voting no on this one as I did with Rule 904. for the reasons expressed by Representative Levy, principally that I think whether something is technically feasible or not, I would have no clue quite honestly and I would have to defer to the commission on that, but I do believe reasonable minds could differ as to that. The question in my mind is did we give them the authority to enact rules in this area and I think in section 34-60-106 (11) (a) (II), C.R.S., it's pretty clear that we did. The motion is to repeal Rule 910. A yes vote will repeal the rule as requested by Senator Brophy. The motion failed on a 2-7 vote, with Representative Gardner and Senator Brophy voting yes and Representative Labuda, Representative Levy, Representative McGihon, Representative Roberts, Senator Morse, Senator Schwartz, and Senator Veiga voting no.

8:14 p.m.

Representative McGihon moved that the automatic expiration of May 15, 2010, for the remainder of the rules of the Oil and Gas Conservation Commission of the Department of Natural Resources concerning practice and procedure, as adopted by the commission on December 11, 2008, is postponed, effective May 15, 2009. Representative Gardner said I sort of tongue-in-cheek suggested to some of the stakeholders that I would simply make a motion that we repeal the commission rules in their totality because key portions exceed the authority granted to the commission. I know many, many disagree with that and I won't belabor the point. What I think this

motion is is the equivalent of that in reverse and I will be a no vote for the postponement of the automatic expiration because I believe that as currently conceived these rules should expire. Senator Veiga said Representative Gardner is correct that that is the reverse of what your desired effect is, which is why I will be an aye vote on the motion. Representative Labuda asked if there is going to be a sunset review or something? Ms. Haskins said these rules were adopted on December 11, 2008, which makes them not subject to expiration for this year's rule review. It really would be next year. If you do nothing, they would expire because of the language in the APA on May 15, 2010. What you're doing in this motion is postponing that automatic expiration that is scheduled for May 15, 2010. You're postponing it indefinitely, effective May 15, 2009, which is the date we're working with for this year's rule review bill. It's kind of a technical rule review bill issue. Representative Labuda said yes, so since it's going to be in our regular rule review bill, it will eventually come up for review again? Ms. Haskins said no. This is the time you're dealing with it, this year, in this Committee. If you pass this motion, it would be your recommendation to the General Assembly that is included in the 2009 rule review bill, House Bill 1292, which you're going to act on in a minute. Representative Labuda said I think I get it. Any time that the commission would want to change their rules that would be when we would look at the rules again and not at any other time. Ms. Haskins said right. If they go into rule-making again, they'll have to go through the whole process, it will come to our office, we'll review it, and we'll make our recommendations at that time. Representative Roberts said in totality I support the work that's been done and I will be supporting this motion. If there's another opportunity to address some of the concerns that I expressed tonight, I just didn't want anyone to think I wouldn't take that chance to do that. The motion passed on a 7-2 vote, with Representative Labuda, Representative Levy, Representative McGihon, Representative Roberts, Senator Morse, Senator Schwartz, and Senator Veiga voting yes and Representative Gardner and Senator Brophy voting no.

Senator Veiga said I'm going to turn this over to Ms. Haskins again. We have concluded sitting as the Committee on Legal Services. We will also be sitting as the House committee of reference, so let me turn it over to Ms. Haskins to explain how we're going to proceed.

Ms. Haskins said you're now sitting as the committee of reference on House Bill 09-1292 and what we are recommending is that after the Committee moves the bill, that you would move that a committee report be drafted to House Bill 1292 that would reflect the findings that this Committee just made on these oil and gas rules, and then we would need you to vote on the bill.

8:21 p.m.

Representative McGihon moved House Bill 1292 and that the committee report to House Bill 1292 be drafted to amend the bill to reflect the findings and incorporate the decisions made by the Committee on Legal Services on the rules of the Oil and Gas Conservation Commission of the Department of Natural Resources, as adopted by the commission on December 11, 2008. Representative Gardner said I will be a yes vote on this motion. While I have serious concerns that I've expressed about the commission rules, we've made some improvements here that I think are important and necessary to include in the committee report, so I will be a yes on the motion. The motion passed on a 9-0 vote, with Representative Gardner, Representative Labuda, Representative Levy, Representative McGihon, Representative Roberts, Senator Brophy, Senator Morse, Senator Schwartz, and Senator Veiga voting yes.

Ms. Haskins said there was one other thing I failed to do. I should just explain the usual thing about the rule review bill, which is this is your annual rule review bill and it contains the recommendations from the Committee on the rules that you reviewed this year. Subsections (1), (2), and (3) of section 1 of the bill are the parts of the bill that relate to the rules adopted during the 2008 rule review year, which is from November 1, 2007, to November 1, 2008. The automatic expiration of those rules is postponed in the rule review bill with the exception of the rules that are specifically listed in the bill and those are ones that you have found there was a problem with exceeding statutory authority or statutory conflict. We do have an explanation somewhere on the table of those rule issues.

8:23 p.m.

Representative McGihon moved that House Bill 1292, as amended, be moved to the Committee of the Whole with a favorable recommendation. The motion passed on a 9-0 vote, with Representative Gardner, Representative Labuda, Representative Levy, Representative McGihon, Representative Roberts, Senator Brophy, Senator Morse, Senator Schwartz, and Senator Veiga voting yes.

8:24 p.m.

The Committee adjourned.