

**Water Quality and the Interaction of Federal, State and Local  
Regulation of Oil and Gas Development in Colorado**

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In recent months, several local governments in Colorado and throughout the Intermountain West have either experienced or identified the potential for a dramatic increase in oil and gas development activity. This document addresses some of the issues that local governments may want to consider as they respond to development. The examples are specific to Colorado, but may be applicable in part to local governments in other states (see the [Law and Policy page](#) for links to the regulations of various local governments in our five-state intermountain region). Ordinances and permits from Douglas County, Colorado are used as examples because their geographic location in the Cherry Creek Watershed provides some additional complexity that is not found in other jurisdictions. Water quality issues are discussed because they provide examples of the federal, state and local regulatory interaction.

This document was prepared by University of Colorado Law School students, Lauren Walker and Kristen Rice, with the help of the Intermountain Oil and Gas BMP Project manager, Kathryn Mutz. It is not intended to provide legal advice on any of the issues. The Intermountain BMP project welcomes comments, corrections, and additional examples on this and other materials on the website. Please go to our [About Us](#) page to provide comments or to contact us for more information.

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## Laws and Entities Regulating Stormwater Discharges

### *National Pollutant Discharge Elimination System (NPDES)*

The U.S. Environmental Protection Agency (EPA) manages the National Pollutant Discharge System (NPDES) in partnership with EPA Regional Offices, states, tribes, and other stakeholders.<sup>1</sup> The goal of the program is to control water pollution by regulating point sources that discharge pollutants into U.S. waters, in furtherance of the federal Clean Water Act (CWA).<sup>2</sup> The NPDES program requires permit authorization for certain stormwater discharges, including those associated with regulated municipal separate stormwater systems (MS4s) and construction projects disturbing one acre or more.<sup>3</sup> An MS4 is “a conveyance or system of conveyances that is owned by a state, city, town, village, or other public entity that discharges to waters of the U.S. and is designed or used to collect or convey stormwater (including storm drains, pipes, ditches, etc...). An MS4 is not a combined sewer and is not part of a sewage treatment plant.”<sup>4</sup> Phase I of the NPDES permit program, established in 1990, requires medium and large cities with populations of 100,000 or more to obtain an NPDES permit for stormwater discharges associated with their MS4s.<sup>5</sup> In 1999, NPDES permit program was expanded to include smaller construction activities including smaller MS4s in urbanized areas. Each regulated MS4, under either Phase I or II, is required to develop and implement a stormwater management program (SWMP) to reduce stormwater contamination and illicit discharges.<sup>6</sup>

While the NPDES permitting requirements now apply to oil and gas construction operations, this was not always the case.<sup>7</sup> For a short period of time, EPA regulations effectively excluded construction projects associated with oil and gas operations from the NPDES requirements:<sup>8</sup>

- Section 402(1)(2) of the CWA, added by the 1987 Water Quality Act (WQA), specifies that the EPA shall not require NPDES permits, nor shall it directly or indirectly require states to require NPDES permits for uncontaminated discharges “from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities”<sup>9</sup> unless the facility “has had a discharge of stormwater resulting in a discharge of a reportable quantity” of oil or hazardous substances or “[c]ontributes to a violation of a water quality standard.”<sup>10</sup>
- The Energy Policy Act of 2005 added the following definition of “oil and gas exploration, production, processing, or treatment operations or transmission facilities” to

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<sup>1</sup> EPA, *About NPDES* (May 9, 2008, 5:39 PM), [http://cfpub2.epa.gov/npdes/about.cfm?program\\_id=0](http://cfpub2.epa.gov/npdes/about.cfm?program_id=0).

<sup>2</sup> EPA, *National Pollutant Discharge Elimination System (NPDES)* (March 12, 2009, 11:32 PM).

<sup>3</sup> 40 CFR 122.26 (2009).

<sup>4</sup> EPA, *Stormwater Discharges from Municipal Separate Storm Sewer Systems (MS4s)* (June 24, 2011, 11:06 AM), <http://cfpub.epa.gov/npdes/stormwater/munic.cfm>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> EPA, *Regulation of Oil and Gas Construction Activities* (April 7, 2009, 3:40 PM), <http://cfpub.epa.gov/npdes/stormwater/oilgas.cfm>.

<sup>8</sup> *Id.*

<sup>9</sup> 33 U.S.C. § 1342(1)(2) (2006).

<sup>10</sup> 40 C.F.R. 122.26(c)(1)(iii) (2005)

the CWA: “all field activities or operations associated with exploration, production, processing, or treatment operations, or transmission facilities, including activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, whether or not such field activities or operations may be considered to be construction activity.”<sup>11</sup>

- EPA’s 2006 final rule addressing this new definition effectively exempted from NPDES requirements stormwater discharges from construction activities associated with oil and gas development unless the relevant facility had a discharge of stormwater resulting in a discharge of a reportable quantity of oil or hazardous substances.<sup>12</sup> Notably, the preamble to the EPA’s 2006 rulemaking stated that “EPA also encourages State and local authorities to address storm water discharges of sediment from construction activities associated with oil and gas field operations through authorities other than the NPDES permit program where appropriate but . . . prohibits EPA or the States from requiring a permit for these discharges under the authority of the CWA NPDES program.”<sup>13</sup>

The Ninth Circuit Court of Appeals vacated the rule after finding it arbitrary, capricious, and an impermissible construction of § 402(1)(2) of the CWA.<sup>14</sup> Currently, the requirements in effect are the regulations that were in place prior to the 2006 rule plus the Energy Policy Act clarification of the activities in the CWA § 402(1)(2) exemption:<sup>15</sup>

- 40 C.F.R. §122.26(a)(2): EPA may not require a permit for discharges of uncontaminated storm water runoff from oil and gas exploration, production, processing or treatment operations or transmission facilities, including those activities that might be considered construction activities.
- 40 C.F.R. §122.26(e)(8): Discharges associated with small construction activities at oil and gas sites now required a permit. These include disturbances equal to or greater than one acre and less than five acres and also an area less than one acre if it is part of a larger common plan disturbing one to five acres (40 C.F.R. §122.26(b)(15)(i)).

### ***Colorado Department of Public Health and Environment (CDPHE)***

In Colorado, NPDES is managed by the Colorado Department of Public Health and Environment (CDPHE), Water Quality Control Division (WQCD) through the Colorado Discharge Permit System (CDPS).<sup>16</sup> <sup>17</sup> The regulation creating CDPS, “Regulation 61,” outlines the requirements and administration of the CDPS.<sup>18</sup>

While most CDPHE regulations implementing the CDPS program mirror the federal

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<sup>11</sup> 33 U.S.C. § 1362(24) (2006).

<sup>12</sup> See “Amendments to the National Pollutant Discharge Elimination System (NPDES) Regulations for Storm Water Discharges Associated With Oil and Gas Exploration, Production, Processing, or Treatment Operations or Transmission Facilities,” 71 Fed.Reg. 33,628 (Jun. 12, 2006) (codified at 40 C.F.R. § 122.26).

<sup>13</sup> 71 Fed. Reg. 33628-01 (June 12, 2006).

<sup>14</sup> *Natural Resources Defense Council v. United States Environmental Protection Agency*, 526 F.3d 591 (9th Cir. 2008); see also EPA, *Regulation of Oil and Gas Construction Activities*, *supra* note 6.

<sup>15</sup> <http://cfpub.epa.gov/npdes/stormwater/oilgas.cfm>

<sup>16</sup> 5 Colo.Code Regs. § 1002-61 (LexisNexis 2011), available at

<http://www.cdphe.state.co.us/regulations/wqccregs/100261dischargepermitsystemnew.pdf>.

<sup>17</sup> Colo. Dep’t of Pub. Health and Env’t, Water Quality Control Div., *Colorado’s Phase II Municipal Guidance*, at 1 (2001), available at

<http://www.cdphe.state.co.us/wq/PermitsUnit/POLICYGUIDANCEFACTSHEETS/factsheets/ms4guide.pdf>.

<sup>18</sup> 5 Colo. Code Regs. § 1002-61.1(1) (LexisNexis 2011).

NPDES requirements, CDPHE has a stormwater permitting requirement more stringent than the federal NPDES program. The CDPS program requires a CDPS permit for oil and gas construction activities including the uncontaminated construction activity discharges exempted from the NPDES program by the 2005 Energy Act.<sup>19</sup> CDPHE/WQCD “may adopt rules more stringent than corresponding enforceable federal requirements only if it is demonstrated at a public hearing, and the commission finds...that state rules more stringent than the corresponding federal requirements are necessary to protect the public health, beneficial use of water, or the environment of the state.”<sup>20</sup> In adopting oil and gas related revisions to Regulation 61, CDPHE justified why Colorado requires CDPS permit coverage for oil and gas construction activities, while the NPDES program may not. This more stringent requirement was explained by commission findings generally that (1) if not properly managed, discharges from oil and gas construction can impact receiving waters, (2) oil and gas construction is not significantly different than other forms of construction.<sup>21</sup>

Regulation 61 also outlines the minimum requirements for all Phase II MS4 permits.<sup>22</sup>

- “Construction activities” that disturb five or more acres of land require a Phase I permit;
- “small construction activities” that disturb between one and five acres of land require a Phase II permit;
- “large or medium [MS4s]” require a Phase I permit; and
- “regulated small [MS4s]” require a Phase II permit.

Phase I and phase II MS4s require a CDPS General Permit issued by the CDPHE.<sup>23</sup> This permit requires the MS4 operator to develop and implement the following six stormwater management programs and measures, consistent with NPDES program requirements:

- 1) Public education and outreach
- 2) Public participation/involvement
- 3) Illicit discharge detection and elimination
- 4) Construction site stormwater runoff control
- 5) Post-construction stormwater management
- 6) Pollution prevention/good housekeeping for municipal operations.

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<sup>19</sup> See 5 Colo. Code Regs. § 61.4(3)(a)(xiii) (LexisNexis 2011); 5 Colo. Code Regs. § 61.4(3)(b)(i)(C) (LexisNexis 2011); 5 Colo. Code Regs. § 61.3(2)(c)(LexisNexis 2011)(uncontaminated runoff from oil and gas operations exempted, but oil and gas operations do not include construction activities)5 Colo. Code Regs. § 61.3(2)(e)(iii)(C) (LexisNexis 2011)(industrial activity facilities requiring stormwater discharge permit ); 33 U.S.C. § 1342(l)(2) (2006).

<sup>20</sup> Colo. Rev. Stat. Ann. § 25-8-202(8)(a) (2010).

<sup>21</sup> 5 Colo. Code Regs. § 61.55 Basis and Purpose at 69-70, available at <http://www.cdphe.state.co.us/regulations/wqccregs/100261dischargepermitsystemnew.pdf>; 5 Colo. Code Regs. § 61.58 Basis and Purpose

<sup>22</sup> 5 Colo. Code Regs. § 1002-61.8(11) (LexisNeis 2011).

<sup>23</sup> Colo. Dep’t of Pub. Health and Env’t, Water Quality Control Div., *CDPS General Permit: Stormwater Discharges Associated with Municipal Separate Storm Sewer Systems (MS4s)*, Permit No. COR-090000, § I.A.4. (2008), available at <http://www.cdphe.state.co.us/wq/PermitsUnit/MS4/2008MS4090000permit.pdf>, at 2.

CDPHE also imposes more stringent water quality control standards for parts of Colorado in the Cherry Creek Watershed through the Cherry Creek Reservoir Control Regulation.<sup>24</sup> This regulation requires that MS4 permittees in the Cherry Creek Watershed incorporate additional requirements into their stormwater management programs beyond those required under the CDPS General Permit.<sup>25</sup> The additional requirements of the Cherry Creek Reservoir Control Regulation for construction and post-construction stormwater management are outlined in the Authority's Cherry Creek Reservoir Watershed—Stormwater Quality Model Stormwater Ordinance (revised version April 19, 2001), an ordinance reviewed by the Water Quality Control Division.<sup>26</sup>

The Cherry Creek Reservoir Control Regulation and CDPS General Permit both contain language suggesting that the requirements they set forth for the permittee's stormwater program are minimum standards for the MS4 permittee to meet, suggesting that permittees may set more stringent standards than those contained in the regulations, to the extent allowable under State and local law.

### ***County Grading Permit Programs***

Local governments have the authority to adopt water quality ordinances as contemplated by the Water Quality Control Act.<sup>27</sup> In order to comply with the requirements of CDPHE and Watershed Regulations, counties in Colorado have developed stormwater permit programs.

Specifically, Douglas County's MS4 is covered by the CDPS General Permit and, because part of the County is located in the Cherry Creek Watershed, the County's construction site runoff programs must also comply with Cherry Creek Reservoir Control Regulation. To comply with the requirements for construction site stormwater runoff control under both the CDPS General Permit and the Cherry Creek Reservoir Control Regulation, Douglas County has passed Zoning Resolution Section 31, which outlines the county's "Grading, Erosion, and Sediment Control Program (GESC)."<sup>28</sup>

The GESC Program is a permitting program for grading, erosion, and sediment control on public and private construction projects in the unincorporated limits of Douglas County.<sup>29</sup> Depending on the extent of potential land-disturbance, a given construction project will require the developer to obtain one of three types of permits: (1) Low Impact GESC Permits, (2)

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<sup>24</sup> 5 Colo. Code Regs. § 1002-72 (LexisNexis 2011), *available at* <http://www.cdphe.state.co.us/regulations/wqccregs/100272cherrycreeknew.pdf>.

<sup>25</sup> 5 Colo. Code Regs. § 1002-72.7.2 (LexisNexis 2011).

<sup>26</sup> 5 Colo. Code Regs. § 1002-72, Basis and Purpose, 72.7 Stormwater Stormwater Permit Requirements (LexisNexis 2011), *available at* <http://www.cdphe.state.co.us/regulations/wqccregs/100272cherrycreeknew.pdf>, at 40.

<sup>27</sup> *Town of Carbondale v. GSS Properties, LLC*, 140 P.3d 53, 61 (Colo. Ct. App. 2005) *rev'd on other grounds*, 169 P.3d 675 (Colo. 2007).

<sup>28</sup> Douglas County Zoning Resolution § 31, *available at* [http://www.douglas.co.us/zoning/Section\\_31\\_Clearing\\_Grading\\_and\\_Land\\_Disturbance.html](http://www.douglas.co.us/zoning/Section_31_Clearing_Grading_and_Land_Disturbance.html); Douglas Cnty. Gov't, *Construction Site Stormwater Runoff Control* (2011), [http://www.douglas.co.us/stormwater/Construction\\_Site\\_Stormwater\\_Runoff\\_Control.html](http://www.douglas.co.us/stormwater/Construction_Site_Stormwater_Runoff_Control.html).

<sup>29</sup> Douglas Cnty. Dep't of Pub. Works Eng'g Div., *Grading, Erosion, and Sediment Control (GESC) Manual 1-2* (March 2004), *available at* [http://www.douglas.co.us/engineering/documents/Douglas\\_County\\_GESC\\_Manual\\_March\\_20\\_2004.pdf](http://www.douglas.co.us/engineering/documents/Douglas_County_GESC_Manual_March_20_2004.pdf).

Temporary Batch Plan/GESC Permit, and (3) Standard GESC Permits.<sup>30</sup> GESC permits require that the developer employ BMPs approved by Douglas County throughout the duration of the construction project.<sup>31</sup>

Arapahoe County, like Douglas County, operates a small, Phase II MS4 and is subject to both the CDPS General Permit and Cherry Creek Reservoir Control Regulation.<sup>32</sup> Also similar to Douglas County, Arapahoe County has chosen to maintain a GESC Permitting Program, implemented by the Southeast Metro Stormwater Authority (SEMSWA), to comply with the CDPS General Permit requirements for a construction site runoff control program.<sup>33</sup>

Similarly, Denver County also operates a MS4 that is subject to the CDPS General Permit. Denver, like Douglas and Arapahoe Counties, uses a construction permitting system, called the Construction Activities Stormwater Discharge Permit (CASDP), to comply with its MS4 permit requirement for construction site runoff control.<sup>34</sup> The City and County of Denver Construction Activities Stormwater Manual notes specifically that, “The CASPD permit is required in addition to any similar permits issued by the State of Colorado under its Colorado Discharge Permit System (CDPS). It is not “in lieu” of the State Permit and is required even though a State issued permit may already be in place.”<sup>35</sup>

#### ***Colorado Oil and Gas Conservation Commission (COGCC)***

The Colorado Water Quality Control Act recognizes the Colorado Oil and Gas Conservation Commission (COGCC) as an “implementing agency” that must, through its own programs and in consultation with the CDPHE/WQCD, implement the water quality standards and classifications for state waters adopted by the CDPHE/WQCD.<sup>36</sup> COGCC has authority to implement water quality protection measures with respect to groundwater but not surface water.<sup>37</sup> COGCC has, in coordination with CDPHE, promulgated rules requiring stormwater management BMPs for oil and gas operators in the state.<sup>38</sup> Specifically, COGCC rules require operators to employ certain stormwater BMPs at all oil and gas locations and develop a post-construction stormwater program prior to the termination of any stormwater permits issued by CDPHE for the construction of oil and gas facilities.<sup>39</sup>

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<sup>30</sup> *Id.* at 1-7.

<sup>31</sup> *Id.* at 3-5–3-6.

<sup>32</sup> Southeast Metro Stormwater Authority, *Arapahoe County SPLASH, Cherry Creek Watershed*, <http://www.splashco.org/ourwatersheds/cherrycreek.html>; 5 Colo. Code Regs § 1002-72.7.2 (LexisNexis 2011).

<sup>33</sup> Southeast Metro Stormwater Authority, *Water Quality Program*, <http://www.semswa.org/programs/waterquality.html>.

<sup>34</sup> City and Cnty. of Denver Wastewater Mgmt. Div., *Construction Activities Stormwater Manual* (Revised June 2010) 4, 8, available at <http://www.denvergov.org/Portals/491/documents/StormConsCriteriaFinWCover121610.pdf>.

<sup>35</sup> *Id.* at 11.

<sup>36</sup> Colo. Rev. Stat. § 25-8-202(7) (2010).

<sup>37</sup> Phone conversation with AG’s Office, Casey Shpall and Annette Quill. August 16, 2011 10:00 AM

<sup>38</sup> *See, e.g.*, 2 Colo. Code Regs. § 404-1:1002f. (LexisNexis 2011).

<sup>39</sup> 2 Colo. Code Regs. § 404-1:1002f.(2)–(3) (LexisNexis 2011).

## Regulatory Overlap by State Agencies: COGCC and CDPHE

Colorado statutes grant broad rulemaking authority to state agencies to enable them to regulate consistent with their statutory purposes. Given this broad grant of authority, there may be overlap between the regulations of two different state agencies. For example, COGCC and CDPHE both regulate stormwater and water quality under their respective programs.

C.R.S. § 24-4-103 governs the rulemaking procedure for all state administrative agencies. Under this statute, no rule shall be adopted by any agency unless “(IV) the regulation does not conflict with other provisions of law; and (V) The duplication or overlapping of regulations is explained by the agency proposing the rule.”<sup>40</sup> Ultimately the purpose of this provision is to ensure that the agency rules are clear and can be applied properly by regulated entities. Theoretically, those regulations that would directly conflict with other agencies are eliminated prior to the passage of the final agency rule.

Conflict can be resolved through the political process with agency heads entering into MOUs to delineate the responsibilities of each agency based upon the agencies’ separate enabling statutes. Agencies are not in the practice of competing to regulate in a given area, but rather the process focuses on coordination. For example, COGCC framed the 2008 revisions to their regulations in coordination with CDPHE to limit overlap and conflict. Theoretically if conflicting regulations were adopted then the regulation would be void, but there is not a case of agencies going to court to litigate which agency has authority to regulate.

Presumably, in the case of overlapping regulations, those subject to regulation must comply with all applicable regulations in a given area. C.R.S. § 24-4-103(4)(b) both expressly prohibits the adoption of conflicting laws and specifically authorizes the existence of overlapping regulations by different agencies so long as there is a justification for doing so. Thus given that neither regulation appears to control, adherence to the stricter regulation imposed by one agency in a particular area should satisfy the lesser requirements of another overlapping regulation.

The regulation establishing the CDPS program is an example of an overlapping regulations that required justification prior to being adopted. When CDHPE first introduced the CDPS program, at least two other state agencies were already exercising jurisdiction over matters covered by the CDPS. First, the Hazardous Materials and Waste Management Division already had programs in place to address run-on and runoff controls for solid and hazardous waste disposal sites, and CDPS would require that those same landfill operators obtain permits to discharge stormwater. Second, the statutory mandate of the Division of Minerals and Geology of the Department of Natural Resources already required that measures be taken to protect the hydrologic balance as a condition of granting a Mined Land Reclamation Board permit, and the CDPS would require some mining activities to obtain stormwater discharge permits that also require measures to be taken to control the sources of stormwater pollution.<sup>41</sup>

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<sup>40</sup> Colo. Rev. Stat. § 24-4-103(4)(b) (2010).

<sup>41</sup> 5 Colo. Code Regs. § 1002-61:61.36E. (LexisNexis 2011).

CDPHE explained the overlap as necessary because according to state statute, the WQCD is solely responsible for the issuance and enforcement of permits authorizing point source discharges to state waters.<sup>42</sup> Moreover, the stormwater permit applications and the CDPS regulations are necessary to assure compliance with the federal CWA.<sup>43</sup>

After CDPHE began the CDPS program, COGCC promulgated rules that include stormwater management provisions. COGCC regulations went through a major overhaul in 2008. In order to protect the health, safety, and welfare of the general public, the COGCC staff developed the new rules in consultation with the CDPHE.<sup>44</sup> The COGCC regulations were designed to coexist with the regulations of other agencies without creating a direct conflict.<sup>45</sup> Specifically, the Statement of Basis and Purpose for the COGCC, states that 1002.f. regulating stormwater management is not intended to be as rigorous as those for stormwater management plans required under stormwater construction permits issued by the CDPHE/WQCD.<sup>46</sup> For instance, the stormwater plan under these rule amendments must be site-specific only to the extent necessary to describe implementation where general operating procedures and descriptions are not adequate to clearly describe the implementation and operation of BMPs. The regulations were not intended to conflict, rather the overlap exists according to the Statement in order to fill a “regulatory gap” that would otherwise allow storm and non-storm related discharges from oil and gas operations, including pollutants such as sediment from roads/pads and chemicals associated with an oil and gas production site or associated support facilities.<sup>47</sup> Prior to this rule amendment in 2008, such discharges were not regulated.<sup>48</sup>

Therefore, CDPHE and COGCC regulations (1) may overlap but should not be in conflict and (2) are both applicable to oil and gas operators.

## Colorado’s Preemption Doctrine

Questions of preemption can arise when local governments and state agencies attempt to regulate the same activities regardless of whether the local government sets more or less stringent requirements than those contained in state law. Several preemption issues have arisen in the context of oil and gas regulations.

In the oil and gas context, both state agencies and local governments have the authority to regulate aspects of the development and production process. Local governments in Colorado

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<sup>42</sup> Colo. Rev. Stat. § 25-8-202(7)(b)(I) (2010).

<sup>43</sup> See Colo. Rev. Stat. § 25-8-202(7)(b)(II)(A) (2010).

<sup>44</sup> Colo. Rev. Stat. § 34-60-106(11)(a)(II) (2010); see also Colorado Oil and Gas Conservation Commission, *Statement of Basis, Specific Statutory Authority, and Purposes: New Rules and Amendments to Current Rules of the Colorado Oil and Gas Conservation Commission, 2 CCR 404-1*, available at <http://cogcc.state.co.us/> (see “Final Statement of Basis and Purpose”) (last visited July 28, 2011).

<sup>45</sup> 2 Colo. Code Regs. § 404-1:App. I (LexisNexis 2011) (stating that “1002.f. is not intended to be seen as overlapping with the CDPHE/WQCD stormwater permitting requirements” and explaining how the regulation fits with the CDPHE permitting process).

<sup>46</sup> 2 Colo. Code Regs. § 404-1:App. I (LexisNexis 2011).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

derive the authority to regulate the use of land, including aspects of oil and gas development, from two main sources. First, the Local Government Land Use Control Enabling Act of 1974 “clarif[ies] and provide[s] broad authority to local governments to plan and regulate the use of land within their respective jurisdictions.”<sup>49</sup> Furthermore, counties are authorized to form a county planning commission to enact a zoning plan for parts of the unincorporated territories of the county.<sup>50</sup> Incorporated cities and towns are similarly authorized to have a planning commission to enact a zoning plan.<sup>51</sup>

At the state level, the COGCC also has authority to regulate oil and gas development under the OGCA, including the authority to “[p]romulgate rules and regulations to protect the health, safety, and welfare of the general public in the drilling, completion, and operation of oil and gas wells and production facilities.”<sup>52</sup> In the context of water quality, the controlling state statute is the Colorado Water Quality Control Act (WQCA).<sup>53</sup> Under the WQCA, CDPHE is the state agency responsible for “develop[ing] and maintain[ing] a comprehensive and effective program for prevention, control, and abatement of water pollution and for water quality protection throughout the entire state and, to ensure provision of continuously safe drinking water by public water systems.”<sup>54</sup> Therefore, there is the potential for conflicts between CDPHE regulations and local water quality ordinances similar to those between COGCC rules and local oil and gas ordinances.

The CDPHE regulation creating the CDPS program, similar to COGCC regulations, state, “nothing in these regulations shall be construed to limit a local government's authority to impose land-use or zoning requirements or other limitations on the activities subject to these regulations.”<sup>55</sup> Currently, while counties operating a regulated MS4 must comply with the CDPS General Permit, they also retain the power to regulate land-use, which may include some extent of power to protect water quality.

For example, Douglas County has adopted Zoning Resolution 31 and the Grading, Erosion, and Sediment Control (GESC) permit program to comply with its CDPS MS4 Phase II permit. Resolution 31 requires developers planning construction projects, including oil and gas facilities, that will disturb one acre or more to obtain a GESC permit from the county government. In order to comply with state law, the developer must also obtain a stormwater discharge permit from CDPHE/WQCD. The issue, therefore, is whether Douglas County’s authority to regulate those aspects of construction associated with stormwater runoff is preempted by the WQCA and CDPHE’s implementing regulations.

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<sup>49</sup> Colo. Rev. Stat. § 29-20-102 (2010).

<sup>50</sup> Colo. Rev. Stat. § 30-28-111 (2010).

<sup>51</sup> Colo. Rev. Stat. § 31-23-201 (2010).

<sup>52</sup> Colo. Rev. Stat. § 34-60-106(11) (2010).

<sup>53</sup> Colo. Rev. Stat. § 25-8-101 to -129. (2010).

<sup>54</sup> Colo. Rev. Stat. § 25-8-202(1) (2010).

<sup>55</sup> 5 Colo. Code Regs. § 1002-61:61.1(1)(c) (LexisNexis 2011); 2 Colo. Code Regs. § 404-1:201 (LexisNexis 2011) (stating that “Nothing in these rules shall establish, alter, impair, or negate the authority of local and county governments to regulate land use related to oil and gas operations, so long as such local regulation is not in operational conflict with the Act or regulations promulgated thereunder.”)

In Colorado, the “preemption methodology for resolving state and local legislative conflicts borrows from our cases involving federal preemption analysis.”<sup>56</sup> Under federal preemption analysis, there are number of ways that federal law can preempt state law:

“when Congress expresses clear intent to preempt state law; when there is outright or actual conflict between federal and state law; when compliance with both federal and state law is physically impossible; when there is an implicit barrier within federal law to state regulation in a particular area; when federal legislation is so comprehensive as to occupy the entire field of regulation; or when state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.”<sup>57</sup>

The analysis used to determine whether Colorado state law preempts a local ordinances depends upon whether the ordinance is from a home-rule jurisdiction, deriving its powers from the Colorado Constitution, or county, whose powers are limited to those expressly granted to them by the Colorado Constitution or General Assembly.<sup>58</sup>

To examine the validity of ordinances enacted by a home-rule city in the face of a potential conflict with state law, Colorado courts looks at four factors: “whether there is a need for statewide uniformity of regulation; whether the municipal regulation has an extraterritorial impact; whether the subject matter is one traditionally governed by state or local government; and whether the Colorado Constitution specifically commits the particular matter to state or local regulation.”<sup>59</sup>

For example, a home-rule city’s land use ordinance banning oil and gas drilling in the City of Greeley’s corporate limits was preempted by Colorado’s OGCA in *Voss v. Lundvall Bros., Inc.*, 830 P.2d 1061 (Colo. 1992). First, the court found that there is a need for statewide uniformity of regulation in location and spacing of individual wells by the COGCC, because local bans would force irregular drilling patterns that could result in “uneven and potentially wasteful production from pools which underlie the city but extend beyond the city to land where production is not prohibited by a total drilling ban.”<sup>60</sup> Second, the extraterritorial effects of the ban conflicted with a statutory purpose of OGCA, because it affected the ability of nonresident owners of oil and gas interests in pools underlying the city to obtain an equitable share of production profits.<sup>61</sup> Third, “the regulation of oil and gas development and production has traditionally been a matter of state rather than local control.”<sup>62</sup> Fourth, while the Colorado Constitution does not commit either the state or local governments to the regulation of oil and gas development, the court found that home-rule cities can exercise control over oil and gas development and production within their territorial limits “only to the extent that the local

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<sup>56</sup> *Colo. Min. Ass’n v. Bd. of Cnty. Comm’rs of Summit Cnty.*, 199 P.3d 718, 723 (Colo. 2009).

<sup>57</sup> *Id.* (citing *State Dep’t of Health v. The Mill*, 887 P.2d 993, 1004 (Colo.1994)); see also *Brubaker v. Bd. of Cnty. Comm’rs*, 652 P.2d 1050, 1055-56 (Colo. 1982).

<sup>58</sup> See *Colo. Min. Ass’n v. Bd. of Cnty. Comm’rs of Summit Cnty.*, 199 P.3d 718, 723-24 (Colo. 2009).

<sup>59</sup> *Voss v. Lundvall Bros., Inc.*, 830 P.2d 1061, 1067 (Colo.1992) (citing *Denver v. State*, 788 P.2d 764, 768 (Colo. 1990)); see also *City of Northglenn v. Ibarra*, 62 P.3d 151, 155-56 (Colo. 2003).

<sup>60</sup> *Voss v. Lundvall Bros., Inc.*, 830 P.2d 1061, 1067 (Colo. 1992).

<sup>61</sup> *Id.* at 1067-68.

<sup>62</sup> *Id.*

ordinance does not materially impede” the state’s goals.<sup>63</sup> In determining this limit, the court reasoned that while the OGCA manifests a state interest in the efficient production of oil and gas, it does not manifest a “legislative intent to expressly or impliedly preempt all aspects of a local government’s land-use authority over land that might be subject to oil and gas development and operations within the boundaries of a local government.”<sup>64</sup> Therefore, the court held that while the OGCA preempts home-rule cities from completely banning the drilling of oil, gas, or hydrocarbon wells within the city, it does not completely preempt a home-rule city’s ability to use its land-use authority to regulate drilling within its territorial limits.<sup>65</sup>

In cases involving counties, Colorado applies “the ordinary rules of statutory construction to determine whether a state statute and a local ordinance can be construed harmoniously or whether the state statute preempts the local ordinance.”<sup>66</sup> Under this analysis, the state statute preempts the county regulation if (1) the state law expressly indicates state preemption of local authority over the subject matter, (2) the state law manifests a legislative intent to completely occupy the field by reason of a dominant state interest, or (3) there is an operational conflict with the application of the state law and local ordinance.<sup>67</sup> If there is such a conflict between a county ordinance and a state statute, then the state law controls over the statutory county’s general land use authority.<sup>68</sup>

For example, the Colorado Supreme Court held that the OGCA did not completely preempt a county’s authority to enact land-use regulations applicable to oil and gas operations in *Bd. of Cnty. Comm’rs, La Plata County v. Bowen/Edwards Associates, Inc.*, 830 P.2d 1045, 1052, 1060 (Colo. 1992). There, an operator challenged county regulations requiring administrative approval by various levels of county government prior to the construction, installation, and operation of any oil and gas well in the county.<sup>69</sup> First, no express preemption of local authority was found in the text of the OGCA.<sup>70</sup> While the OGCA was an attempt to consolidate state regulatory authority over the technical aspects of oil and gas development under the COGCC, nothing in the Act suggested intent to expressly preempt local authority on the matter.<sup>71</sup> Similarly, there is no implied preemption because the purposes and scope of the OGCA do not evince a legislative intent to occupy the field of regulating all aspects oil and gas development.<sup>72</sup> While the state has an interest in the efficient and fair development of oil and gas resources, that interest “is not so patently dominant over a county’s interest in land-use control, nor are the respective interests of both the state and the county so irreconcilably in conflict, as to eliminate by necessary implication any prospect for a harmonious application of both regulatory schemes.”<sup>73</sup> Finally, the court was unable to determine whether there was an operational conflict

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<sup>63</sup> *Id.*

<sup>64</sup> *Voss v. Lundvall Bros., Inc.*, 830 P.2d 1061, 1066 (Colo. 1992).

<sup>65</sup> *Id.* at 1066, 1068.

<sup>66</sup> *Colo. Min. Ass’n v. Bd. of Cnty. Comm’rs of Summit Cnty.*, 199 P.3d 718, 723-24 (Colo. 2009) (citing *Cnty. Comm’rs v. Bainbridge*, 929 P.2d 691, 698-99 (Colo.1996)).

<sup>67</sup> *Bd. of Cnty. Comm’rs, La Plata Cnty. v. Bowen/Edwards Assoc., Inc.*, 830 P.2d 1045, 1056-57 (Colo. 1992).

<sup>68</sup> *Colo. Min. Ass’n v. Bd. of County Comm’rs of Summit County*, 199 P.3d 718, 723-724 (Colo. 2009), (citing *County Comm’rs v. Bainbridge*, 929 P.2d. 691, 705 (Colo. 1996)).

<sup>69</sup> *Bd. of County Comm’rs, La Plata County v. Bowen/Edwards Assoc., Inc.*, 830 P.2d 1045, 1050-51 (Colo. 1992)

<sup>70</sup> *Id.* at 1058.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

in that case, because the record was not fully developed on that issue.<sup>74</sup> However, the court looked to the purpose of the county regulation, which was to “facilitate the development of oil and gas resources...,” and reasoned that this statement of purpose “evinces an obvious intent to regulate in a manner that does not hinder the achievement of the state’s interest in fostering [the efficient development of oil and gas].”<sup>75</sup> Therefore, the court held that the OGCA did not totally preempt a county’s authority to use land-use ordinances to regulate oil and gas development and operations in its territorial limits.<sup>76</sup>

Additionally, the Colorado Court of Appeals illustrated the ad hoc nature of the test for operational conflict in *Board of Cnty. Comm’rs of Gunnison Cnty. v. BDS International, LLC*, 159 P.3d 773 (Colo. App. 2006).<sup>77</sup> In that case, a county sought to require a natural gas producer to comply with county regulations governing many aspects of the oil and gas development process.<sup>78</sup> In Colorado, local ordinances are preempted by state law by reason of an operational conflict when “the effectuation of a local interest would ‘materially impede or destroy the state interest.’”<sup>79</sup> Two of the county’s ordinances were preempted under this test. First, the county’s financial requirements for oil and gas operators were “inconsistent with the state regulation’s financial caps [and] the County cannot reserve the right to determine financial requirements where COGCC has reserved for itself the sole authority to impose fines on oil and gas operations.”<sup>80</sup> Second, county regulations requiring operators to maintain five years worth of records available for county inspection was preempted because the state statute creating the COGCC provides that operators must maintain five years of records for inspection by COGCC and, therefore, the state statute excludes the county “by omission as an entity authorized to inspect the records.”<sup>81</sup> Other county ordinances related to water quality, soil erosion, wildlife and vegetation, livestock, geologic hazards and cultural and historic resources, wildfire protection, recreation, and permit duration were remanded for an evidentiary hearing to determine whether or not an operational conflict existed between the county ordinances and state regulations.<sup>82</sup>

Douglas County is a statutory county and, therefore, a preemption analysis would look at whether a county ordinance is preempted by the WQCA or OGCA in any of the following three ways: (1) the state law expressly indicates state preemption of local authority over the subject matter, (2) the state law manifests a legislative intent to completely occupy the field by reason of a dominant state interest, or (3) there is an operational conflict with the application of the state law and local ordinance.<sup>83</sup>

First, the WQCA does not expressly preempt local regulation of water quality. While the statute prohibits departments, agencies, municipal corporations, counties, and other subdivisions from issuing “any authorization for the discharge of pollutants into state waters unless authorized

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<sup>74</sup> *Id.* at 1059.

<sup>75</sup> *Id.* at 1059-60 (citing County Regulations, § 6.103; C.R.C. § 34-60-102(1) (1984)).

<sup>76</sup> *Id.* at 1059.

<sup>77</sup> *Bd. of Cnty. Comm’rs of Gunnison Cnty. v. BDS International, LLC*, 159 P.3d 773 (Colo. App. 2006)

<sup>78</sup> *Id.* at 777.

<sup>79</sup> *Id.* at 778 (citing *Bd. of Cnty Comm’rs v. Bowen/Edwards Assocs., Inc.*, 830 P.2d 1045,1059 (1992)).

<sup>80</sup> *Id.* at 779.

<sup>81</sup> *Id.* at 779-80 (citing *Zab, Inc. v. Berenergy Corp.*, 136 P.3d 252, 261 (Colo. 2006)).

<sup>82</sup> *Id.* at 780-82.

<sup>83</sup> See *Bd. of County Comm’rs, La Plata County v. Bowen/Edwards Assoc., Inc.*, 830 P.2d 1045, 1056-57 (Colo. 1992).

to do so in accordance with this article,” the statute does not expressly prohibit counties from using their land-use authority to regulate grading, erosion, and sediment control to help minimize discharges.<sup>84</sup> Additionally, Colorado courts considering the construction of a statute de novo “may accord deference to the agency’s construction of its statute.”<sup>85</sup> CDPHE regulations establishing the CPDS permit system specifically state that, “nothing in these regulations shall be construed to limit a local government’s authority to impose land-use or zoning requirements or other limitations on the activities subject to these regulations.”<sup>86</sup> This is similar to the COGCC proclamation that, “[n]othing in these rules shall establish, alter, impair, or negate the authority of local and county governments to regulate land use related to oil and gas operations, so long as such local regulation is not in operational conflict with the Act or regulations promulgated thereunder.”<sup>87</sup> Therefore, it seems likely that a court would give deference to CDPHE’s interpretation of the WQCA and COGCC’s interpretation of the OGCA as not expressly preempting local land-use authority.

Similarly, the WQCA does not impliedly preempt the ordinance because its purpose and scope do not manifest a legislative intent to completely occupy the field by reason of a dominant state interest. The WQCA notes that the protection of water quality and pollution control are “matters of statewide concern,” just as the court in *Bd. of County Comm’rs, La Plata County* noted that the state has an interest in the efficient and fair development of oil and gas resources.<sup>88</sup> But also like *La Plata County*, here the interests of both the state and the county in water quality are not so irreconcilably in conflict that the two regulatory schemes cannot be harmonized, because both the WQCA and Douglas County’s Zoning Resolution §31 function to protect the health and safety of the environment.<sup>89</sup> Furthermore, adopting local regulations that are more stringent than the standards set by the state is different than the outright ban on drilling imposed by Greeley in *Voss*. Whereas a ban on drilling activity worked counter to the state’s interest in the efficient and fair development of oil and gas, regulations that control water quality, but do not completely ban operations, work *with* rather than *against* the state’s interests in protecting water quality and the efficient development of natural resources. However, courts have yet to rule on what level of regulatory burden may be considered as acting against the “efficient” development of oil and gas resources.

Finally, whether there exists an operational conflict between Douglas County requirements and the WQCA or the OGCA would depend on an analysis of specific provisions of Zoning Resolution 31 and the GESC permit program (see section below). However, the intent of the resolution evinces an intent to regulate stormwater pollution in a manner that does not impede the state’s interest in controlling water quality and pollution. The Intent of the Resolution reads, in relevant part, “To control non-point source pollution and protect water quality by requiring soil erosion and sediment control practices that comply with the provisions of the

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<sup>84</sup> C.R.S. § 25-8-102(4) (2010).

<sup>85</sup> *Bd. of Cnty. Comm’rs of Cnty. of San Miguel v. Colo. Pub. Util. Comm’n*, 157 P.3d 1083, 1092 (Colo. 2007) (citing *Lobato v. ICAO*, 105 P.3d 220, 223 (Colo. 2005))

<sup>86</sup> 5 Colo. Code Regs. § 1002-61:61.1(1)(c) (LexisNexis 2011).

<sup>87</sup> 2 Colo. Code Regs. § 404-1:201 (LexisNexis 2011).

<sup>88</sup> Colo. Rev. Stat. § 25-8-102(3) (2010); *Bd. of Cnty. Comm’rs, La Plata Cnty. v. Bowen/Edwards Assoc., Inc.*, 830 P.2d 1045, 1052, 1060 (Colo. 1992).

<sup>89</sup> See Colo. Rev. Stat. § 25-8-102(3) (2010); Douglas County Zoning Resolution § 31, available at [http://www.douglas.co.us/zoning/Section\\_31\\_Clearing\\_Grading\\_and\\_Land\\_Disturbance.html](http://www.douglas.co.us/zoning/Section_31_Clearing_Grading_and_Land_Disturbance.html).

Grading, Erosion and Sediment Control (GESC) Manual, as amended.”<sup>90</sup> Zoning Resolution 31 is also similar to the county regulations upheld in *La Plata County* in that it does not completely prevent the effectuation of the state’s interest, but rather increases the regulatory oversight and compliance costs for developers within the county’s territorial boundaries. Therefore, there appears to be no operational conflict between Zoning Resolution 31 and the WQCA.

Other attempts by local governments to regulate oil and gas development using land use powers have not been tested in Colorado courts. For example, some local governments have required planning as a condition for a special use permit before the oil and gas development proceeds. For example, in Yuma County, located in northeastern Colorado, the local land use code requires that major land use (including oil and gas development) obtain a special use permit. Included in the requirements for obtaining this permit are the incorporation of BMPs, but also the submission of a site plan, drainage and erosion control plans, and a noxious weed control plan. Thus far these special use permits and the planning that these permits require have not been challenged by litigation as in operational conflict with the COGCC regulations.<sup>91</sup>

While the OGCA does not expressly preempt local regulation of oil and gas development, a possible challenge could be brought against extremely stringent regulations alleging that an extremely high regulatory burden set by the local government operationally conflicts with the state’s goal to “[f]oster the responsible, balanced development, production, and utilization of [oil and gas].”<sup>92</sup> This may be an argument raised by SG Interests in its recently filed lawsuit against Gunnison County alleging that the county is unreasonably delaying oil and gas production.<sup>93</sup>

## **Regulating Water Quality Under Local Land-Use Powers**

Local governments in Colorado derive the authority to regulate land use from two main sources. First, the Local Government Land Use Control Enabling Act of 1974 “clarif[ies] and provide[s] broad authority to local governments to plan and regulate the use of land within their respective jurisdictions.”<sup>94</sup> Second, counties are authorized to form a county planning commission to enact a zoning plan for parts of the unincorporated territories of the county.<sup>95</sup> Incorporated cities and towns are similarly authorized to have a planning commission to enact a zoning plan.<sup>96</sup>

The CDPHE regulation creating the CDPS program states that “nothing in these regulations shall be construed to limit a local government’s authority to impose land-use or zoning requirements or other limitations on the activities subject to these regulations.”<sup>97</sup> Therefore, while counties operating a regulated MS4 must comply with the CDPS General

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<sup>90</sup> Douglas County Zoning Resolution 3101 Intent (*Amended 8/11/09*).

<sup>91</sup> 2 Colo. Code Regs. § 404-1:303a.(2) (LexisNexis 2011).

<sup>92</sup> Colo. Rev. Stat. § 34-60-102 (2010).

<sup>93</sup> See Colorado Energy News, *Oil and Gas Corporate News* (June 10, 2011), <http://coloradoenergynews.com/2011/06/oil-and-gas-corporate-news/>.

<sup>94</sup> Colo. Rev. Stat. § 29-20-102 (2010).

<sup>95</sup> Colo. Rev. Stat. § 30-28-111 (2010).

<sup>96</sup> Colo. Rev. Stat. §§ 31-23-201 to -227 (2010).

<sup>97</sup> 5 Colo. Code Regs. § 1002-61:61(c) (LexisNexis 2011).

Permit, they also retain the power to regulate land use, which may include some power to protect water quality.

The Grand Junction Watershed Plan is an example of a local government asserting this power to regulate oil and gas development. In 2006, the City of Grand Junction passed a watershed ordinance that requires an operator to submit a plan of operations, including all stages of development, before a permit to drill within the watershed would be approved.<sup>98</sup> This exercise of authority remains untested in the courts, however, since oil and gas development has not occurred within the watershed since the ordinance was passed.

Municipalities in Colorado have been statutorily granted additional power with regard to watershed protection given there has been an explicit grant of authority by the legislature.<sup>99</sup> Under C.R.S. § 31-15-707(1)(b), municipalities have the authority “[t]o construct or authorize the construction of such waterworks without their limits and, for the purpose of maintaining and protecting the same from injury and the water from pollution.” This statute gives municipalities authority that extends beyond municipal borders such that “jurisdiction shall extend over the territory occupied by such works and all reservoirs, streams, trenches, pipes, and drains used in and necessary for the construction, maintenance, and operation of the same and over the stream or source from which the water is taken for five miles above the point from which it is taken and to enact all ordinances and regulations necessary to carry the power conferred in this paragraph (b) into effect.”<sup>100</sup> More simply, under this statute, municipalities have the power to regulate regardless of whether the land is within its municipal boundary so long as it is within the five-mile radius. Thus, if part of the watershed extends into neighboring counties a municipality has jurisdiction to issue watershed ordinances that apply in those neighboring counties as well.

The scope of this authority while extensive does have limitations. There has been some controversy regarding this authority when the five mile radius extends onto federally owned lands managed by the Bureau of Land Management (BLM) or U.S. Forest Service. The Forest Service administers over 14.5 million acres of National Forest System (NFS) lands in Colorado, and nearly 90 percent of these lands lie in watersheds that contribute to public water supplies. However, in 2009 a memorandum of understanding (MOU) between CDPHE and the U.S. Forest Service was executed addressing management and protection of Source Water Areas on NFS lands in Colorado.<sup>101</sup> The purpose of the MOU was to establish a framework for CDPHE and the Forest Service to work together on source water protection on NFS lands in Colorado for purposes of protecting public water supplies. But the MOU also addressed municipal authority under C.R.S. § 31-15-707. In the MOU, the Forest Service agreed to recognize municipal watershed ordinances or regulations as they control or abate water pollution, but would “resist attempts to deny, restrict or otherwise control management activities or land use on NFS lands.”<sup>102</sup> Also, Colorado courts have yet to decide how to reconcile the OGCA and the state’s

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<sup>98</sup> Grand Junction Mun. Code § 13.32.220 (2011).

<sup>99</sup> Matt Sura, *Colorado Landowner’s Guide to Oil and Gas Development* (Spring 2011) (Working Version) (on file with authors).

<sup>100</sup> C.R.S. § 31-15-707(1)(b) (2011).

<sup>101</sup> *CDPHE and U.S. Forest Service Memorandum of Understanding*, 2009, [http://www.cdphe.state.co.us/wq/sw/swap/CDPHE\\_USFS\\_MOU.htm](http://www.cdphe.state.co.us/wq/sw/swap/CDPHE_USFS_MOU.htm)

<sup>102</sup> *Id* at § C.6. See also, Memorandum of Understanding Among Bureau of Land Management, Colorado State Office, U.S. Forest Service, Rocky Mountain Region, and Colorado Oil and Gas Conservation Commission

interest in oil and gas development with local land-use authorities including this statutory grant of authority over source water areas. Yet despite these limitations, the statute continues to provide a very powerful tool for municipalities to protect water quality.<sup>103</sup>

## **Comparison of COGCC, CDPHE, and Douglas County's Stormwater Regulations**

This section compares selected stormwater regulations related to construction projects from CDPHE, COGCC, and Douglas County, concluding that while regulations from the various regulatory bodies overlap in some instances, they do not appear to be operationally in conflict with one another with the exception of a possible conflict in post-construction management. Regulations that set “minimum” standards or requirements will not typically be “in conflict” unless it is impossible to comply with both. The areas of potential conflict analyzed here are (a) construction site stormwater management, (b) post-construction stormwater management, and (c) revegetation requirements.

### ***Construction Stormwater Management***

The CDPHE's CDPS General Permit and Cherry Creek Reservoir Control Regulation, COGCC rules, and Douglas County's GESC Program all regulate stormwater management during construction projects in Douglas County. Because Douglas County's MS4 drains into the Cherry Creek Reservoir basin, its stormwater programs must comply with the Cherry Creek Reservoir Control Regulation in addition to the requirements of the CDPS General Permit.<sup>104</sup>

Regulation 61 requires both local governments operating MS4s as well as oil and gas operators planning construction activities to obtain either a phase I permit, for construction activities that disturb greater than five acres, or a Phase II permit for construction activities that disturb between one and five acres.<sup>105</sup>

The CDPS General Permit requires that the MS4 permittee, Douglas County in this case, maintain a program to “assure adequate design, implementation, and maintenance of BMPs at

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Concerning Oil and Gas Permitting on BLM and NFS Lands in Colorado, 2009, [http://www.blm.gov/pgdata/etc/medialib/blm/co/programs/oil\\_and\\_gas/Lease\\_Sale/2009.Par.11578.File.dat/BLM\\_COGCC\\_USFS\\_Permitting\\_MOU\\_2009.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/co/programs/oil_and_gas/Lease_Sale/2009.Par.11578.File.dat/BLM_COGCC_USFS_Permitting_MOU_2009.pdf) (clarifies parties roles and responsibilities in permitting and administering oil and gas operations on federal lands).

<sup>103</sup> While C.R.S. § 31-15-707 only applies to municipalities, COGCC Rule 317B provides some additional protection to public water systems, regardless of ownership. Rule 317B applies to drilling completion production and storage operations (DCPS) in surface water supply areas. It is designed to protect public water systems by excluding drilling within 300 feet of the water source, and requiring the use of best management practices and water quality monitoring for drilling within the watershed (up to a half-mile away (2,640 ft) from the water source for all new oil and gas development. For existing development, the rule mandates no new surface disturbance in the area following the effective date. Under this rule the COGCC can protect public water systems from potential impacts, although the areas of protection (300/2640 feet) are not as extensive as provided for in C.R.S. § 31-15-707.

<sup>104</sup> See 5 Colo. Code Regs § 1002-72.7.2 (LexisNexis 2011).

<sup>105</sup> 5 Colo. Code Regs § 1002-61.3(2)e.-f. (LexisNexis 2011).

construction sites within the MS4 to reduce pollutant discharges and protect water quality.”<sup>106</sup> The minimal requirements for this program include (1) an ordinance or other regulatory mechanism to require erosion and sediment controls; (2) requirements for construction site operators to implement appropriate erosion and sediment control BMPs; (3) requirements for construction site operators to implement BMPs to control waste; (4) site plan review procedures; (5) procedures for construction site compliance assessments; (6) enforcement procedures; and (7) an education and training program for municipalities, their representatives and/or construction contractors.<sup>107</sup>

The Cherry Creek Reservoir Control Regulation adds additional requirements to the Public Education, Construction, and Post-Construction Minimum Measures contained in the CDPS General Permit.<sup>108</sup> Regarding construction, the state regulation adds a requirement that developers submit an Erosion and Sediment Control Plan to the MS4 permittee, Douglas County here, “describing permittee-approved construction BMPs For Land Disturbance...prior to the commencement of Land Disturbances.”<sup>109</sup> The regulation also lists a set of required construction BMPs that must be included in Douglas County’s program, including (A) phasing construction, (B) reducing stormwater runoff flow to non-erosive velocities when practicable, (C) protecting state waters located on construction sites from erosion and sediment damages resulting from land disturbance, (D) controlling sediment before it leaves the construction site through managing stormwater runoff with an entrapment BMP and vehicle tracking.<sup>110</sup>

Douglas County’s construction stormwater program must comply with both the Cherry Creek Reservoir Control Regulation and the CDPS General Permit.<sup>111</sup> Furthermore, Douglas County “has the option” to apply the more stringent Cherry Creek Reservoir Control Regulation standards to its entire jurisdiction and “may also incorporate requirements into [its] programs that are more restrictive than those outlined in [the Cherry Creek Reservoir Control Regulation].”<sup>112</sup> The County has chosen to comply with both regulations by implementing the GESC Permit Program. Under GESC, oil and gas operators planning construction projects that disturb one acre or more of land are required to obtain a GESC Permit.<sup>113</sup> If the construction project requires a GESC permit, the developer’s GESC Plans must include GESC Drawings and identify additional county, state, and federal plans and permits required for the project.<sup>114</sup> All GESC permits require the developer to comply with the set of BMPs approved by Douglas

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<sup>106</sup> Colo. Dep’t of Pub. Health and Env’t, Water Quality Control Div., *CDPS General Permit: Stormwater Discharges Associated with Municipal Separate Storm Sewer Systems (MS4s)*, Permit No. COR-090000, § I.B.2. (2008), available at <http://www.cdphe.state.co.us/wq/PermitsUnit/MS4/2008MS4090000permit.pdf>, at 9.

<sup>107</sup> *Id.*

<sup>108</sup> 5 Colo. Code Regs. § 1002-72 (LexisNexis 2011), available at <http://www.cdphe.state.co.us/regulations/wqccregs/100272cherrycreeknew.pdf>, at 40.

<sup>109</sup> 5 Colo. Code Regs. § 1002-72.7.2.(b)(4)(i) (LexisNexis 2011).

<sup>110</sup> 5 Colo. Code Regs. § 1002-72.7.2.(b)(5) (LexisNexis 2011).

<sup>111</sup> Douglas Cnty. Dep’t of Pub. Works Eng’g Div., *Grading, Erosion, and Sediment Control (GESC) Manual*, Dep’t of Pub. Works Eng’g Div., at 1-4 (March 2004); 5 Colo. Code Regs. § 1002-72.7.2 (LexisNexis 2011).

<sup>112</sup> 5 Colo. Code Regs. § 1002-72. Basis and Purpose 72.7, 40 (2010).

<sup>113</sup> Douglas Cnty. Dep’t of Pub. Works Eng’g Div., *Grading, Erosion, and Sediment Control (GESC) Manual 2-1* (March 2004).

<sup>113</sup> *Id.* at 1-5.

<sup>114</sup> *Id.* at 2-1.

County.<sup>115</sup>

COGCC Rule 1002f.(2) outlines stormwater BMPs that must be applied to all oil and gas locations, including (A) covering materials and activities and stormwater diversion; (B) materials handling and spill prevention procedures and practices; (C) erosion controls; (D) self-inspection, maintenance, and good housekeeping procedures and schedules; (E) spill response procedures; and (F) vehicle tracking control practices.

These CDPHE, COGCC, and Douglas County regulations do not conflict with one another, but rather require different actions from different entities. Douglas County must implement a program to comply with the requirements of both the CDPS General Permit and the Cherry Creek Reservoir Control Regulation. An oil and gas operator operating in Douglas County must comply with the (1) CDPHE's Regulation 61 by obtaining appropriate state permits for any construction activity, Cherry Creek Reservoir Control Regulation by submitting an Erosion and Sediment Control Plan to Douglas County as well as employing the list of required construction BMPs, (3) GESC by obtaining the proper permit from Douglas County for construction activities, and (4) COGCC rules by employing the stormwater BMPs listed in Rule 1002f.(2).

### ***Post-Construction Stormwater Management***

The CDPHE's General Permit and Cherry Creek Reservoir Control Regulation, COGCC rules, and Douglas County's GESC Program all require post-construction stormwater management and BMPs.

CDPHE's CDPS General Permit requires that Douglas County develop and implement a program that addresses stormwater runoff from new development and redevelopment projects that disturb greater than one acre.<sup>116</sup> This program must meet the following criteria:<sup>117</sup>

- 1) Develop, implement, and document strategies which include the use of structural and/or non-structural BMPs appropriate for the community that address the discharge of pollutants from new development and redevelopment projects, and/or that maintain or restore hydrologic conditions at sites to minimize the discharge of pollutants and prevent in-channel impacts associated with increased imperviousness;
- 2) Use an ordinance or other regulatory mechanism to address post-construction runoff from new development and redevelopment projects to the extent allowable under State or local law;
- 3) Develop, implement, and document procedures to determine if the BMPs required under Item (1), above, are being installed according to specifications. (This may be developed and implemented in conjunction with the Construction program area, as described in Part I.B.4);
- 4) Develop, implement, and document procedures to ensure adequate long-term operation and maintenance of BMPs, including procedures to enforce the requirements for other parties to maintain BMPs when necessary;

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<sup>115</sup> *Id.* at 3-5.

<sup>116</sup> Colo. Dep't of Pub. Health and Env't, Water Quality Control Div., *CDPS General Permit (Permit No. COR-090000)*, 9-10 (2008).

<sup>117</sup> *Id.* at 9.

- 5) Develop, implement, and document an enforcement program, which addresses appropriate responses to common noncompliance issues, including those associated with both installation (subparagraph (3), above) and long term operation and maintenance (subparagraph (4), above) of the required control measures;
- 6) Develop and implement procedures and mechanisms to track the location of and adequacy of operation of long- term BMPs implemented in accordance with the program.

Under the Cherry Creek Reservoir Control Regulation, Douglas County must also develop a post-construction stormwater program for, at a minimum, those portions of the MS4 that drain into the Cherry Creek Basin.<sup>118</sup> This program must require the developer to submit for county approval a post-construction BMP plan that addresses, at a minimum, long-term operation and maintenance of required post-construction BMPs.<sup>119</sup> The Cherry Creek Reservoir Control Regulation contains a list of required post-construction BMPs that must be included in the developer's plan.<sup>120</sup>

GESC Permits issued by Douglas County, in the case of projects other than single-family residences, are active until revegetation has reached completion and "Final Close-out Acceptance is granted."<sup>121</sup> If a permit expires and is not renewed, seeding and mulching is required.<sup>122</sup>

COGCC Rule 1002f.(3) applies to oil and gas locations where there is a construction stormwater permit issued by the CDPHE.<sup>123</sup> Under this rule, the operator must develop a Post-Construction Stormwater Program no later than the time of termination of the stormwater permits issued by CDPHE for the construction of oil and gas facilities.<sup>124</sup> The program must include BMPs selected to (1) "serve the purposes of this rule," (2) address potential sources of pollution which may reasonably be expected to affect the quality of discharges associated with the ongoing operations of the facilities, and (3) address pollutant sources associated with the transport of chemicals and materials, vehicle/equipment fueling, outdoor storage activities, produced water and drilling fluids storage, outdoor processing activities and machinery, significant dust or particulate generating processes, erosion and vehicle tracking from well pads/roads/pipelines, waste disposal, leaks and spills, ground-disturbing maintenance activities.<sup>125</sup> Furthermore, a "qualified person(s)" must develop, supervise, and document the Post-Construction Stormwater Program. Finally, the program must include facility-specific maps, installation specification, and implementation criteria when general operating procedures and descriptions are not adequate to describe the implementation and operation of BMPs.<sup>126</sup>

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<sup>118</sup> 5 CCR 1002-72.7.2(c)(6).

<sup>119</sup> *Id.*

<sup>120</sup> 5 CCR 1002-72.7.2(c)(6).

<sup>121</sup> Douglas Cnty. Dep't of Pub. Works Eng'g Div., *Grading, Erosion, and Sediment Control (GESC) Manual* 3-36 (March 2004).

<sup>122</sup> *Id.*

<sup>123</sup> 2 Colo. Code Regs. § 404-1:1002f.(3) (LexisNexis 2011).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

These post-construction stormwater requirements from CDPHE, COGCC, and Douglas County do not conflict. First, COGCC regulations do not conflict with CDPHE. In fact, COGCC rule 1002f. is specifically “not intended to be seen as overlapping with the CDPHE/WQCD stormwater permitting requirements...[o]nce the CDPHE stormwater permit is inactivated for a specific location the stormwater requirements under [Rule 1002f.] will become effective for that location.”<sup>127</sup> Second, COGCC rules do not conflict with the GESC program. The GESC program requires seeding and mulching as soon as earthwork is complete, while COGCC rules exceed this standard by specifically stating that, “[r]e-seeding alone is not sufficient” to meet revegetation requirements once a well has been completed for production.<sup>128</sup>

### ***Revegetation Requirements***

Both the Cherry Creek Reservoir Control Regulation and COGCC Rules require post-construction revegetation of disturbed land. The Cherry Creek Reservoir Control Regulation requires soil stabilization and revegetation of disturbed areas within 14 days after construction activity temporarily or permanently ceases.<sup>129</sup> COGCC requires that when a well is completed for production, “all disturbed areas no longer needed will be restored and revegetated as soon as practicable.”<sup>130</sup>

While these rules overlap in that they both contain revegetation requirements after construction operations have ceased, they do not conflict unless it is not “practicable” for the oil and gas operator to comply with the COGCC and Cherry Creek Reservoir Control Regulation requirements within the 14-day timeframe mandated by the Cherry Creek Reservoir Control Regulation. Such a situation might arise if construction in an area ceases when soils are frozen or saturated or otherwise not practicable for revegetation. Nonetheless, compliance with both regulations is required, meaning that oil and gas operators must stabilize the soil and revegetate the disturbed area as soon as practicable or within 14 days after construction activity has temporarily or permanently ceased, whichever comes first. Presumably, if revegetation were not practicable within the 14-day period, the operator would stabilize the area and seek a time extension for completing the revegetation process in a more timely manner.

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<sup>127</sup> 2 Colo. Code Regs. § 404-1:App. I (LexisNexis 2011).

<sup>128</sup> 2 Colo. Code Regs. § 404-1:1003e.(2) (LexisNexis 2011).

<sup>129</sup> 5 Colo. Code Regs. § 1002-72.7.2(b)(5)(ii) (LexisNexis 2011).

<sup>130</sup> 2 Colo. Code Regs. § 404-1:1003e. (LexisNexis 2011).