

# SULLIVAN GREEN SEAVY LLC

## COLORADO LEGAL AUTHORITIES RECOGNIZING LOCAL GOVERNMENT POWERS TO REGULATE LAND USE IMPACTS OF OIL AND GAS OPERATIONS

Prepared by  
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November 2012

- I. **Local governments have authority to regulate land use impacts relating to oil and gas operations.**
  - A. Local Government Land Use Control Enabling Act of 1974 (C.R.S. §§ 29-20-101, *et seq.*).
  - B. County Planning Code (C.R.S. §§ 30-28-101, *et seq.*).
  - C. *See Board of County Commissioners of La Plata County v. Bowen/Edwards Associates*, 830 P.2d 1045, 1056 (Colo. 1992) (“*Bowen/Edwards*”).
  - D. *See also Voss v. Lundvall Brothers, Inc.*, 830 P.2d 1061, 1064-65 (Colo. 1992) (Home rule city has land use authority under Colo. Const. art. XX, § 6 and C.R.S. §§ 29-20-101, *et seq.*).
- II. **Local governments can regulate impacts of oil and gas development in the same way they regulate any other development through land use permits and regulations within the scope of their ordinary land use authority. Counties have a legally protected interest to enact and enforce regulations governing land use impacts of oil and gas operations. *Board of County Commissioners of La Plata County v. COGCC*, 81 P.3d 1119, 1124 (“*La Plata County*”). Counties have standing to file suit to protect this interest. *See id.***
- III. **Preemption of local regulations by state law is not presumed.**
  - A. Express Preemption. With the exception of two areas of regulation described below, the Colorado Oil and Gas Conservation Act does not expressly preempt local regulation of the impacts of oil and gas

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operations.<sup>1</sup>

1. Monitoring fees. C.R.S. 34-60-106(15) prohibits assessment of fees for inspection and monitoring of oil and gas operations.
  2. Access to records. The court has held that “[s]tate statute and rule exclude the county by omission as an entity authorized to inspect the records” that the COGCC requires operators to keep. *Board of County Commissioners of Gunnison County v. BDS International, LLC*, 159 P.3d 773, 779 (Colo. App. 2006) (“BDS”). See also *Bowen/Edwards*, 830 P.2d at 1057.
- B. Implied Preemption. No implied preemption (a/k/a "field preemption" or "occupying the field"). *Bowen/Edwards*, 830 P.2d at 1058-59.
- C. Preemption when operational conflict is shown. With the exception of the areas discussed above under “*Express Preemption*,” local government regulations are preempted ONLY where an "operational conflict" is shown. *Bowen/Edwards*, 830 P.2d at 1059-60.
1. "Preemption by reason of operational conflict can arise where the effectuation of a local interest would materially impede or destroy the state interest." *Bowen/Edwards*, 830 P.2d at 1059-60. See also *Town of Frederick v. North American Resources Company*, 60 P.3d 758, 761 (Colo. App. 2002) (“Town of Frederick”).
  2. If the local interest and the state interest can be harmonized, there is no operational conflict. *Bowen/Edwards*, 830 P.2d at 1060; *Voss v. Lundvall Brothers, Inc.*, 830 P.2d at 1068-69.

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<sup>1</sup> Other state and federal laws expressly preempt three other areas of local government regulation:

Point source discharges. Colorado Water Quality Control Act preempts local government regulation of point source discharges. CWQCA, § 202(7)(b)(I).

Injection of fracking fluids into the aquifer. Federal law preempts local government regulation of injection of contaminants into aquifers during fracking. See Safe Water Drinking Act, and Energy Policy Act of 2005.

Noise. County Powers Statute does not allow counties to regulate noise impacts caused by oil and gas operations. C.R.S. § 30-15-401(1)(m)(II)(B).

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3. Determination of operational conflict must be resolved on an *ad hoc* basis with a fully developed evidentiary record. *Bowen/Edwards*, 830 P.2d at 1060.
4. "Operational conflict" does not mean "any conflict." *La Plata County*, 81 P.3d at 1124.(emphasis added).
5. Local regulations in same subject matter area as state laws are not automatically preempted under operational conflicts preemption (*i.e.* operational conflicts test is not a "same subject matter test"). *BDS*, 159 P.3d at 783-85; *C&M Sand and Gravel v. Bd. of County Comm'rs of Boulder County*, 673 P.2d 1013, 1016 (Colo. App. 1973).

## IV. Amendments to the Oil and Gas Conservation Act since 1992 have not preempted local government authority to regulate impacts of oil and gas operations.

- A. *Town of Frederick*, 60 P.3d at 762-63 (Analyzing 1994 and 1996 amendments).
- B. 2007 Amendments, House Bill 07-1341, House Bill 07-1298. See C.R.S. §§ 34-60-106(15), 34-60-127(4)(c), and 34-60-128(4) (*nothing in this section shall establish, alter, impair, or negate the authority of local governments to regulate land use related to oil and gas operations*); see also COGCC Rule 201.
- C. Order dated September 16, 2011, *SG Interests I, Ltd. v. Board of County Commissioners of the County of Gunnison, Colorado*, Case No. 2011 CV 127, Gunnison County District Court (Patrick, J.), p.5, ¶ 2, (2007 Amendments to Oil and Gas Conservation Act did not "occupy the field" or affect existing land use authority of local governments.)

## V. Local governments are not expressly or impliedly preempted by federal law from regulating impacts of oil and gas activities on federal lands. *BDS*, 159 P.3d at 783-85.

## VI. Current Events

- A. *COGCC v. City of Longmont*, Case No. 2012-CV-702, Boulder County District Court.

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- B. *KP Kaufmann Company, Inc. v. Town of Frederick*, Case No. 12-CA-0037  
(Unpublished opinion on Inspection Fee and C.R.S. § 34-60-106(15)).
- C. COGCC rulemaking re: statewide setbacks and aesthetic and noise control.
- D. City of Longmont fracking ban (passed November 6, 2012).

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Table

SUMMARY OF LOCAL GOVERNMENT AUTHORITY  
OIL AND GAS REGULATION

SUBJECT MATTER	PREEMPTED? NOT PREEMPTED? OPERATIONAL CONFLICT?	LEGAL AUTHORITY
<b>Water Quality Impacts</b>	Not Preempted	<i>Town of Carbondale v. GSS Props., LLC</i> , 144 P.3d 53 (Colo. App. 2005)  “Protection of water supplies is a matter of both state and local concern and may be regulated by local governments.”
<b>Regulations to Prevent Significant Degradation to Water Quality</b>	Not Preempted	<i>BDS</i> , 159 P.3d at 780 (Evidentiary hearing required to determine whether there is operational conflict)  Order on Cross Motions for Summary Judgment (January 3, 2012), <i>SG Interests I, Ltd. v. Board of County Commissioners of the County of Gunnison, Colorado</i> , Dist. Court Gunnison County, 2011 CV 127, pg. 5, ¶13
<b>Point Source Discharges</b>	Preempted	CWQCA, § 202(7)(b)(I)  Water Quality Control Division is “solely responsible for the issuance and enforcement of permits authorizing point source discharges into surface waters of the state affected by such discharges, . . .”
<b>Non-Point Source Discharges</b>  • e.g., soil erosion control and sediment control to prevent or minimize non-point source discharges	Not Preempted	<i>BDS</i> , 159 P.3d at 780-81 (evidentiary hearing required)

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SUBJECT MATTER	PREEMPTED? NOT PREEMPTED? OPERATIONAL CONFLICT?	LEGAL AUTHORITY
<b>Wildlife and Vegetation</b>	Not Preempted	<i>BDS</i> , 159 P.3d at 780-81 (evidentiary hearing required)
<b>Livestock</b>	Not Preempted	<i>BDS</i> , 159 P.3d at 781 (evidentiary hearing required)
<b>Geologic Hazards</b>	Not Preempted	<i>BDS</i> , 159 P.3d at 781 (evidentiary hearing required). <i>See also</i> C.R.S. §§ 24-65.1-201(1)(c) (Areas and Activities of State Interest (“1041”))
<b>Cultural and Historic Resources</b>	Not Preempted	<i>BDS</i> , 159 P.3d at 781 (evidentiary hearing required). <i>See also</i> C.R.S. §§ 24-65.1-201(1)(c) (Areas and Activities of State Interest (“1041”))
<b>Wildfire Protection</b>	Not Preempted	<i>BDS</i> , 159 P.3d at 781 (evidentiary hearing required)
<b>Recreation</b>	Not preempted	<i>BDS</i> , 159 P.3d at 781 (evidentiary hearing required)
<b>Regulations that Require Information Required by Other Entities</b> <ul style="list-style-type: none"> <li>• regulations requiring an entity to provide water quality information that it must also provide to other regulators, to disclose the results of monitoring it is doing for other regulators, or to explain the extent of mitigation it is proposing to perform as a result of other permitting.</li> </ul>	Not Preempted	Can be harmonized with state law
<b>Water Body Setbacks</b>	Not Preempted	<i>BDS</i> , 159 P.3d at 780 (evidentiary hearing required)

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SUBJECT MATTER	PREEMPTED? NOT PREEMPTED? OPERATIONAL CONFLICT?	LEGAL AUTHORITY
<b>Regulation of the Injection of Fracking Fluids into Aquifers</b>	Preempted	Federal law would preempt county regulation of injection of contaminants into aquifers during fracking. See Safe Water Drinking Act, and Energy Policy Act of 2005
<b>Regulation that Requires the Installation of Monitoring Wells as a Condition of Permit Approval</b>	Preempted if operational conflict is shown	
<p><b>Regulation of “Technical Aspects” of Oil and Gas Operations</b></p> <ul style="list-style-type: none"> <li>• regulation of drill casing, fluids injected, process, etc.</li> <li>• regulation of the <u>land use impacts</u> caused from these processes</li> </ul>	<p>Preempted if operational conflict is shown</p> <p>Not Preempted</p>	<p>No case states that all local regulation of the “technical aspects” of oil and gas drilling is preempted. Whether local regulations addressing technical aspects of oil and gas activities are valid should be based on the “operational conflicts” test. <i>Bowen/ Edwards</i>, 830 P.2d at 1060</p> <p><i>Town of Frederick</i>, 60 P.3d at 765</p>
<b>Regulation of Oil and Gas Activities Occurring on State Land Board Lands</b>	Not Preempted	<i>Colorado State Bd. of Land Comm'rs v. Colorado Mined Land Reclamation Bd.</i> , <a href="#">809 P.2d 974</a> , 982-85 (Colo. 1991); <i>Bowen/Edwards</i> , 830 P.2d at 1058
<b>Noise Regulations</b>	Preempted	C.R.S. § 30-15-401(1)(m)(II)(B) County Powers Statute does not allow counties to regulate noise impacts caused by oil and gas operations.





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SUBJECT MATTER	PREEMPTED? NOT PREEMPTED? OPERATIONAL CONFLICT?	LEGAL AUTHORITY
permit conditions.		
<b>Total Ban on Oil and Gas Development</b>	Preempted	Voss, 830 P.2d at 1068-69. (Total ban on all oil and gas development within the county conflicts with state's interest in efficient development and production of oil and gas)
<b>Ban on Oil and Gas Operations in Certain Zoning Classifications</b>	Open Question	<i>Colorado Mining Association v. Board of County Commissioners of Summit County</i> , 199 P.3d 718, 731 (Colo. 2009) (County planning authority generally does not include the right to ban uses from all zoning districts. Local land use authority is typically exercised by designating appropriate areas for different land uses and placing conditions on those uses.)
<b>Permits for Oil and Gas Operations Taking into Account Consistency with the Comprehensive Plan, Compatibility with Adjacent Uses, Impact on Public Services, Traffic, Pollution, Landscaping, and Similar Factors</b>	Not Preempted	<i>C &amp; M Sand and Gravel v. Bd. of County Comm'rs of Boulder County</i> , 673 P.2d 1013 (Colo. App. 1983) (upheld county special use permit requirements for mining activities).  See also <i>Town of Frederick</i> , 60 P.3d at 765-66; <i>BDS</i> , 159 P.3d at 778
<b>Can Counties Ban Fracking?</b>	Preempted if operational conflict is shown	Better course of action is to regulate the land use impacts caused by the use of the technology. Banning this technology likely imposes a technical condition that conflicts with state regulatory scheme. See <i>Bowen/Edwards</i> , 830 P.2d at 1060