

**ATTACHMENT F**

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Board of County Commissioners  
Garfield County  
Administration  
108 8<sup>th</sup> Street  
Glenwood Springs, Colorado 81601

Re: Comments on the Second Draft of the Battlement Mesa Health Impact Assessment

Dear Commissioners:

Attached on behalf of Antero Resources Piceance Corporation ("Antero") is a copy of Antero's "Comments on the Second Draft Battlement Mesa Health Impact Assessment" submitted today to the Colorado School of Public Health ("CSPH" or "HIA authors"). See Exhibit A. Antero provides a copy of these comments to the Garfield County Board of County Commissioners ("Board") so that the Board may have the benefit of Antero's concerns during its own review of the Second Draft of the Battlement Mesa Health Impact Assessment ("Second Draft HIA").

The attached materials consist of the following:

- General comments on the Second Draft HIA;
- An expert report from ENVIRON International Corporation ("ENVIRON") commenting on the Second Draft HIA and Human Health Risk Assessment ("HHRA");
- A detailed response to each of the proposed recommendations in the Second Draft HIA;
- A chart describing existing state, federal and local regulations and requirements that apply to the areas addressed by the proposed recommendations;
- A memorandum regarding existing federal and state law protection for ambient air quality; and
- A report by S.S. Papadopolus & Associates that confirms that natural gas production in the Battlement Mesa and Gravel Trend areas has not impacted the quality of groundwater that serves as a potable water supply.

Antero's comments demonstrate that the Second Draft HIA is fundamentally flawed for lack of appropriate scientific basis, objectivity, and consideration of existing regulation, cost and feasibility, among many other substantial shortcomings. Its recommendations are not based on a realistic

assessment of impacts or a consideration of legal requirements and operational measures that will mitigate or avoid actual impacts. These problems with the Second Draft HIA are so extensive that it does not provide a reliable tool for permitting and policy decisions of Garfield County in connection with Antero's proposed oil and gas operations in the Battlement Mesa PUD or elsewhere. For this reason, Antero respectfully requests that the Board not approve or rely on the HIA in anything close to its present form. Adoption of the HIA would not be appropriate unless the HIA is substantially revised in order to provide an objective, scientifically valid, and legally supportable analysis of likely health impacts and the adequacy of mitigation measures to be utilized in Antero's oil and gas operations in Battlement Mesa.

The prior Board initiated the Battlement Mesa Health Impact Assessment ("HIA") to assess oil and gas operations proposed by Antero within the Battlement Mesa Planned Unit Development ("PUD"). Antero participated in the HIA process in many ways, including but not limited to: attending public meetings, providing privately collected data, submitting information regarding its proposed Best Management Practices ("BMPs") and commenting on the First Draft of the HIA ("First Draft HIA"). In addition, other comments were provided on the First Draft HIA by both West Slope Colorado Oil and Gas Association ("WSCOGA") and by the Colorado Department of Public Health and Environment ("CDPHE"). Antero remained optimistic throughout the HIA process that the stakeholder meetings and comment process would encourage completion of a scientific, objective and valid assessment that would identify likely impacts and consider appropriate, cost-effective and technically feasible mitigation measures to accomplish demonstrated benefits in connection with Antero's planned oil and gas operations within and around the Battlement Mesa PUD. However, the Second Draft HIA comes nowhere close to this goal.

Antero's initial concerns regarding the HIA arose during review of the First Draft HIA. Many of Antero's concerns with the First Draft HIA were expressed by members of this Board during a December 13, 2010 public hearing, including: (1) the First Draft HIA left much open for interpretation; (2) the First Draft HIA contained more theory (i.e., possibilities) than facts; (3) the First Draft HIA seemed designed to be used as political tool against oil and gas operations; and (4) the First Draft HIA expanded beyond the initial scope of the Battlement Mesa PUD and appeared to address oil and gas operations on a broader basis (i.e., regional and national). Overall, the Board concluded that the First Draft HIA needed more work before it could be used as a reliable predictor of realistic concerns. As a result, this Board delayed the finalization of the HIA to allow for additional stakeholder meetings and another round of public comments on the Second Draft HIA. In taking this step, the Board clearly expected that the HIA authors would take its concerns and the public comments – including those from industry – into account.

Unfortunately, that did not happen. The Second Draft HIA is a highly flawed document which downplays or ignores the concerns expressed by industry and the CDPHE and accepts without critical inquiry many of the suggestions of citizen groups opposed to oil and gas development. The HIA authors have indicated their intent not to consider in any meaningful way the comments submitted on the Second Draft HIA. According to the Garfield County website (which houses the Second Draft HIA and related materials), the HIA authors have unilaterally declared that they will not accept comments about the HIA authors' response to public comments apparently without regard to the inadequacy of their responses to the first round of public comments. On March 17, 2011, the

HIA authors submitted a written response to Antero's request for an extension of the comment period for the Second Draft HIA which stated as follows:

- Any additional data provided by Antero or WSCOGA at this time is not likely to substantively change the recommendations of the HIA.
- The industry focus on the risk assessment is not likely to substantively change the recommendations.
- Any assumptions made by WSCOGA/Antero consultants with regard to alternate risk assessment methods and proposed mitigations are not substantiated. Although manipulation of assumptions may result in lower risk numbers, these alternate risk assessments will not substantively change our recommendations.

The lack of receptivity of the HIA authors to critical input simply underscores the lack of objectivity in their work product.

Based upon the continuing problems with the Second Draft HIA and the HIA authors' stated unwillingness to consider revisions to it, Antero remains concerned that many of the problems contained within the First Draft HIA (including those expressed by this Board) will carry through to a final published HIA. As a result, Antero's comments focus less on the ways in which the Second Draft HIA can be improved and instead concentrate on the serious flaws, inconsistencies, inadequacies and scientific shortcomings in the Second Draft HIA and accompanying Human Health Risk Assessment ("HHRA") so that anyone considering use of the HIA – such as this Board – will have an accurate and more balanced view of the matters addressed in the Second Draft HIA.

Antero has recently learned, in part from statements the HIA authors have made to the press, that the Battlement Mesa HIA (either in its current draft form or final form) could potentially be used (1) as a model for the Environmental Protection Agency ("EPA") and other federal agencies in regulatory decision-making; (2) as a model for other researchers and activist groups contesting oil and gas operations across the United States; and (3) as a litigation tool by plaintiffs' lawyers bringing civil lawsuits against oil and gas companies. See Attachment A to Antero Comments on Second Draft HIA. Any such use of the HIA would be misguided considering the serious flaws of the HIA, and it is critical that this Board not encourage such use by approving the HIA in anything close to its present form or relying on it for any purpose in connection with its review of proposed oil and gas operations in the Battlement Mesa PUD or elsewhere in Garfield County.

In fact, the Board's adoption of the HIA recommendations would be unlikely to withstand legal challenge. Most of the key recommendations contained in the Battlement Mesa HIA – and certainly all of the major recommendations regarding protection of air and water quality - address subjects currently governed by an extensive framework of federal and state regulation, including regulation by CDPHE and the Colorado Oil and Gas Conservation Commission ("COGCC"). The Second Draft HIA frankly admits that the authors did not take this existing regulatory framework into account or try to analyze their effectiveness in addressing the health concerns analyzed. Instead, the authors recommend that the Board take over the role from other state and federal agencies of overseeing the technical and operational aspects of oil and gas development, a role for which the County has neither legal authority, expertise nor resources to fulfill.

To assist the Board in understanding how existing regulation already addresses the concerns identified, including existing regulations by Garfield County under its land use code, we have prepared as Attachment D to Antero's Comments a side-by-side comparison of the recommendations in the Second Draft HIA with existing state and local regulations that apply to oil and gas operations and would address most of the issues discussed.

The existence of state regulation addressing the subject matter of the recommendations raises significant issues regarding the Board's authority to adopt many of the recommendations contained within the Second Draft HIA. The doctrine of state preemption of local regulation prohibits county adoption of measures that would conflict with state regulation on a matter of statewide concern. The Second Draft HIA contains numerous recommendations that would create such conflict. The Colorado Supreme Court has stated that, "[t]he purpose of the preemption doctrine is to establish a priority between potentially conflicting laws enacted by various levels of local government." Bd. of County Comm'rs v. Bowen/Edwards Assocs., Inc., 830 P.2d 1045, 1055 (Colo. 1992). Garfield County is a statutory county and, therefore, only enjoys "those powers that are expressly granted to [it] by the Colorado Constitution or the General Assembly." Colo. Mining Ass'n v. Bd. of County Comm'rs of Summit County, 199 P.3d 718, 723-34 (Colo. 2009). Likewise, a statutory county such as Garfield County is prohibited from adopting a law that "is in conflict with any state statute." Colo. Rev. Stat. § 30-15-411 (2007). Thus, it follows that a county ordinance or regulation exceeding the authority granted by the state is invalid.

Preemption is generally divided into three categories: express, implied and operational. Express preemption occurs when "the express language of the statute may indicate state preemption of all local authority over the subject matter." Dept. of Transportation v. City of Idaho Springs, 192 P.3d 490, 495 (Colo. 2008) (citing Bowen/Edwards, 830 P.2d at 2056-57). Implied preemption is inferred "if the state statute impliedly evinces a legislative intent to completely occupy a given field by reason of dominant state interest." Id. A local law may also, however, be wholly or partially preempted "where its operational effect would conflict with the application of the state statute." Id. Thus, while local governments may issue land use permits that include conditions affecting oil and gas operations, they may not do so when "the effectuation of a local interest would materially impede or destroy the state interest." See e.g., Town of Frederick v. North American Resources Co. 60 P.3d 761 (Colo. App. 2002).

The court in Frederick has spoken directly on point explaining that, "the local imposition of technical conditions on well drilling where no such conditions are imposed under state regulations, as well as the imposition of safety regulations or land restoration requirements contrary to those required by state law, gives rise to operational conflicts and requires that the local regulations yield to state interest." Frederick, 60 P.3d at 765 [emphasis added].

This holding simply followed the directive of the Colorado Supreme Court in Bowen/Edwards, which held that "a county may not impose technical conditions on the drilling or pumping of wells under circumstances where no such conditions are imposed by state law or regulations." 830 P.2d at 1059-60. Where a County attempts to do so, the County regulations must "yield to state interest." Id. at 1060.

This is precisely what would happen if the recommendations of the Second Draft HIA were adopted as Garfield County requirements since many, if not all, of those recommendations conflict with existing regulation, either by regulating an area already comprehensively covered or by regulating more strictly than the state has chosen to regulate in the area of its primary authority. By way of illustration and not by limitation, consider the following examples of Second Draft HIA recommendations in conflict with state regulation:

- The HIA recommends that the Board require Antero to list all chemicals used within the PUD on a website approved by the Battlement Mesa Community. This overly burdensome operational requirement directly conflicts with COGCC Rule 205, adopted after an extended public rulemaking proceeding, which does not require disclosure of all chemicals regardless of use or volume. See Second Draft HIA, § 3.1 at 13, Item 2.
- The suggested requirement that Antero be required to use permitted tanks rather than a pond at a centralized water storage facility is contrary to COGCC Rule 908, which does not require the use of permitted tanks. See Second Draft HIA, § 3.1 at 13, Item 6.
- The suggested requirement to use vapor recovery rather than combustion squarely conflicts with COGCC Rule 805.b.2, which does not require vapor recovery. See Second Draft HIA, § 3.1 at 13, Item 9.

The Second Draft HIA contains numerous such recommendations which conflict with existing state law regulating air quality, water quality and soils protection, and scores of other recommendations which conflict operationally with other state regulation of oil and gas development in Colorado. These recommendations are plainly pre-empted under the principles articulated by the Colorado courts. As such, the implementation by Garfield County of these recommendations in the permitting process – in addition to being unnecessary because of the existing regulatory framework - would be subject to extended and costly legal challenge.

The existence of local regulations and requirements associated with obtaining a land use change permit raises additional concerns regarding the Board's authority to adopt many of the recommendations contained within the Second Draft HIA. The Board must approve an application for a land use change permit if the application satisfies all of the applicable requirements. See Garfield County Unified Land Use Resolution 2008, as amended ("Garfield County ULUR"), Section 4-106.A.8. However, many of the recommendations are not necessary to meet the requirements applicable to Antero's proposed oil and gas operations in Battlement Mesa, including those specified in the Battlement Mesa PUD documentation.

In addition to concerns regarding the legal import of the Board's adoption of the recommendations in the Battlement Mesa HIA, Antero respectfully requests that the Board consider the policy implications of this action. The Board's implementation of the recommendations proposed in the Second Draft HIA (or substantially similar recommendations) for oil and gas operations in or around the Battlement Mesa PUD would treat Antero differently from other operators that also operate in close proximity to residences or residential neighborhoods in Garfield County. This differential treatment would be based primarily upon the concerns expressed by certain citizens and not on the legitimacy of the existing data and scientific assessment. The Second Draft HIA itself concedes that

most of its key recommendations are not based on existing data or on demonstrated impacts, and indeed there are innumerable examples in Garfield County and in many other areas of the state where oil and gas development has occurred in proximity to local communities without the impacts speculated by the Second Draft HIA. Yet it would only be Battlement Mesa where those speculative impacts would require costly, duplicative and unnecessary precautions, threatening the viability of a project that has significant economic potential for the citizens of Garfield County.

Because of the Second Draft HIA's serious deficiencies, Antero respectfully requests that the Board not endorse, adopt or rely on it in any form for any purpose and, further, that the Board disavow the Second Draft HIA for the reasons set forth in this letter and in the Antero comment package. Otherwise, oil and gas development in Garfield County – and indeed throughout Colorado and even beyond – will be compromised by the Board's imprimatur on a highly flawed product.

Antero remains committed to working with this Board during the land use change process and otherwise, as well as the citizens in and around Battlement Mesa, to address concerns raised by its oil and gas operations and in fact has designed its operations and BMPs to go above and beyond legal requirements to address many of the concerns expressed by the community and in the HIA. Antero anticipates proposing many of these BMPs for incorporation on a site-specific basis as conditions of approval in any permits issued by the COGCC or in any special use permit approved by this Board, in accordance with each agency's respective areas of governance.

Thank you for the opportunity to submit these comments. We are happy to discuss any questions you may have.

Respectfully,



Howard L. Boigon

Attorney for Antero Resources Piceance Corporation

- cc: K. Kilstrom – Antero Resources Piceance Corporation
- K. Wilson – Antero Resources Piceance Corporation
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**EXHIBIT A**