

Environment and Wildlife: Development of New Oil and Gas Regulations –
Industry Perspective

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I. HB 07-1298 and 07-1341: Changing the Playing Field

A., HB 1298 requires the Colorado Oil and Gas Conservation Commission (“COGCC”) to administer Colorado Oil and Gas Conservation Act to “minimize adverse impacts” to wildlife resources affected by oil and gas development by doing the following:

1. Establish a timely and efficient procedure for consultation with Wildlife Commission and CDOW on decision-making impacting wildlife resources;
2. Provide for COGCC consultation and consent of affected surface owner on permit-specific conditions for habitat protection;
3. Implement, whenever reasonably practicable, BMPs to conserve wildlife resources;
4. Promulgate rules by July 1, 2008, in consultation with Wildlife Commission, to establish standards for minimizing adverse impacts to wildlife resources affected by oil and gas operations and ensure proper reclamation of habitat during and following such operations, such rules to address at a minimum:
 - a) Developing timely and efficient consultation process with CDOW governing notification and consultation on minimizing adverse impacts;
 - b) Encouraging operators to utilize comprehensive drilling plans and geographic area analysis to provide for orderly development of oil and gas fields;
 - c) Minimize surface disturbance and fragmentation in important wildlife habitat by incorporating BMPs in orders

establishing drilling units or increasing well density within units, in orders approving unit development agreements, and on a site-specific basis as COAs to drilling permits.

B. HB 1341 modified the composition and mission of COGCC:

1. Decreased industry representation, added heads of DNR and CDPHE, and added representatives of local government, environment/wildlife protection, soil conservation/reclamation, and agricultural production/royalty owner; and
2. Modified mission of COGCC to foster “balanced” development of oil and gas consistent with protection of public health, safety and welfare including protection of environment and wildlife.

C. HB 1341 also required the COGCC by April 1, 2008 to do the following:

1. Promulgate rules to establish timely and efficient procedure for review of applications for permits to drill (“APDs”) and for orders establishing or amending spacing units; and
2. Promulgate rules, in consultation with CDPHE, to protect public health, safety and welfare in conduct of oil and gas operations, and to provide a timely and efficient procedure for CDPHE to have opportunity to provide comments during COGCC decision-making process, to be coordinated with rule-making under HB 1298.

II. November 27, 2007 COGCC “pre-draft rule-making proposal” (the “Proposal”) implementing HB 1298 and 1341:

A. Proposes a comprehensive procedural and substantive overhaul of COGCC rules for obtaining permits to drill and conducting operations which industry believes goes far beyond the intent and requirements of HB 1298 and 1341 and would have significant adverse impacts on activity and production levels, with consequent adverse effects on local communities, the state economy, and consumer prices, none of which have been studied or quantified.

B. Creates open-ended, indeterminate process, with unquantifiable costs and unpredictable outcome, the antithesis of “timely and efficient” processing of drilling permits and consultation process required by HB 1298 and 1341.

C. Purpose of consultation becomes muddled: to make ad hoc site-specific decisions, consider variance requests, or establish appropriate operating standards in advance? Is it the rule for each application or the exception?

D. Creates a new regulatory regime for restricting activities on private lands for wildlife protection that would override landowner concerns and existing contract and property rights.

E. Creates potential for abdication of COGCC regulatory authority to CDOW and CDPHE.

F. Invites obstruction by recognizing unprecedented legal rights in adjacent landowners, who have no legal relationship with oil and gas operators and have every incentive to oppose proposed oil and gas operations.

G. Ignores or assumes ineffectiveness of existing COGCC rules, both procedural and substantive, which provide consultation and planning opportunities and address protection of public health, safety and welfare.

H. Creates new enforcement mechanisms based on perceptions or anecdotal evidence of unaddressed impacts rather than on scientific and empirical data.

III. Elements of the COGCC Proposal Raising Concerns for Industry

A. Form 34: a good idea gone bad

1. Creation of new Form 34 for locating oil and gas facilities to address site-specific impacts before consideration of individual APDs for such locations, thus adding another layer of regulatory approval to existing process. Was originally conceived by COGCC as a way to streamline APD process where multiple wells drilled on same pad and to provide information re significant surface disturbance. Has now morphed into a comprehensive planning tool for every drilling location that turns every proposed surface disturbance into extensive filing with innumerable opportunities for obstruction and delay (see Flow Chart) resulting in ad hoc decision-making; imposes "one size fits all" procedural requirements on all areas even where there are already mechanisms in place to protect public health and environment (e.g., Greater Wattenberg Area):

a) Extensive new information required, including detailed vegetative and reclamation plans, waste management plans, area wildlife surveys, construction and operations plans, requiring much information that may not yet be known, may change, or may not be obtainable (e.g., no landowner consent for information-gathering in required 800-meter buffer area) or merely confirms intent to comply with existing rules; will be

- costly and time-consuming to prepare, requiring significant COGCC staff time and expertise to evaluate for “completeness,” and adds no enforcement protection in addition to that provided in substantive rules;
- b) Applicable to activities on all lands in state, including federal, raising questions of pre-emption and duplication of federal and local requirements;
 - c) Surface owners and adjacent landowners given opportunities to consult, thereby inviting obstruction and delay;
 - d) “Consultation” with CDOW and CDPHE required in almost all cases;
 - e) Public comment invited to “assist the COGCC, CDPHE, and CDOW in identifying issues and concerns”;
 - f) No standards of decision stated;
 - g) Uncertain timelines for issuance of COGCC decision and processing of subsequent appeals;
 - h) CDPHE, CDOW, local government designee, surface owner, adjacent surface owner directly and adversely affected can appeal COGCC staff decision to full COGCC and potentially to court;
 - i) Applicable to all surface disturbance, including proposed wellpads, tank batteries, gathering systems, pipelines, etc., raising substantial questions of jurisdiction (does COGCC have siting jurisdiction of gathering systems?), feasibility (e.g., adjacent landowners along entire length of 20-mile pipeline), and delay (required permitting for surface facilities and gathering systems creates significant uncertainty in putting wells on production).

B. Form 35: inventory run amok

1. New requirement to file as-built facilities inventory within 30 days of installation, including each piece of equipment on location, with serial numbers, and report any changes to use or siting of equipment within 30 days of modification.

- a) Ignores reality of mobility of equipment and difficulty in tracking – entirely impractical;
- b) Intended by CDPHE to establish inventories for air quality modeling for equipment whose emissions are too insignificant to be included in APENS reporting; an attempt to accomplish indirectly what Air Quality Control Commission and Air Pollution Control Division have not done by direct rule-making;

c) Inventories of surface equipment for COGCC tracking purposes can be accomplished by filing plans and sundry notices for significant modifications.

C. Self-certification: operators to file annual certifications of compliance with all terms of approved Form 34s and all applicable COGCC rules and regulations.

1. Would criminalize rule compliance, much of which is based on interpretation – no indication why failure to comply with permit conditions or substantive rules cannot be enforced on their own like all other regulatory systems;
2. An effort by CDPHE to import concepts from Clean Air Act and solid waste management regulation to entirely different operational and regulatory systems;
3. Operators would rather see more resources go to effective enforcement than creation of broad personal exposure.

D. Comprehensive Development Plans: voluntary informal discussions between operators, COGCC, CDPHE, and CDOW to identify potential cumulative impacts from planned operations and develop potential measures to mitigate or avoid these impacts.

1. Does not avoid the Form 34 process and thus does not provide demonstrable benefits to operators.

E. Geographic Area Plans: area-wide planning covering activities of multiple operators, initiated by COGCC, with public comment and participation by CDOW, CDPHE, local governments, to identify reasonable foreseeable development scenarios and propose monitoring plans, consolidation of facilities or other measures to mitigate anticipated impacts.

1. Would not eliminate the Form 34 process or comprehensive development plan process, thus raising questions regarding efficacy of the planning process and multiplicity of effort.

F. Conduct of Health and Air Quality Studies: COGCC to enter into MOUs with CDPHE to initiate studies regarding public health impacts of oil and gas operations: toxicological and epidemiological studies of long-term exposure to high-density oil and gas development; and cumulative air quality impact analysis for selected geographic areas based on anticipated oil and gas development (e.g., Piceance Basin).

1. Industry supports peer-reviewed, scientifically based studies, believing that regulation should be based on scientific data and objective evidence, not perception and anecdote.
2. Industry is concerned about proposed collection of information regarding sources, quantity and chemical composition of products used during oil and gas operations and toxicity of fluids used in fracturing operations. Operators are already subject to SARA Title III "Community Right-To-Know Act" and OSHA disclosure requirements, and there are hundreds of products used or present in one form or another in any given drilling operation having no potential to impact public health in the manner used. Any information-gathering needs to be narrowly tailored to target demonstrable need.

G. Changes to substantive COGCC rules: the Proposal includes many proposed changes described as necessary to protect public welfare and wildlife, some of which are based on practices voluntarily implemented by operators in certain areas where warranted by unique circumstances. Among the proposals of concern to industry:

1. Required maintenance of inventories of "types and quantities of all chemicals, products, and materials used or stored onsite during site preparation, well drilling, construction, completion, stimulation, and production," without any demonstration that such an overbroad inventory would have any demonstrable relationship to any public health issue;
2. Odor management by requiring minimum setbacks and control equipment for production equipment such as glycol dehydrators and produced water pits and by requiring combustors for flaring equipment meeting emissions standards permits issued by APCD, and the establishment of odor emissions standards by AQCC along with the requirement of use of best practical control measures.
3. Required "green completion" practices whereby initial flow during production testing is directed into flowlines and other surface equipment rather than vented; this may not be practical in many areas.
4. Required establishment of Facility Spill and Runoff Control Programs during post-construction operations. Would duplicate required SPCC plans, and industry is concerned about their potential breadth, cost-effectiveness and demonstrated need.

5. Proposed modifications to COGCC's current rules on regulation of exploration and production waste management to prevent potential harm to groundwater by requiring the lining of pits and other measures. Industry does not believe there has been any showing of actual harm or threat to groundwater from existing practices but has been engaged in stakeholder discussions on these proposals.

6. Proposed new reclamation standards shortening the period for interim reclamation and establishing substantive ground cover standards for both interim and final reclamation. These standards have been the subject of extensive discussion in the stakeholder process with CDOW. Industry is concerned that specific standards are difficult to establish with certainty and that site-specific issues require tailored solutions oriented toward defined objectives rather than prescribed methods.

IV. Proposed Adoption of Wildlife Operating Standards: among the most controversial of COGCC's substantive proposals, raising substantial questions concerning the interpretation of HB 1298 and the authority of COGCC and CDOW to regulate oil and gas operations on private lands.

1. The rules would contain new Standard Operating Practices ("SOPs") developed by CDOW for the protection of wildlife that would be applicable statewide and impose requirements on every Form 34 location. They would include general operating standards, seasonal timing limitations, and restricted surface occupancy areas.

2. An operator seeking relief from an SOP would be required to seek consultation with CDOW, except that consultation would also be required to consider potential imposition of BMPs.

3. HB 1298 on its face contemplates BMPs, not SOPs, to minimize adverse impacts in drilling permits.

4. HB 1298 requires consent of surface owner to impose permit-specific conditions, such as conduct of wildlife surveys or imposition of seasonal drilling limitations, but CDOW proposal would override such consent.

5. Substantial questions exist regarding the extent of CDOW and COGCC authority to impose seasonal drilling restrictions or limitations on surface occupancy on privately owned land. HB 1298 does not contain explicit grant of such authority, which would raise substantial constitutional questions.

6. CDOW also contemplates issuing recommended or required BMPs to minimize potential adverse habitat impacts, to be implemented in the consultation process. Stated examples include consolidation of facilities to minimize surface impact, mandatory use of “pitless drilling” systems (i.e., use of tanks to store drilling fluids rather than earthen pits), minimization of vehicle trips through centralized fluid delivery systems, and required interim reclamation measures. All could potentially have significant cost impact that could render particular operations uneconomic. There is no indication in the Proposal whether any such requirements would be preceded by a cost-benefit analysis.

V. CDPHE is evolving its conception of consultation required under HB 1341

A. Based on stakeholder discussions, CDPHE position on consultation has changed from all-encompassing approach stated in the Proposal (e.g., consultation required in all “high density areas”) to a more selective approach. CDPHE is now proposing that consultation with CDPHE would be required in any of the following situations:

1. The operator requests an exception from a provision or aspect of the rule that falls within CDPHE purview (i.e. has to do with the protection of public health, welfare, safety or environment). CDPHE would review the exception request and the basis for that waiver request, review any consultation with surface owners (or adjacent land owners), and then provide recommendations, including the basis for those recommendations.

a) How does one determine what is within CDPHE purview for this purpose? CDPHE could enter into MOU with COGCC to determine which rules or requirements trigger this oversight.

2. A local government requests consultation during the permit process. CDPHE would only consult on public health, welfare and safety issues. The consultation would include input from surface owners (adjacent land owners), review of BMPs, monitoring and other potential conditions of approval and then CDPHE would make recommendations.

3. The operator requests well density increases based on the 500 series rules. This would be on a well density basis and not on an individual well basis. In this case, when well density increases are requested, CDPHE would engage in discussions with COGCC and operator.

B. Industry can support intensified monitoring and modeling to study air quality and other potential public health impacts and the development of appropriate performance measures to mitigate actual or reasonably foreseeable impacts.

