Colo.’s New Oil And Gas Law Shifts Rulemaking Landscape

By **Zachary Fitzgerald and Ivan London**

The 2019 Colorado legislative session took the state’s oil and gas-development opponents and proponents on a wild ride. On April 3, 2019, the Colorado Senate passed S.B. 19-181, which dramatically changes the regulation of oil and gas development in the state. The new governor signed it into law on April 16, 2019, and it became effective on that date. And although the legislative session recently ended, it looks like the ride will keep going — particularly in three important areas.

First, in response to a recent Colorado Supreme Court opinion,[1] S.B. 19-181 changed the state’s Oil and Gas Conservation Act so that the Colorado Oil and Gas Conservation Commission is no longer tasked with “fostering” oil and gas development. Instead, the COGCC must now “regulate” development “in a manner that protects public health, safety, and welfare, including protection of the environment[.]”

In other words, the Legislature ordered a wholesale reconsideration of how the executive branch regulates oil and gas development in Colorado, and which goals it should pursue. In a similar vein, S.B. 19-181 changed the composition of the COGCC, removing two positions previously reserved for oil and gas industry representatives.

Second, in response to other Colorado Supreme Court precedent,[2] S.B.19-181 explicitly empowers local governments with increased oversight of (1) land use related to oil and gas activities in their communities and (2) the location and siting of oil and gas facilities.

It also empowers local governments with the ability to make regulations, impose fines and enact other oil and gas regulations. Related — at least recently[3] — to local control of oil and gas development, the new law also changes the force-pooling laws, requiring 45% of owners (instead of just one owner) to approve a plan, and raising nonconsenting owners’ royalty rates.

As S.B. 19-181 appears to have been drafted specifically to do away with the Colorado Supreme Court’s holdings that state law may preempt local law regarding oil and gas regulations, it is setting the stage for legal battles. And it is anyone’s guess at this point how those will unfold.

Third — and the focus of this article — S.B. 19-181 sets out several areas in which the COGCC and the Colorado Air Quality Control Commission must make new rules. And the new law empowers the COGCC director to delay any final oil and gas permit determinations if the director determines, pursuant to objective criteria and following a public comment period, that the permit requires additional analysis for environmental or local-government review.[4]

Arguably, the new law implicitly imposes a moratorium on oil and gas permitting in Colorado, although the COGCC insists that “there is NOT a moratorium.”[5] Nevertheless, oil and gas-development opponents have demanded that regulators “halt” oil and gas permitting until they make the new rules.

Making these rules is going to require a lot of time and work. Under the Colorado Administrative Procedure Act, a Colorado court must set aside an agency’s rulemaking decision if the agency acted “arbitrarily” or, for example, made a decision that is unsupported by the evidence in the administrative record that the agency has compiled to support the decision.[6]

In practice, this means that the COGCC and AQCC will have to put a lot of time and effort into listening to the diverse interests who want to have a say in how these new rules look. That will require publishing draft rules, holding hearings, soliciting and reviewing comments and justifying any decisions made in the final rules.

The COGCC has already begun this process. But this will take time — likely years. Hence, it looks like the ride in Colorado will keep going for the state’s oil and gas-development opponents and proponents for some time.

So, what new rules must the Colorado regulators make? We have generally focused on the following:

- The COGCC must adopt rules to “evaluate and address the cumulative impacts of oil and gas development” in “consultation with the department of public health and environment.” This is no small task. It is a near-Sisyphean task that opponents of oil and gas development have used in their attempts to halt development on federal lands. It suffices for this writeup to say that whether and how to evaluate and address cumulative impacts of oil and gas development during regulatory planning and permitting is completely “up in the air” (so to speak), and frequently results in litigation.[7]

- The COGCC must make rules that (1) establish an “alternative location analysis process” and (2) specify criteria requiring oil and gas permittees to propose suitable alternative locations any time the development would be “near populated areas.” However, the statute is not clear regarding what it means to be “near” a “populated area,” or what the “alternative location analysis process” should look like.

- The COGCC must make a rule setting permit-application fees at a level that covers the COGCC's "reasonably foreseeable direct and indirect costs" incurred in analyzing permits.

- The COGCC must make rules requiring every oil and gas operator to provide assurance that it is financially capable of fulfilling every obligation under the Oil and Gas Conservation Act — rules that might disproportionately affect small operators. The COGCC's rulemaking must: (1) increase financial assurance for inactive wells and wells transferred to a new owner; (2) require a financial assurance account tied to each well, fully covering future costs to plug, reclaim and remediate; and (3) create a pooled fund to address orphaned wells.

- The COGCC must make rules "to ensure proper wellhead integrity" by (1) imposing nondestructive testing requirements of well joints and (b) requiring the certification of oil and gas field welders.

- The COGCC must review and, if necessary, amend its rules regarding flowlines and inactive, temporarily abandoned and shut-in wells, to ensure that the rules "protect and minimize adverse impacts to public health, safety, and welfare and the environment."

- The AQCC must make rules regulating methane, VOC and NOx emissions from upstream oil and gas production facilities and "transmission segments of the natural gas supply chain." The AQCC must also consider adopting more stringent requirements for, among other things, leak detection and repair. As with "cumulative impacts" analyses, these requirements echo much debated and litigated federal agency attempts to regulate air emissions from oil and gas facilities. Their inclusion in the Colorado legislation similarly signals the state's adoption of the tools that opponents of oil and gas development have used in their attempts to halt development.

In comments on the rulemaking process, the COGCC has stated, "There will be numerous opportunities for the public to become involved in the implementation of Colorado's new oil and gas law." In other words, oil and gas development opponents and proponents should prepare for years of complicated rulemaking and public comment opportunities at the Colorado agencies and a possible "soft" moratorium on development permits until that process is completed.

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[1] Colo. Oil & Gas Conservation Comm'n v. Martinez, 2019 CO 3, ¶ 41 (interpreting C.R.S. § 34-60-102, and holding that the pre-SB 19-181 version of the Oil and Gas Conservation Act demonstrates that the people of Colorado — through the State's legislative body — had decided that it is in the public interest to foster the development of oil and gas resources).

[2] E.g., City of Longmont v. Colo. Oil & Gas Ass'n, 2016 CO 29, ¶ 54 (holding that the operational effect of a home-rule city's ban on hydraulic fracturing materially impeded application of the Oil and Gas Conservation Act and its implementing regulations, and thus state law preempted the ban).

[3] See, e.g., Wildgrass Oil and Gas Comm. v. State of Colo., No. 1:19-cv-190 (D.Colo.).

[4] On April 19, 2019, the COGCC director released the initial proposed draft of the "objective criteria" that would drive these interim permitting decisions. They are located here: https://cogcc.state.co.us/documents/reg/SB_19_181/COGCC_Directors_Draft_Objective_Criteria_20190419.pdf.

[5] "What's Next for Colorado's New Oil and Gas Law," at https://cogcc.state.co.us/documents/reg/SB_19_181/Whats_Next_for_Colorados_New_Oil_and_Gas_Law.pdf.

[6] Colo. Rev. Stat. § 24-4-106(7)(b).

[7] E.g., Dine Citizens against Ruining Our Env't v. Jewell, 312 F. Supp. 3d 1031 (D.N.M. 2018) (alleging the U.S. Bureau of Land Management violated the National Environmental Policy Act by failing to analyze direct, indirect and cumulative effects of hydraulic fracturing). In the context of NEPA, federal regulation defines "cumulative impact" as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.7; see generally Wilderness Workshop v. BLM, 342 F. Supp. 3d 1145, 1154–58 (D. Colo. 2018) (contrasting foreseeable indirect impacts of oil and gas development from cumulative impacts of such development on climate change and greenhouse gases).