

SULLIVAN GREEN SEAVY LLC

MEMORANDUM

To: Board of Trustees, Town of Erie
Farrell Buller and Malcolm Fleming
From: Barbara Green, Sullivan Green Seavy
Re: Summary of SB 181 provisions of interest to local governments.
Date: June 10, 2019

This memorandum summarizes the provisions of SB 19-181 that affect the Town's regulatory authority and increase the state's responsibility to protect the public from impacts of oil and gas operations. Because SB 19-181 clarifies local government and state regulatory roles, preemption challenges to local government regulatory authority are less likely to succeed than under existing law.

The page numbers in this memo refer to the final act that awaits Governor Polis' expected signature as of April 10, 2019. The Act is available at this link:
http://leg.colorado.gov/sites/default/files/documents/2019A/bills/2019a_181_enr.pdf.

1. Amends "1041" Areas and Activities of State Interest Act – eliminates COGCC oversight of local government 1041 designation.

Removes requirement that the COGCC must first identify an area of oil and gas development before a local government can designate an oil and gas development area as an area of state interest under 1041.

Sections 1 & 2, pp. 1-2, repeals C.R.S. §24-65.1-202(1)(d) and 302.

Comment

Municipalities and counties currently have the authority under "1041" to designate and regulate matters of state interest, including mineral resource areas. Under the existing law, local governments cannot regulate a mineral resource area containing oil and gas unless the COGCC identifies the oil and gas area to be designated. This has dissuaded local governments from attempting to use their 1041 authority over oil and gas. SB 181 eliminates this requirement.

2. Amends Local Government Land Use Control Enabling Act – clarifies express local government authority over "surface impacts" of oil and gas operations.

"(1) Each local government in its respective jurisdiction has the authority to plan for and regulate the use of land by:"

“(h) Regulating the surface impacts of oil and gas operations in a reasonable manner to address matters specified in this subsection 1(h) and to protect and minimize adverse impacts to public health, safety, welfare, and the environment.”

a. Regulating surface impacts of oil and gas in subsection 1(h) includes these matters:

- land use
- location and siting
- impacts to public facilities and services
- water quality and source
- noise
- vibration
- odor
- light
- dust
- air emissions and air quality
- land disturbance
- reclamation procedures
- cultural resources
- emergency preparedness and coordination with first responders
- security
- traffic and transportation impacts
- financial securities, indemnification, and insurance, and
- all other nuisance type effects of oil and gas development.

Section 4, pp. 3-4, amends C.R.S. § 29-20-104(1)(h).

“To implement the powers and authorities in 1(h), a local government within its respective jurisdiction has the authority to. . .”

- inspect facilities,
- impose fines for leaks, spills, and emissions, and
- impose fees to cover permitting, monitoring, and inspection costs.

Section 4, pp. 4-5, adds a new section C.R.S. § 29-20-104(2).

b. Under amended C.R.S. § 29-20-104(1)(h), local governments have authority to regulate for the use of land by: “Regulating the surface impacts of oil and gas operations in a reasonable manner. . .to protect and minimize adverse impacts to public health, safety, welfare, and the environment.” Emphasis added.

“Minimize adverse impacts” means “to the extent necessary and reasonable, to protect public health, safety, and welfare and the environment by avoiding adverse impacts from oil and gas operations and minimizing and mitigating the extent and severity of those impacts that cannot be avoided.” Emphasis added.

Section 4, pp. 3-4, amends C.R.S. § 29-20-104(1)(h).

3. Amends Local Government Land Use Control Enabling Act – **technical review board.**

“(3)(a)(I) Once an operator . . . files an application for location and siting of an oil and gas facility or oil and gas location and the local government has made either a preliminary or final determination regarding the application, the local government having land use jurisdiction may ask the [COGCC] director . . . to appoint a technical review board to conduct a technical review of the preliminary or final determination and issue a report that contains the board’s conclusion.”

“(II) Once a local government determination has been made a final determination . . . or if the local government has not made a final determination . . . within two hundred ten days after filing by the operator, the operator may ask the director to appoint a technical review board to conduct a technical review of the final determination and issue a report that contains the board’s conclusion.”

“(b) A local government may finalize its preliminary determination without any changes based on the technical review report, finalize its preliminary determination with changes based on the report, or reconsider or do nothing with regard to its already finalized determination.”

“(c) If an applicant or a local government requests a technical review . . . the period to appeal a local government’s determination pursuant to Rule 106(a)(4). . . is tolled until the report. . . has been issued, and the applicant is afforded the full period to appeal thereafter.”

Section 4, pp. 5-6, adds new section C.R.S. § 29-20-104(3).

Technical review board is outlined in more detail in Section 10, pp. 13-14, amending at COGCA at C.R.S. § 34-60-104.5(3)(a).

Comment

The addition of a technical review board could provide an opportunity for an operator and a local government to avoid litigation by bringing a dispute to a technical review board. The efficacy of the technical review board will depend on the nature of the dispute and the composition of the review board. Importantly, the opinion or findings of the review board are non-binding on the local government.

4. Amends C.R.S. §30-15-401 – **restores County noise authority.**

Removes a prohibition on county authority to adopt noise ordinances for oil and gas development.

Section 5, p. 6.

5. Amends the Colorado Oil and Gas Conservation Act (COGCA) – **eliminates “foster” and requires protection of public health, safety and welfare, and environment.**

Changes the statutory charge of the Colorado Oil and Gas Conservation Commission (COGCC) to “regulate the development and production of the natural resources of oil and gas in the state of Colorado in a manner that protects public health, safety, and welfare, including protection of the environment and wildlife resources.”

Section 6, pp. 6-7, amends C.R.S. § 34-60-102.

Comment

In addition to requiring the COGCC to regulate instead of foster the oil and gas industry, eliminating the term "foster" removes the argument that local regulations to protect public health, safety, welfare and the environment are in "operational conflict" with the state's interest.

6. Amends the COGCA – **changes the make-up of the COGCC.**

Immediately upon the Governor’s signature, the COGCC make up will be 7 commission members:

- 1 with industry experience,
- 1 local government official,
- 1 with environmental protection experience,
- 1 with wildlife protection experience,
- 1 with “technical expertise relevant to the issues considered by the Commission” or training in soil conservation or reclamation,
- 1 actively engaged in agricultural production or a royalty owner,
- 1 with public health experience.
- Retains the COGCC and CDPHE Directors or designees as ex officio members.

By 2020, changes make-up of the COGCC to include 5 commission members:

- 1 with industry experience,
- 1 with land use/planning experiences,
- 1 with environmental, wildlife, or reclamation experience,
- 1 with public health expertise, and
- 1 whose experience “will aid the commission in making sound, balanced decisions.”
- Retains the COGCC and CDPHE Directors or designees as ex officio members.

Section 8, pp. 10-11, amends C.R.S. § 34-60-104.

Comment

The addition of commissioners with experience in land use and that will "aid the commission in making sound, balanced decisions" replaces two seats on the commission held by industry. This change plus the new conflict of interest provisions in this same section were designed to improve the public's confidence in the COGCC. Commission members will serve full time with pay by 2020; the implications of creating a body with full-time commissioners like the PUC are unknown.

7. Amends the COGCA – **savings provision for local regulations.**

Nothing in the COGCA “alters, impairs, or negates the authority of:
(V) A local government to regulate oil and gas operations pursuant to Section 29-20-104.”

Section 11, pp. 14-15, amends C.R.S. § 34-60-105(b).

Comment

This provision expresses legislative intent to preserve local regulatory authority over oil and gas as itemized under the Local Government Land Use Control Enabling Act. *See Part 2 of memo, above.*

8. Amends the COGCA. – **COGCC permit application requires evidence of local permit application or that no local regulations require permit.**

Requires COGCC permit application to include evidence that a) the operator has filed a permit application with the local government with jurisdiction or b) there are no local government regulations requiring such a permit. Same evidence required when applying for drilling units for forced pooling.

Section 12, pp. 16-17, for permit applications, and Section 14, p. 23, for drilling unit applications, amend C.R.S. § 34-60-106(1)(f)(I)(A) and 34-60-116(b)(I) respectively.

Comment

These provisions place the burden on the operator to determine applicable local government requirements before submitting a permit or seeking a pooling order. The COGCC cannot act on an application that does not include this information.

9. Amends the COGCA – **Director may delay permit determination.**

“[U]ntil the Commission has promulgated any rules required to be adopted by subsections (2.5)(a), (11)(c), and (19) [see Section 3, pp. 2-3] . . . and each rule specified in this subsection (1)(f)(III)(A) has become effective, the director may delay the final determination regarding a permit application if the director determines, pursuant to objective criteria. . . and following a public comment period, that the permit requires additional analysis to ensure the protection of public health, safety, and welfare or the environment or requires additional local government or other state agency consultation.”

Section 12, p. 17, amends C.R.S. § 34-60-106(1)(f)(III)(A).

Comment

To avoid the demand to issue permits for pending applications before the new COGCC Rules can be adopted, the Director may delay a final determination on a permit that requires additional analysis to protect public health, safety, and welfare or the environment or additional consultation with a local government or state agency. The Director has developed objective criteria for such delays.

10. Amends the COGCA – **mandatory protection against adverse environmental impacts and conditions/denial not waste.**

“(a) [T]he commission shall regulate oil and gas operations in a reasonable manner to protect and minimize adverse impacts to public health, safety, and welfare, the environment, and wildlife resources and shall protect against adverse environmental impacts on any air, water, soil, or biological resource resulting from oil and gas operations.

(b) The nonproduction of oil and gas resulting from a conditional approval or denial. . .does not constitute waste.”

Section 12, p. 18, adds a new C.R.S. § 34-60-106(2.5)(a-b).

Comment

This new section replaces the current language that allows the COGCC to prevent "significant adverse impacts" and requires the COGCC to "take into consideration cost-effectiveness and technical feasibility." COGCC is now required to "protect against adverse environmental impacts on any air, water, soil, or biological resource resulting from oil and gas operations.” In addition, loss of production that might occur because of COGCC regulation is not "waste." (Waste is prohibited under the COGCA.)

11. Amends the COGCA – **limitations on "forced pooling."**

“(6)(b)(I). In the absence of voluntary pooling, the commission, upon the application of a person who owns, or has secured the consent of the owners of, more than forty-five percent of the mineral interests to be pooled, may enter an order pooling all interests in the drilling unit . . .”

“(7)(a). Each pooling order must:

(IV) prohibit the operator from using the surface owned by a nonconsenting owner without permission from the nonconsenting owner.”

Section 14, pp. 23-24, amends C.R.S. § 34-60-116.

Comment

Under current law, any non-consenting owner can be "forced pooled." The amendments now require an operator to secure consent from the owners of more than forty-five percent of the mineral interests to be pooled. Local governments who own mineral rights will be able to coordinate with other mineral-rights owners. Also, under current law, the nonconsenting owner of the surface estate cannot prevent an operator from using the surface estate to access minerals in the pool, subject to the "reasonable accommodation" doctrine. The amendments now prohibit surface use of surface owned by a nonconsenting owner, including a local government, without permission.

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12. Adds a new section to COGCA titled “No land use preemption” – **local regulations may be more protective.**

Local governments and state agencies all have regulatory authority over oil and gas development, and a local government’s regulations “may be more protective or stricter than state requirements.”

Section 17, p. 27, adds C.R.S. § 34-60-131.

Comment

Many challenges to local regulations by the oil and gas industry were based on the theory that local regulations that were in addition to or more stringent than state regulations caused an operational conflict with the state interest and were therefore, preempted. This provision eliminates that challenge. Note, however, that local government regulations, and the implementation of those regulations, must still be "reasonable," and regulatory requirements or conditions must be "necessary and reasonable."

13. Amends the COGCA – **requires multiple rulemakings to address public health and safety.**