



## **COGCC Proposes Amendments to Pending Rules; Colorado General Assembly Rejects Others**

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In response to a memorandum from the Office of Legislative Legal Services (“OLLS”), the Colorado Oil & Gas Conservation Commission (“COGCC”) has docketed a rulemaking to correct a legal defect in its pending oil and gas regulations. The issue relates to the burden of initiating consultation on wildlife habitat protection measures. Under the pending rules, operators with proposed oil and gas locations in “sensitive wildlife habitat” are required to consult with the Colorado Division of Wildlife (“CDOW”) on potential mitigation measures as conditions of approval to a well permit. However, the OLLS analysis of the authorizing acts found that the burden of consultation is primarily intergovernmental, between the COGCC and CDOW. To the extent that the CDOW wishes to involve the operator, it bears the burden of initiating such consultation.

Although this change appears subtle, it is significant with respect to the dynamics of the consultation process. It will require CDOW to review and prioritize the permit applications on which it desires to consult. Instead of the operator approaching the agency, “hat-in-hand,” seeking permission to proceed, the CDOW will be approaching the operator (and the landowner) requesting consideration of wildlife measures. In many cases, especially where a variance is sought, it will still make sense for the operator to informally approach the CDOW in advance of filing a well permit. In other cases, however, the operator can file the permit application (Form 2A) and put CDOW “on the clock” with respect to comment and consultation, not to exceed 40 days.

Concurrent with this development, the General Assembly is conducting its review of the pending COGCC regulations. One of the issues raised in

committee testimony concerned the ability granted to CDOW, as well as the Colorado Department of Public Health & Environment (“CDPHE”), to suspend the issuance of a staff-approved well permit, and bring the matter before the full Oil & Gas Commission for an adjudicatory hearing. Industry objected to this provision, arguing that it far exceeded the statutory directive to provide these agencies with an “opportunity for comment” on permit applications. In addition, legislators displayed discomfort with the notion of sister agencies appealing to a board that includes the executive directors of the very same agencies as voting members. After the committee hearing, and prior to “second reading” of the rules review bill on the House floor, the COGCC announced that it had docketed a second rulemaking to delete the standing of the CDOW and CDPHE to appeal well permits.

Other industry-proposed rule amendments found little support outside of the minority House Republican Caucus. Proposed amendments rejected on a party line vote (excepting lone Democratic Rep. Wes McKinley) included:

- *Deletion of the standing to appeal well permits granted to surface owners.* Industry argued that statute does not authorize the COGCC to, in-effect, deputize surface owners to bring objections based on violations of statute or rule, or based on allegations of “potential adverse impacts” to public health, safety, welfare or the environment, including wildlife.
- *Deletion of the requirement imposed on operators to provide actual notice of well permit applications to nearby landowners, and granting such neighboring landowners the right to extend the public comment period (from 20 to 30 days).* Industry argued that this requirement is not authorized by statute – which requires notice only to the surface owner on whose property the well is to be drilled, and to the relevant local government. In addition, involving neighbors – likely to assert “nimby” objections – in the process impairs the statutory obligation on operators to “accommodate” the surface owner. Finally, granting actual notice, along with rights to extend the comment period, to nearby landowners lowers the bar for them to assert, in a judicial appeal, that they have standing based on being directly and adversely affected or aggrieved.
- *Deletion of the rule concerning obtaining landowner consent to wildlife-related conditions of approval.* Industry, allied with landowner organizations such as the Colorado Farm Bureau and Cattlemen, argued that the current rule is defective in that it does not provide for the statutorily-required landowner consent in all respects (wells are prohibited in “restricted surface occupancy” areas regardless of

landowner preference). In addition, the COGCC made landowner consent a potential pre-condition to the approval of a well permit – reserving the right to deny a permit where withheld – instead of a pre-condition only to the imposition of a wildlife restriction.

- *Removal of the May 1, 2009, effective date of the rules with respect to federal lands.* Industry argued that the COGCC should have a memorandum of agreement with BLM in-place *before* applying the rules to federal lands, in order to avoid duplication and conflict. In addition, there are significant legal barriers to the application of state land use regulation – as under the Wildlife Habitat Stewardship Act – to federal lands.

A final amendment offered by House Republicans would have delayed the effective date of the new COGCC rules until July, 2010. This proposal was based on the assertion that Colorado should not be burdening a distressed oil and gas industry, shedding drilling rigs and jobs, with the most onerous set of regulations in any producing state. This too was rejected, with one Republican, Rep. Ellen Roberts, joining the Democrats.

The next step in the rules review process is for the bill (HB 1292) to go through a parallel procedure in the State Senate, where a similar outcome is likely.



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