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Senate Bill 181 Headed to Governor's Desk

By Jim Martin

Senate Bill 181 (SB 181) is headed to the Governor's desk. This article provides a high-level review of the final version of the bill and the key amendments from the original text. Out of necessity, it omits much of the detail.

Bill Status: Last week, the Colorado House of Representatives approved a set of amendments to SB 181 and sent the amended bill back to the Senate. On Wednesday, April 3, the Colorado Senate concurred in the House amendments, approved the bill, and sent it to the Governor's office for his consideration. The Governor is expected to sign the legislation.

Final Bill: House and Senate amendments rounded off some of the bill's hard edges. The imposition of guardrails on agency and local government authority is perhaps the most important change from the bill as introduced. The professionalization of the Oil and Gas Conservation Commission (Commission) may prove equally important. Nevertheless, the final bill will significantly transform oil and gas siting and regulation in Colorado.

1. Air Quality. While the legislation principally focuses on local government and Commission authority and responsibilities, the legislation also includes significant new air quality mandates to the Air Quality Control Commission (AQCC) at the Department of Public Health and Environment. First, the Act directs the AQCC to minimize emissions of both methane and ozone precursors from all segments of the industry but provides little direction beyond that. The state already has leading-edge regulations on methane emissions from the upstream and midstream segments. It is unclear what additional methane regulations the legislative sponsors envisioned.

During the legislative debate, there were multiple references to ozone pollution. However, the AQCC already has plans to update the state implementation plan (SIP) in light of the imminent reclassification of the ozone nonattainment area as serious for one national ozone standard, and to develop a SIP for a more recent ozone standard (both are applicable in Colorado). While there may be opportunities for additional emissions reductions from the oil and gas sector, the single largest source of ozone precursors in the Denver area is mobile sources; no effort to bring the area into attainment will be successful absent significant emissions reductions from that sector.

2. Oil and Gas Pipelines. The General Assembly clearly was motivated, at least in part, by the tragic accident in Firestone that left two people dead. In response, the new legislation requires the Commission to review its flowline and pipeline regulations to ensure they protect and minimize adverse impacts, allow public access to flowline information, ensure deactivated flowlines are inspected before being reactivated, and evaluate when inactive wells are inspected before being returned to production.

However, the recently-adopted pipeline regulations already cover much of this ground; a rulemaking may be narrow in scope.

3. Land Use Jurisdiction to Local Governments. The final bill retains the core features of the legislation as it was introduced. Local governments now will have the option of regulating facility siting and surface impacts of oil and gas operations. In the case of local governments that elect to exercise those authorities, operators will have to first file permit applications with the local government with land use jurisdiction prior to or concurrently with filing requisite requests with the Commission.

The original bill referred in numerous places to "affected local governments," raising a concern that multiple local governments could assert land-use jurisdiction over a proposed facility. A House amendment clarified that it is only the local government with jurisdiction that can regulate oil and gas activities.

Many local governments will not elect to exercise these new authorities. In that case, operators will still file applications with the Commission just as they always have.

4. Local Government Guardrails. The House adopted an amendment specifying that local governments may address surface impacts but must do so "in a reasonable manner" to protect and minimize adverse impacts. The bill defines "minimize adverse impacts" to mean, to the extent reasonable and necessary, to protect public health and safety and the environment by avoiding adverse impacts and mitigating impacts that cannot be avoided. These amendments clarify that local governments cannot intrude into operational or downhole considerations and their actions must be reasonable and necessary.

5. Commission Guardrails. In parallel with the guardrails on local government authority, SB 181 constrains the Commission to regulate oil and gas operations "in a reasonable manner" to protect and minimize adverse impacts. As noted above, the term "minimize adverse impacts" is defined to require that agency actions must be reasonable and necessary.

6. Waste, Statutory Pooling & Royalties. SB 181's drafters introduced three technical changes with potentially far reaching impacts. "Waste" has been redefined to exclude nonproduction of oil and gas necessary to protect public health, safety, the environment and wildlife. SB 181 also amends the pooling statute to require an applicant to secure the consent of owners of more than 45 percent of the mineral interests to be pooled, excepting mineral interests that cannot be located. Finally, the legislation increases royalties from 12.5 percent to 13 percent for gas wells and 16 percent for oil wells.

7. Permit Backlog. One of the most contentious provisions in the original bill would have authorized the Director to refuse to issue permits upon a determination the permit required additional analysis or local government consultation. That authority would have lapsed upon the conclusion of a number of rulemakings. The final bill permits the Director to delay a final determination, based on objective criteria to be published in thirty days and following a public comment period. That authority will expire when four specific rulemakings have been completed: development of an alternative location analysis process for facilities to be located near populated areas; replacement of regulations designed to "foster" development with regulations designed to "regulate" operations; updates to the flowline regulations; and development of a method to assess cumulative impacts. These rules likely will be completed by July 1, 2020, when the Commission becomes a professional commission.

8. Technical Review Board. The final bill retains a provision that allows either a local government or an operator to request that the Director of the Commission convene a panel of experts to conduct a technical review of a local government's decision on a permit application. The board would assess: (1) impacts from a siting decision on recovery of the resource; (2) whether the local government has required technologies that are not available or are impracticable; and (3) whether the operator is using best management practices. The board can not address the economic effects of the local government's decision. While the bill does not require the local government to adjust its decision based on board review, the board will provide an operator the opportunity to make a case to a panel of experts and create a record that may be useful to the operator.

9. Change "foster" to "regulate". The final bill amends the legislative declaration in the Oil and Gas Act to replace the word "foster" with the word "regulate." Once the Act becomes effective, this seemingly simple change will force a rulemaking to make corresponding changes in the Commission's regulations. For example, expect the Commission staff to propose elimination of any reference to technological or economic feasibility as constraints on Commission authority. Determining the scope of changes needed to conform the regulations to the amended legislative declaration could be contentious.

10. A New Commission. The Act changes the format and makeup of the Commission, once in the short term and again in the longer term. Initially, the Commission will continue to be composed of seven volunteers, as well as two voting ex officio members. However, only one member need have oil and gas experience, as opposed to the current three members. The newly constituted Commission will include a local government official, a member with environmental or wildlife protection experience, a member who must be engaged in agriculture or be a royalty owner, a member with public health experience, and a member with other relevant experience. It appears the administration expects there to be some carryover from the current Commission to provide some institutional memory to enable it to complete the four rulemakings required to be completed during the time when the Director is empowered to delay final determinations on permits. The administration's goal is to complete those rulemakings before a professional commission is empaneled.

Effective July 1, 2020, the governor will appoint a professional, full-time, five-member Commission with the consent of the Senate. The Commission's composition will be similar to that of the reconstituted volunteer Commission that precedes it. The professional Commission will be charged with completion of other rulemakings—including wellbore integrity and financial assurance—as well as disposing of the other matters that come before the Commission. They may be aided by a new provision allowing the Commission to delegate contested matters to an administrative law judge or a hearing officer.

For further information regarding amendments to SB 181, or the potential impacts on your operation, please contact Jim Martin.