

IMPLEMENTING SB-181, COLORADO'S SWEEPING OIL AND GAS LAW

Beau Stark, Frederick Yarger, and Graham Valenta,
Gibson, Dunn & Crutcher LLP

I. Introduction and Background

Last year, Colorado ushered in a new era of oil and gas regulation when Governor Jared Polis signed into law Senate Bill 19-181 (“**SB-181**”). For opponents of oil and gas development, SB-181 represented a significant victory following a string of high-profile defeats, including the failure of a citizen-initiated setback measure during the previous election and the Colorado Supreme Court’s unanimous decision in *Martinez v. Colorado Oil and Gas Conservation Commission*, 433 P.3d 22 (Colo. 2019), which affirmed the state’s longstanding regulatory approach to the industry. In response to these defeats, Governor Polis, with the support of a Democratic majority in both houses of the Colorado General Assembly, pushed for legislation to reform the Colorado Oil and Gas Conservation Commission (“**COGCC**”) and its statutory mission, resulting in SB-181.

Since SB-181 was passed, the COGCC and other state regulators have encountered difficulties in implementing the law. Rulemaking at the COGCC has been contentious, and local governments have threatened to significantly restrict oil and gas development within their borders. Meanwhile, legal challenges to these regulations are likely on the horizon. While the COVID-19 crisis and turmoil in global markets have recently dominated concerns about the future of oil and gas development in Colorado, determining the state’s long-term regulatory scheme remains a top concern for both the proponents and opponents of Colorado’s oil and gas industry.

II. A Recap of SB-181’s Major Changes

SB-181 fundamentally changed Colorado’s regulatory structure for the oil and gas industry, in some cases reversing assumptions that had been a part of state law for decades. First, SB-181 granted local governments power to regulate future oil and gas development within their jurisdictions, including the power to preempt less restrictive statewide regulations. This decentralization was a dramatic shift in Colorado’s regulatory approach. In the decades before SB-181, lawmakers resisted granting local governments significant control over the industry. Doing so, they feared, would lead to an impractical patchwork of regulations across the state. SB-181 was an about-face: a local government may now impose oil and gas regulations that are stricter than those promulgated by the COGCC. COLO. REV. STAT. § 34-60-131.

Second, SB-181 altered the overall mission of state regulators. Previously, the COGCC was charged with a statutory mandate to “foster” development of oil and gas resources to achieve the “maximum efficient rate of production.” Now, under SB-181, the COGCC is required to “regulate”—not “foster”—oil and gas development in Colorado “in a manner that protects” public health and the environment. COLO. REV. STAT. § 34-60-102(1)(a). In effect, SB-181 required the COGCC to reevaluate its regulatory approach while deemphasizing full utilization of state oil and gas reserves. Consistent with this “mission change,” the COGCC is required to collaborate with the Colorado Department of Public Health and Environment (“**CDPHE**”) to address the “cumulative impact” of oil and gas development. COLO. REV. STAT. § 34-60-106(11).

Third, SB-181 called for the restructuring and professionalization of the COGCC. COLO. REV. STAT. § 34-60-104.3. Previously, the COGCC was composed of nine volunteer members. By July 1, 2020, however, membership will be reduced by two commissioners, and each of the seven will be paid, full-time government employees. Five will be newly appointed by the Governor, only one of whom is required to have industry experience. The remaining two are the Executive Directors of the Colorado Department of Natural Resources and CDPHE, who will serve as *ex officio* non-voting members.

III. Delays in the Statewide Rulemaking Process

To implement its wide-reaching reforms, SB-181 required the COGCC to undertake major rulemaking initiatives on a range of subjects, including (1) updates to the COGCC's hearing procedures (the so-called "500 Series" rules); (2) disclosure of flowline locations; (3) criteria for selection of drilling sites, including consideration of alternative locations; (4) wellbore integrity; (5) minimizing the "cumulative impact" of oil and gas development (in consultation with the CDPHE); and (6) the overall "mission change" of the COGCC. In addition, SB-181 instructed CDPHE to establish rules to minimize air and water pollution generated from exploration and development activities.

All of these rules were initially scheduled to be finalized by July 1, 2020, before the transition in the COGCC's structure and membership. But the rulemaking process has proved more contentious than expected and has been plagued by delays. As a result, the COGCC has acknowledged that it will not meet the July deadline.

The COGCC attempted to ease into the rulemaking process in June 2019 by tackling a subject thought to be relatively uncontroversial—the 500 Series, which would amend existing procedural rules. Instead, public rulemaking hearings became a battleground, with environmental groups demanding a moratorium on new drilling permits until updated health and safety regulations could be implemented. The COGCC eventually adopted updated 500 Series rules in July 2019 and new flowline rules in November 2019, but delays continue to affect the COGCC's other rulemaking proceedings.

The COVID-19 crisis has exacerbated these delays. Rulemaking hearings to address the "mission change" of the COGCC, cumulative impacts of oil and gas development, and drilling site criteria were delayed by several months. Hearings to consider rules governing wellbore integrity were rescheduled from February 2020 to April 2020 and were rescheduled again to June 2020. While the COGCC recently began holding hearings via videoconference to continue the rulemaking process, it has recognized the inadequacy of these virtual meetings for public testimony with respect to especially controversial rulemakings, such as the mission change rules. Consequently, the COGCC opted to reschedule public hearings on the mission change rules until August 24 through September 24, when the COGCC hopes to be able to hold in-person hearings. Accordingly, the COGCC will not meet its July 1st goal of completing all of the rulemaking required by SB-181. While the current commissioners may be able to complete the wellbore integrity regulations before July 1st, the ongoing rulemaking process will be completed by the newly constituted COGCC. It remains to be seen whether shifting the balance of the rulemaking proceedings to the new COGCC commissioners will further delay adoption of final rules or affect their content.

Meanwhile, CDPHE has been engaged in separate rulemaking proceedings through two of its divisions, the Air Quality Control Commission (“AQCC”) and the Water Quality Control Commission (“WQCC”). In December 2019, the AQCC adopted rules imposing increased leak detection and repair requirements on producing wells, comprehensive annual emissions reports, and more stringent emissions controls on storage tanks. At the same time, the AQCC also adopted regulations requiring oil and gas producers to obtain air-quality permits (in addition to the permit to drill required by the COGCC) before beginning exploration and production activities, eliminating a 90-day grace period under previous rules. In a future rulemaking, the AQCC will consider rules intended to reduce emissions of hydrofluorocarbons and rules requiring producers to track and report greenhouse gas emissions. Separately, the WQCC is finalizing tighter regulations governing surface and ground water, which will affect injection wells, waste disposal, and other operations.

IV. Local Regulation: Renewed Drilling Moratoriums and a Patchwork Approach

Soon after the passage of SB-181, a number of cities and counties in the Denver-Julesburg Basin enacted moratoriums on new applications for local drilling permits. The stated intent of these moratoriums was to pause oil and gas development while the COGCC and local governments updated their regulations. Given the delays plaguing the rulemaking process at the COGCC, however, some of these moratoriums have effectively banned new oil and gas development for as much as a year.

The legality of these moratoriums is unclear. Under the pre-SB-181 framework, a number of cities and counties in Colorado attempted to impose lengthy moratoriums on oil and gas activity. But the courts struck them down, and the Colorado Supreme Court confirmed that local governments did not have the power to halt oil and gas development within their borders. *City of Fort Collins v. Colo. Oil & Gas Ass’n*, 369 P.3d 586 (Colo. 2016); *City of Longmont v. Colo. Oil & Gas Ass’n*, 369 P.3d 573 (Colo. 2016). SB-181, however, granted local governments new powers—calling into question the relevance of these earlier court decisions, handed down before SB-181. In the coming months, this question may soon be decided by a trial court in Boulder County, which has been asked for a ruling that would determine the legality of the city’s ban on hydraulic fracturing under SB-181. *Our Health, Our Future, Our Longmont v. Colorado*, 2020cv30033 (Dist. Ct., Boulder Cty.).

In the meantime, local governments have proceeded to consider and impose new regulations for the oil and gas industry. One of the industry’s primary criticisms of SB-181 was that it would enable and even encourage a patchwork of local regulations across the state. For example, neighboring localities might adopt different—and perhaps inconsistent—regulations. Operating under this kind of jurisdiction-by-jurisdiction patchwork would be difficult and expensive, and perhaps impossible, for producers.

These fears appear to be well-founded. The neighboring counties of Boulder and Weld are taking diametrically opposed regulatory approaches. Boulder commissioners have proposed rules that would impose more stringent restrictions on oil and gas exploration and production and impose additional restrictions on noise, vibration, odor, and seismic testing. In contrast, Weld county rejected a permitting moratorium and has taken steps to *facilitate* new oil and gas development. For example, local officials designated unincorporated portions of the county as

“mineral resource areas of state interest,” prompting an agreement with the COGCC to address the backlog of permits affecting oil and gas development in the county.

While these two counties represent extreme approaches, they highlight the difficulties facing the industry, as producers will now have to grapple simultaneously with several sets of different state and local rules and regulations, increasing the cost and complexity of their operations.

V. Statewide Permitting Slows

One primary effect of SB-181 has been a steep decline in the approval of new well locations and drilling permits, which were down nearly 57% and 58%, respectively, in the six months after SB-181 was enacted. Greg Avery, *Colorado Oil-Well Permitting Plummeted in 2019, Stoking Industry Anxiety*, DENVER BUS. J., Jan. 15, 2020. While some of this decline can be attributed to local government moratoriums, the COGCC has also indicated that the permitting slowdown is “a reflection of the new emphasis on health, safety and the protection of the environment” created by SB-181. *Id.* Indeed, shortly after SB-181 was passed, the COGCC adopted interim permitting criteria requiring additional analysis of some drilling permit applications “to ensure the protection of public health, safety, welfare, the environment, or wildlife resources.” COGCC Operator Guidance, *SB19-181: Hearings and Permit Applications* (May 29, 2019). The recent decline in permitting has exacerbated an existing backlog, increasing operators’ uncertainty, interrupting drilling programs, and decreasing overall production.

Critics of SB-181 have long predicted that the new law could contribute to a slowdown in Colorado’s oil and gas industry. The delayed and uncertain regulatory outlook, when coupled with the COVID-19 crisis and the turmoil in global oil markets, have forced the industry to take dramatic steps, such as slashing capital expenditures, reducing or eliminating dividends, and furloughing or laying off employees. Such measures directly impact adjacent industries, including oilfield services companies, investors, and employees. So far, no major lawsuits have been filed to challenge state or local regulations promulgated under SB-181, but future legal challenges are likely given the high stakes.

VI. Conclusion

The implementation of SB-181 over the past year has been difficult. The COGCC’s rulemaking process has been contentious, leading to delays in the adoption of new regulations. Several local governments enacted moratoriums, some of which have been extended due to the delays at the COGCC. These local governments are also taking different approaches to oil and gas regulation, creating a patchwork of rules across the state. With legal challenges to the implementation of SB-181 forthcoming, SB-181 appears not to have dampened clashes between proponents and opponents of oil and gas production in Colorado. The end of Colorado’s oil and gas war is a long way off.