

**Final Statement of Basis, Specific Statutory Authority, and Purpose
New Rules and Amendments to Current Rules of the Colorado Oil and Gas
Conservation Commission, 2 CCR 404-1**

Cause No. 1R, Docket No. 1307-RM-01

Updates to Restricted Surface Occupancy Area and Sensitive Wildlife Habitat maps

On September 17, 2013, the Colorado Oil and Gas Conservation Commission (COGCC) amended the Restricted Surface Occupancy Area (RSO) and Sensitive Wildlife Habitat (SWH) maps, which are Appendix VII and VIII, respectively, to the Rules and Regulations and Rules of Practice and Procedure of the Colorado Oil and Gas Conservation Commission, 2 Code Colo. Regs., 404-1 (Commission Rules), and made conforming changes to the Commission Rule 100-Series definition of Sensitive Wildlife Habitat. This statement sets forth the basis, specific statutory authority, and purpose for the new and amended rules as required by the State Administrative Procedures Act, and is incorporated into the rules by reference. §§ 24-4-101; 103(4)(c), C.R.S.

In adopting the amended rules, the Commission relied on the entire administrative record for this rulemaking proceeding. The administrative record includes the proposed rules and recommended modifications and alternatives; public comment, written testimony, and exhibits; and public hearing testimony.

This rulemaking began on June 14, 2013, when Commission Staff filed a Notice of Rulemaking with the Colorado Secretary of State. Draft proposed rules were attached to the notice. On June 17, 2013, the Commission approved the Commission Staff's June 14, 2013 Notice of Rulemaking and formally directed COGCC Staff to proceed with the instant rulemaking.

COGCC Staff held stakeholder meetings regarding the proposed rules on June 26 and July 31, 2013. The stakeholder meetings were open to the public and were advertised on the Commission's website. Pursuant to §§ 24-4-102(14.5) and 103(2), C.R.S., Commission Staff specifically invited a diverse group of participants to the stakeholder meetings and encouraged all attendees to participate in the rulemaking hearing and comment on the effect of the proposed rules.

During the stakeholder meetings, COGCC Staff, along with representatives from Colorado Parks and Wildlife (CPW), provided an overview of the proposed rules and responded to audience questions. Upon the conclusion of these meetings, the consensus of stakeholders was that additional stakeholder meetings were unnecessary.

Statutory Authority

§ 34-60-105(1), C.R.S. (Commission has the power to make and enforce rules).

§ 34-60-128(3)(d), C.R.S. (Commission shall promulgate rules, in consultation with CPW, to establish standards for minimizing adverse impacts to wildlife resources affected by oil and gas operations).

Purpose

In order to administer the Colorado Oil and Gas Conservation Act, § 34-60-101, C.R.S. (Act), and Commission Rules in a way that minimizes adverse impacts to wildlife resources, the COGCC, in consultation with CPW, must identify and locate wildlife resources that could be impacted by oil and gas development. The most appropriate mechanism for identifying wildlife species and habitats is to require operators to review information already produced and maintained by CPW as part of its statewide wildlife management activities. The CPW has and maintains a statewide classification and mapping system that identifies RSOs and SWHs throughout Colorado. CPW routinely updates its classification and mapping system as it collects new data. The purpose of this rulemaking is to update the Commission's RSO and SWH maps with the best reasonably available scientific data to insure that consultations required under Commission Rule 306.c. are occurring in appropriate locations.

RSO and SWH maps trigger the consultation requirements of Commission Rule 306.c., which provides for consultation between the Commission, CPW, the surface owner and the operator seeking approval of a Commission Form 2A Oil and Gas Location Assessment for a proposed location in an RSO or SWH area. The purpose of consultation under Rule 306.c is to allow the Director of the COGCC to determine whether conditions of approval are necessary to "minimize adverse impacts" from the proposed oil and gas operations in the identified sensitive wildlife habitat or restricted surface occupancy area. See Commission Rule 1202.a. For purposes of Commission Rule 1202.a., "minimize adverse impacts" means, wherever reasonably practicable, to (i) avoid adverse impacts from oil and gas operations on wildlife resources, (ii) minimize the extent and severity of those impacts that cannot be avoided, (iii) mitigate the effects of unavoidable remaining impacts, and (iv) take into consideration cost-effectiveness and technical feasibility with regard to actions taken and decisions made to minimize adverse impacts to wildlife resources, consistent with the other provisions of the Act. *Id.* See also, § 34-60-128(2), C.R.S. ("The commission shall administer this article so as to minimize adverse impacts to wildlife resources affected by oil and gas operations."); § 34-60-103(5.5), C.R.S. (defining "minimize adverse impacts").

Amendments to Appendix VII (RSO map) and Appendix VIII (SWH map) of the Commission Rules

The RSO and SWH rules were first added to the Commission Rules during the Commission's comprehensive 2008 rulemaking and as a result of the passage of the Colorado Habitat Stewardship Act of 2007, House Bill 07-1298, codified at § 34-60-128, C.R.S. RSO maps are "subject to update on a periodic but no more frequent than annual basis and may be modified only through the Commission's rulemaking process, as provided in Rule 529." Commission Rule 100 Series definition of RSO. SWH maps are "subject to update on a periodic but no more frequent than biennial basis and may be modified only through the Commission's rulemaking procedures, as provided in Rule 529." Commission Rule 100 Series definition of SWH. The maps in effect prior to this rulemaking were promulgated in 2008 and had not been updated since. The purpose of this rulemaking is to update the Commission's RSO and SWH maps with the best reasonably available scientific data to insure that consultations required under Commission Rule 306.c. are occurring in appropriate locations.

The maps are based on data that CPW collects as part of several ongoing activities. First, the Species Activity Mapping (SAM) program is organized around annual meetings between the CPW Geographic Information Systems (GIS) unit, biologists and district wildlife managers. At these meetings, the GIS analysts update the various species activity areas for mapped species based on any observed changes since the last mapping session four years earlier. Since 2008, CPW has updated the SAM maps in all four CPW regions (NE, NW, SE, SW); the updated RSO and SWH maps incorporate these new data.

Second, CPW collects data on lek (strutting or booming grounds) activity for several grouse species every year. CPW also maintains a raptor database that tracks the location of raptor nests. The database is updated as CPW biologists and district wildlife managers identify new nests or monitor existing nests. Since 2008, CPW has collected new nest data annually and that information is included in new RSO and SWH maps.

Third, CPW proposed a change in the way buffers are mapped around Gunnison sage-grouse leks. Approximately 85% of Gunnison sage-grouse are known to nest within a 4 mile radius of active lek sites. The existing SWH map for Gunnison sage-grouse production areas was created by placing 4 mile buffers around lek sites and then clipping the buffers to include only the sage brush vegetation type. There have been a number of issues with these clipped buffers. This has been a particular problem in the satellite population areas outside the Gunnison basin as many of the sage brush areas occur in linear strips. CPW does not believe the current clipped buffers allow for adequate consultation to address direct and indirect disturbance to leks and adjacent nesting areas. Accordingly the 4 mile buffers are not clipped in the update to the Gunnison sage-grouse SWH production area map.

Amendments to Commission Rule 100 Series definitions

The Commission Rule 100 Series definition of Sensitive Wildlife Habitat specifies what constitutes sensitive wildlife habitat with reference to numerous identified species, including “mule deer critical winter range” and “greater sage-grouse and Gunnison sage-grouse production areas.” This rulemaking resulted in revisions to the species-specific definitions of Sensitive Wildlife Habitat as identified below.

Mule deer critical winter range

CPW and the Commission have identified an error in the 100 Series definition of mule deer critical winter range. Critical winter range includes only that portion of severe winter range occurring in Data Analysis Units with at least 7 deer per square kilometer; this criteria was omitted from the definition, even though the published map is correct. CPW suggested amending the definition so that it accurately reflects the existing map. The definitional change, by itself, will not cause a change in the number of mapped acres; instead, the definition will conform to the map.

Lesser prairie chicken focal areas

In November 2012, the United States Fish and Wildlife Service (USFS) initiated a process to consider whether the lesser prairie chicken (LEPC) should be listed as a threatened species under the Endangered Species Act of 1973, 16 U.S.C. § 1531 *et seq.* On April 1, 2013, the Lesser Prairie Chicken Working Group, in association with the Western Association of Fish and Wildlife Agencies, which includes CPW, submitted a range-wide conservation plan for the LEPC to the USFS (Conservation Plan). The purpose of the Conservation Plan is to develop a conservation strategy that ensures the improvement and long-term sustainability of the LEPC throughout its current or expanded range, thereby minimizing the likelihood the LEPC will be listed as a threatened or endangered species by the USFS.

The Commission Rule 100 Series definition of sensitive LEPC habitat has been expanded to conform to the Conservation Plan. Prior to this rulemaking, sensitive LEPC habitat was defined as LEPC “production areas (being an area that includes 80% of nesting and brood rearing habitat).” This formula created a SWH designation equal to a 1.5 mile radius around lek sites that were active from 1998-2008.

As a result of this rulemaking, sensitive LEPC habitat has been redefined as LEPC “focal areas (being an area that includes core populations and habitat necessary for a viable population).” This formula expands SWH designation to *potential* LEPC habitat in the State, whereas the prior definition was limited to *current* habitat. The “focal area” concept is a component of the

Conservation Plan and refers to those areas of greatest importance to the species, and focuses habitat enhancement, maintenance, and protection in such areas.

Redefining LEPC sensitive habitat to include focal areas results in an 86% increase in the total SWH acreage for this species (from 338,314 acres currently to 628,081 acres). The Commission emphasizes that SWH maps are used solely to trigger consultation between CPW, COGCC, operators, and the surface owner to determine whether conditions of approval are necessary to “minimize adverse impacts,” § 34-60-103(5.5), C.R.S., from the proposed oil and gas operations in the identified sensitive wildlife habitat area. Sensitive Wildlife Habitat mapped areas do not depict areas in which oil and gas development is restricted or prohibited. The Commission recognizes the consultation process imposes certain transaction costs on operators, regardless of whether the Commission ultimately concludes mitigation measures are necessary or appropriate. However, the Commission concludes such costs are justified by the additional protections consultation and, where applicable, resulting site-specific mitigation measures afford the species. This cost–benefit analysis does not hold true if SWH maps are improperly interpreted or applied to restrict or prohibit oil and gas development within SWH areas, rather than trigger consultation. Consequently, the Commission emphasizes that the SWH maps should not be construed or applied to restrict or prohibit oil and gas development within Sensitive Wildlife Habitat areas.

Greater sage grouse priority habitat

During this rulemaking the Commission chose to defer any revision to the greater sage-grouse SWH definition and also chose to refrain from updating the greater sage-grouse RSO map with more current data.

Gunnison sage grouse production areas

Prior to this rulemaking, SWH determinations for both Gunnison sage grouse and greater sage-grouse were made by reference to “production areas” through one definition which combined both species. During this rulemaking, the Commission made changes to the Gunnison sage grouse SWH definition and chose to defer any revision to the greater sage-grouse SWH definition.

Gunnison sage grouse SWH is now defined as “Gunnison sage-grouse production areas (being an area that includes a 4 mile buffer on active lek sites).” The substance of the Commission Rule 100 Series definition of greater sage-grouse SWH remains as it did prior to this rulemaking and is as follows: “greater sage-grouse production areas (being an area that contains 80% of nesting and brood rearing habitat for any population identified in the Colorado Greater Sage-Grouse Conservation Plan (CDOW, 2008).”

The revision in the SWH definition for Gunnison sage grouse results in an overall increase of 64% in SWH acreage for the species (from 650,845 acres to 1,066,858 acres). The Commission reiterates that SWH maps are used solely to trigger consultation between CPW, COGCC, operators, and the surface owner to determine whether conditions of approval are necessary to “minimize adverse impacts,” § 34-60-103(5.5), C.R.S., from the proposed oil and gas operations in the identified sensitive wildlife habitat area. Sensitive Wildlife Habitat mapped areas do not depict areas in which oil and gas development is restricted or prohibited.