



LEAGUE OF OIL AND GAS IMPACTED COLORADANS

April 29, 2019

Sent Via Email:

Jeff Robbins

COGCC Director

jeff.robbins@state.co.us

RE: LOGIC comments on SB 19-181 Draft Required Director Objective Criteria

Dear Director Robbins:

The League of Oil and Gas Impacted Coloradoans (“LOGIC”) appreciates the opportunity to submit these comments on the draft Objective Criteria dated April 19, 2019. LOGIC is a Colorado nonprofit corporation dedicated to educating and uniting citizens and community groups living near current and proposed oil and gas operations to pass policies that prioritize public health and safety, and environmental protection.

1. General Comments

LOGIC commends the General Assembly and Governor Polis for enacting urgently needed oil and gas reform; and COGCC for swiftly issuing the draft guidance for public comment. Meaningful opportunities for public involvement and participation are key to successful implementation of the new law.

The required rulemakings are a fundamental component of the new law. A measured and cautious approach on interim permit review and processing is integral to meeting the legislative directives of SB 19-181. Subject to the improvements and changes presented below and in the Attachment, LOGIC fully supports all 15 of the Draft Objective Criteria.

As stated in the Draft Criteria (at page 1), SB 19-181 provides that final determinations on permit applications may be delayed for additional analysis pursuant to Objective Criteria to be established by the Director following a public comment period. The Draft Criteria appropriately cite to four statutory provisions, including:

- Protection and minimization of adverse impacts to public health, safety and welfare, the environment, and wildlife resources and the environment resulting from oil and gas operations;
- Alternative location analysis process for oil and gas locations or facilities;

- Cumulative impacts of oil and gas development; and
- Flowline and inactive, temporarily abandoned, and shut-in wells.

All permit applications should be screened with these four provisions in mind. Alternative location analysis and cumulative impacts analysis should be performed where that analysis will better further the statutory scheme. Careful attention to flowlines and inactive, temporarily abandoned, or shut-in wells can save lives.

In finalizing the Objective Criteria, COGCC should ensure that: 1) the Objective Criteria adequately reflect the legislative language and intent by providing for delay, denial, or additional analysis of applications subject to the criteria; and 2) the Objective Criteria provide adequate discretion for COGCC and the Director to address unforeseen circumstances that qualify for delay, denial, or additional analysis.

The focus of the Draft Objective Criteria is identifying proposed permits that are appropriate for additional review or delay. This should not prevent *denying* permits where that disposition is reasonable and necessary to meet the Act’s mandate of protecting public health, safety, welfare, the environment, or wildlife resources; or pursuant to the other statutory provisions listed above.

With regard to unforeseen circumstances, the history of oil and gas and other natural resource development in Colorado teaches us that it has never been possible to fully anticipate all potential development proposals, the impacts or threats stemming from such proposals, or the need to act proactively to protect public health, welfare, safety, and the environment, including wildlife resources, to ensure protection of these values consistent with SB 19-181. This comment incorporates recommendations to address uncertainty.

At page 1, the Draft Criteria appears to assume that the purpose of additional review is to “determine whether additional measures may be necessary, and if so, staff will contact the applicant to respond to the identified issues.” The Criteria should be clarified as follows (underlining denotes proposed additions):

If a permit meets one or more Objective Criteria, it will be subject to additional review pursuant to SB 19-181. The Director and staff will determine whether additional measures may be necessary, whether the permit should be delayed until the rulemakings are complete, or whether the permit should be denied at this time. For permits where additional measures may result in an application that is consistent with SB 19-181, staff will contact the applicant to respond to the identified issues. Where appropriate, staff will engage local governments, state agencies or other appropriate stakeholders for additional consultation. It is the intent of the Objective Criteria review process to allow the Director, the applicant and, where applicable other stakeholders, the opportunity to engage in a timely and constructive dialogue to ensure permit compliance with SB 19-181. The result of the process may be to delay the permit application until the

rulemakings are complete, deny the permit, or modify the permit with additional measures following additional review.

Where a permit application or location is patently inconsistent with SB 19-181, it should be denied. Where a permit application or location raised questions that make it difficult to ascertain whether it is consistent with SB 19-181 until new rules are finalized, denial is also likely to be the most efficient disposition, subject to allowing the applicant to resubmit following the promulgation of final rules. This will allow the operator to make an initial assessment and effort to ensure that the application complies with the new law and rules.

As amended by SB 19-181, the Oil and Gas Act does not assume that all permit applications or locations are presumptively valid, either as is or after “tweaking” with additional measures. Only permit applications that ensure the protection of public health, safety, welfare, or the environment are entitled to approval. SB 19-181 establishes that complying with existing rules does not entitle permit applications to presumptive approval. The inquiry established by the Objective Criteria is required, and must be rigorously applied consistent with the new legal standards in 181.

2. Specific Comments on the Draft Objective Criteria

LOGIC generally supports the 15 draft “Objective Criteria” enumerated in the draft policy at pages 2-3. LOGIC proposes the following edits, as contained in the redlined attachment.

- 1) Locations within 1500’ of a Building Unit or 2,640 of a High Occupancy Building, which include Urban Mitigation Area (“UMA”) and Large UMA Facility (“LUMAF”) locations.

[. . .]

- 4) Locations within 2,640’ of a school property line.

[. . .]

- 14) A Request to Vent or Flare (Form 4) from a location within ~~1,500~~ 2,640’ of a Building Unit or High Occupancy Building Unit or within the Denver Metro/North Front Range ozone nonattainment area.

[. . .]

- 16) Locations for which public or other agency comments (including local government) establish threats to important wildlife species or that wildlife habitat could be threatened, including but not limited to wildlife and habitat within designated state or local open space lands.

[. . .]

17. Locations or proposed operations where extraordinary circumstances indicate the need for further review pursuant to the Oil and Gas Act or existing regulations.

- a. Extraordinary circumstances could arise for locations where public comments state compelling specific circumstances or facts indicating that additional review will further the legislative purpose of protecting public health, safety, welfare, or the environment, including wildlife resources.
- b. Extraordinary circumstances could also arise for proposed operations where recent experience indicates that additional review, including alternative site analysis, cumulative impacts analysis, and/or additional/specially tailored BMPs, might be needed to further the legislative purpose of minimizing adverse impacts in light of substantial evidence that unanticipated adverse impacts could be associated with the proposed operations. For instance, if the technologies or equipment proposed by the operator has recently been demonstrated to pose a threat to public health and safety; or new scientific information credibly establishes such a threat triggering the duty to minimize adverse impacts.

18. Permit applications where the applicant or operator fails to provide evidence to COGCC that it has obtained all required state, local and federal permits prior to commencing operations, including federal air quality permits.

3. Draft Criteria 1) and 4), Distances to Buildings and Schools:

For Draft Criteria 1) and 4), High Occupancy Building, Urban Mitigation Areas, Large UMA Facilities, and schools, 2,640 or ½ mile distances triggering additional review is necessary to protect health and safety because ½ mile is often the evacuation distance for major accidents or catastrophic fires at drilling locations. Such accidents including fires are increasingly common and well documented, presenting serious high risks to public health, safety and welfare. There is also abundant scientific and medical evidence establishing health risks from exposure to emissions within ½ mile of well sites.

For some sites, traffic, land use, demographic or other factors may complicate evacuations and compromise public safety. This information needs to be considered in permit review in the context of cumulative impacts, and be figured into alternative siting analysis. Under SB 19-181, permits should be denied for unsafe locations. This analysis will benefit oil and gas workers and emergency responders in addition to nearby residents and businesses.

4. **Draft Criteria 14), Requests to Vent and Flare**

For Draft Criteria 14), Request to Vent or Flare, venting or flaring should not be occurring anywhere in the state except under emergency conditions as a short-term response to guard against even greater threats to public health and safety. Better planning of infrastructure and timing of operations avoids the “need” to vent or flare. In CDPs and other applications, operators are already committing to avoid venting or flaring by collaborating with midstream partners to construct pipelines and ensure readiness in advance of commercial production.

The Denver Metro/North Front Range ozone nonattainment area is not the only region experiencing air quality challenges or receiving failing grades. Venting and flaring should be entirely phased out statewide. Permit applications proposing or anticipating venting or flaring should be denied. Beyond the health, safety and environmental concerns, venting and flaring wastes resources to the detriment of royalty owners and the State. Additionally, whenever COGCC is notified of venting and flaring, immediate and comprehensive notice should be provided to local government and all potentially impacted residents.

Venting, flaring, and air emissions are a concern statewide. The 2019 “State of the Air” Report Card and Rankings published by the American Lung Association establishes the need for stronger air quality protections to protect public health. See <https://www.lung.org/our-initiatives/healthy-air/sota/city-rankings/states/colorado/>

For ozone, Colorado places two cities on the top 25 most-polluted list: Denver and Fort Collins; and the report gives failing “F” grades were given to Arapahoe, Boulder, Clear Creek, Douglas, Jefferson, La Plata, Larimer, and Weld. To avoid further degradation to air quality in keeping with the cumulative impacts provision in SB 19-181, COGCC and the Colorado Air Quality Control Commission (AQCC) should at a minimum ensure that overall emissions from oil and gas do not increase prior to completion of the air quality rulemakings required by the Act. This will help guard against new spikes in asthma, and other cardio-vascular symptoms and lung disease that negatively affect public health in Colorado.

Consistent with requests from citizens and local government on the West Slope, air quality should be protected statewide. Adverse impacts have been documented statewide, including serious adverse public health impacts. Venting, flaring, and other air quality measures should not be limited to the Front Range ozone nonattainment area.

5. **Proposed Draft Criterium 16, Wildlife**

SB 19-181 provides for broader and stronger protections for wildlife than prior law. The law elevates protecting wildlife resources to the same level as current protections for public health, safety, welfare and the environment. Accordingly, the Objective Criteria need to recognize that the existing COGCC rules governing Restricted Surface Occupancy and Sensitive Wildlife Habitat are not the only circumstances that might trigger additional review based on wildlife and habitat concerns.

Proposed Criterium 16 addresses these provisions in the new law.

Colorado’s overarching commitment to wildlife declares: “It is the policy of the state of Colorado that wildlife and their environment are to be protected, preserved, enhanced, and managed for the use, benefit, and enjoyment of the people of [Colorado] and its visitors[.]” CRS § 33-1-101. Growing numbers of permit applications propose locations or operations within, traversing, or adjacent to open space lands; or near riparian areas, streams, and other locations providing important habitat for bald eagles or other wildlife species and populations treasured by Coloradoans and subject to protected under law. This underlines the need for an additional criterium specific to wildlife resources, in addition to existing criterium 6).

6. Proposed Draft Criterium 17, Extraordinary Circumstances

Proposed Criteria 17, Extraordinary Circumstances, is important to meet the statutory intent of SB 19-181 by guarding against unforeseen permit applications that endanger health, safety, welfare or the environment despite not being covered by the other Objective Criteria and arguably being consistent with existing rules.

The criteria are consistent with the directives in 181 to 1) “evaluate and address the potential cumulative impacts of oil and gas development”; and 2) adopt and conduct an “alternative location analysis process” to ensure protection of health, safety, welfare and the environment.

Precedent for additional analysis where extraordinary circumstances may be present is found under the federal National Environmental Policy Act (“NEPA”), which encompasses cumulative impacts analysis of the direct, indirect, and cumulative impacts of proposed actions; and provides for analyzing alternatives to proposed actions including alternative sites that would better protect the natural and human environment.

The federal Bureau of Land Management (“BLM”) recognizes that extraordinary circumstances disqualify proposed actions from approval as “categorical exclusions” (“CX’s”) which assume adequate site-specific NEPA analysis of direct, indirect or cumulative impacts has already been conducted. BLM CX’s are not available when the agency becomes aware of extraordinary circumstances indicating the additional analysis is necessary consistent with applicable law (which can include NEPA, the Federal Land Policy Management Act, the Mineral Leasing Act, the Endangered Species Act, etc.; or information brought to the agency’s attention by other agencies or the public.).

BLM policy provides that a CX “may be applicable to oil and gas development activities, except when BLM finds there are extraordinary circumstances[.]” See <https://www.blm.gov/policy/ib-2018-061> at page 2.

For state permits not implicating federal surface or mineral estate, the permit application to COGCC is generally the first time COGCC, other state or local agencies have to assess cumulative impacts of the proposed action. Unless subject to an approved Rule 216 Comprehensive Development Plan, cumulative impacts or alternative siting analysis will not have been conducted. Thus, the extraordinary circumstances criterium is needed to provide for adequate review where a given application raises new concerns pursuant to SB 19-181.

In 2018, COGCC was inundated with a flood of thousands of permit applications, some of which may have been hastily conceived and submitted in an effort to win approval of risky or poorly conceived proposals before the November election. These applications included proposals by operators based outside Colorado (and the United States) and without a history of operating in Colorado for permits seeking to develop minerals below or directly adjacent to: 1) the Rocky Flats Superfund site which is characterized by lingering soil contamination from manufacturing weapons-grade plutonium triggers for nuclear bombs, raising concerns for area residents, local government, and other regulatory agencies; and 2) Standley Lake, a reservoir that provides water for more than 100,000 residents of Westminster, Northglenn and Thornton.

In past years, proposals to drill near ground zero of the former underground nuclear detonation test site near Rulison on the West Slope is another high-level example of extraordinary circumstances. These examples illustrate that certain proposals which may not be covered by existing rules or the other proposed Objective Criteria must inarguably trigger additional review under SB 19-181.

If staff or the Director are unsure about whether a given application requires additional review or other action due to extraordinary circumstances, COGCC should err on the side of caution in considering cumulative impacts and ensuring protection of public health, safety and the environment pursuant to SB 19-181.

7. Proposed Criterion 18, Required Permits

It has recently been reported that some operators are not obtaining required federal or state air quality permits prior to commencing production at oil and gas locations, including locations in ozone non-attainment areas. It should be a given that operators certify that they are complying with applicable state, local, and federal law when seeking approval for permit applications. Applications that fail to so certify, or operations that fail to obtain required approvals and permits, should be denied.

Conclusion

LOGIC appreciates the opportunity to submit these comments and looks forward to working with COGCC and other state agencies on the implementation of SB 19-181. Please do not hesitate to contact the undersigned if we can provide additional information.

Sincerely,

/s
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/s
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Attachment A: LOGIC Redlined & Highlighted Proposal

Attachment A to LOGIC Comment: Redline Excerpt of Proposed Changes with Strike-out for Proposed Deletions and Underlining/Highlighting for Proposed Additions

SB 19-181 Draft Objective Criteria

[. . .]

Pages 1-2, replace fourth full paragraph with:

If a permit meets one or more Objective Criteria, it will be subject to additional review pursuant to SB 19-181. The Director and staff will determine whether additional measures may be necessary, whether the permit should be delayed until the rulemakings are complete, or whether the permit should be denied at this time. For permits where additional measures may result in an application that is consistent with SB 19-181, staff will contact the applicant to respond to the identified issues. Where appropriate, staff will engage local governments, state agencies or other appropriate stakeholders for additional consultation. It is the intent of the Objective Criteria review process to allow the Director, the applicant and, where applicable other stakeholders, the opportunity to engage in a timely and constructive dialogue to ensure permit compliance with SB 19-181. The result of the process may be to delay the permit application until the rulemakings are complete, deny the permit, or modify the permit with additional measures following additional review.

[. . .]

Pages 2-3, modify the enumerated Draft Objective Criteria as follows:

- 1) Locations within ~~1500'~~ 2,640' of a Building Unit or High Occupancy Building, which include Urban Mitigation Area ("UMA") and Large UMA Facility ("LUMAF") locations.
- 2) Locations within a municipality.
- 3) Locations within 1500'1 of a municipal boundary, platted subdivision, or county boundary.
- 4) Locations within ~~2,000'~~ 2,640'1 of a school property line.
- 5) Locations within:
 - a) a Floodplain;

- b) an identified public drinking water supply area (i.e. Rule 317B buffer zone, or the Brighton Public Water System); or
 - c) a sensitive area for water resources.
- 6) Locations within a Colorado Parks and Wildlife (“CPW”) mapped Restricted Surface Occupancy Area (“RSO”) or Sensitive Wildlife Habitat (“SWH”), or locations receiving site- or species-specific CPW comments.
 - 7) Locations within 1,000’1 of a Designated Outdoor Activity Area.
 - 8) Locations with more than 18 tanks or 5,200 barrels of hydrocarbon or produced liquid storage.
 - 9) Locations where the operator does not have a Surface Use Agreement.
 - 10) Locations where the relevant local government, or state or federal agency requests additional consultation.
 - 11) Locations where the operator requests the Director grant a Rule 502.b Variance for an associated permit application.
 - 12) Locations with an access road in a RSO, SWH, 317B buffer zone, or within 200’ feet of a Building Unit on lands not subject to a Surface Use Agreement.
 - 13) A proposed centralized E&P Waste Management Facility.
 - 14) A Request to Vent or Flare (Form 4) from a location within ~~1,500’~~ 2,640’ of a Building Unit or High Occupancy Building Unit or within the Denver Metro/North Front Range ozone nonattainment area.
 - 15) An Intent to Plug (Form 6) for:
 - a) a location within 1,500’1 of a Building Unit or High Occupancy Building Unit;
 - b) a well drilled with surface casing set at a depth insufficient to cover all aquifers; or
 - c) a well subject to a stray gas investigation.

- 16) Locations for which public or other agency comments (including local government) establish threats to important wildlife species or that wildlife habitat could be threatened, including but not limited to wildlife and habitat within designated state or local open space lands.
- 17) Locations or proposed operations where extraordinary circumstances indicate the need for further review pursuant to the Oil and Gas Act or existing regulations.
- a. Extraordinary circumstances could arise for locations where public comments state compelling specific circumstances or facts indicating that additional review will further the legislative purpose of protecting public health, safety, welfare, or the environment, including wildlife resources.
 - b. Extraordinary circumstances could also arise for proposed operations where recent experience indicates that additional review, including alternative site analysis, cumulative impacts analysis, and/ or additional/specially tailored BMPs, might be needed to further the legislative purpose of minimizing adverse impacts in light of substantial evidence that unanticipated adverse impacts could be associated with the proposed operations. For instance, if the technologies or equipment proposed by the operator has recently been demonstrated to pose a threat to public health and safety; or new scientific information credibly establishes such a threat triggering the duty to minimize adverse impacts.
- 18) Permit applications where the applicant or operator fails to provide evidence to COGCC that it has obtained all required state, local and federal permits prior to commencing operations, including federal air quality permits.