

April 29, 2019

Colorado Oil and Gas Conservation Commission
1120 Lincoln Street
Suite 801
Denver, Colorado 80203
submitted via web portal: <https://cogcc.state.co.us/comments/>
and to jeff.robbins@state.co.us

Re: Comments on the draft Director's Objective Criteria mandated by SB-19-181

Dear Commissioners and Director,

The undersigned citizen groups welcome the opportunity to comment on the draft list of Director's Objective Criteria (Objective Criteria) prepared by the Director of the Colorado Oil and Gas Conservation Commission (COGCC) pursuant to the recently amended C.R.S. 34-60-106(1)(f)(III)(A). The draft Objective Criteria represent a strong set of standards to evaluate when pending permit and hearing applications warrant additional analysis and notice. The undersigned organizations fully support these draft Objective Criteria, and believe that all 15 of the draft Objective Criteria represent important considerations for when additional analysis is warranted. However, to ensure that the purpose of SB 19-181 to protect public health and safety is realized during the crucial period in which new regulations are being developed, several additions and amendments to the Objective Criteria are needed. We discuss these proposed revisions both generally and specifically.

I. General Comments

SB-19-181's crucial reforms apply as of April 16, 2019, the date the Governor signed the legislation into law. SB 19-181 therefore governs all permit and hearing applications currently pending before the COGCC.¹ Until certain rulemakings are complete, the Objective Criteria will be applied to permits, drilling and spacing unit applications, and comprehensive drilling plan applications to ensure that any decisions made during the rulemaking timeframe complies with SB 19-181's broad mandates. C.R.S. 34-60-106(1)(f)(III)(A).

Comprehensive and meaningful Objective Criteria are necessary to carry out the letter and the intent of SB-19-181, which overhauls Colorado's Oil and Gas Conservation Act. The chief goal of the Act to ensure that oil and gas development in the state will be regulated, including by participating local governments, to safeguard public health and the environment. Ultimately, the COGCC will promulgate rules and otherwise oversee oil and gas development

¹ Section 19 of SB-19-181 states that the "act applies to conduct occurring on or after the effective date of this act, including determinations of applications pending on the effective date." See also COGCC, *COGCC Operator Guidance, SB 19-181: Hearings and Permitting Groups* (Apr. 19, 2019), https://cogcc.state.co.us/documents/reg/SB_19_181/SB_19_181_Guidance_20190419.pdf

to protect and minimize adverse impacts to public health, safety, and welfare, the environment, and wildlife resources and [to] protect against adverse environmental impacts on any air, water, soil, or biological resource resulting from oil and gas operations.

E.g. C.R.S. 34-60-106(2.5)(a).

Actions to minimize impacts encompass all reasonable steps necessary to avoid the adverse impacts of oil and gas development and to minimize and mitigate consequences that cannot be avoided. C.R.S. 34-60-103(5.5).² Nonproduction of oil and gas resources “resulting from a conditional approval or denial” made pursuant to the COGCC’s obligations to protect public health and the environment does not constitute waste. C.R.S. 34-60-106(2.5)(b).

SB-19-181 requires rulemaking to be undertaken in the near-term to accomplish the goals of safeguarding public health, safety and welfare, the environment and wildlife. Operators will be required to consider alternative locations whenever oil and gas development is proposed near populated areas. C.R.S. 34-60-106(11)(c)(I). SB-19-181 also directs that public health and the environment must be protected from adverse cumulative, as well as project-specific, impacts. C.R.S. 34-60-106(11)(c)(II) (directing the COGCC to adopt rules that “evaluate and address the potential cumulative impacts of oil and gas development”). We expect that the criteria will identify pending locations that would benefit from these alternative location and cumulative impacts analyses.

This fundamental goal of safeguarding public health and the environment from the individual and cumulative adverse impacts of oil and gas development is a significant move away from Colorado’s previous statutory and regulatory scheme. As the Colorado Supreme Court explained, the former Oil and Gas Conservation Act required the COGCC to fulfill a series of conflicting legislative mandates, including the consideration of “cost-effectiveness and technical feasibility” as it moved to protect public health and the environment from oil and gas development. *Colo. Oil and Gas Conservation Comm’n v. Martinez*, 433 P.3d 22, 31-32, 2019 CO 3 at ¶ 42 - ¶ 43.

Thus, SB 19-181 is a considerable departure from the old way of administering oil and gas development in Colorado. The new legislation requires COGCC to protect public health, safety, and welfare, the environment, and wildlife resources from the individual and cumulative adverse impacts of oil and gas development, and to ensure that development does not harm any air, water, soil, or biological resources. Plainly then, to ensure that the Objective Criteria function to implement this new statutory and regulatory direction, they must be sufficiently broad to identify any pending applications that **may** require the additional analysis, notice, and measures needed to safeguard Colorado’s people, wildlife, and environment.

² Ultimately, of course, the COGCC must “protect against adverse environmental impacts on any air, water, soil, or biological resource resulting from oil and gas operations” in addition to any efforts to avoid or minimize adverse impacts. C.R.S. 34-60-106(2.5).

II. Specific Comments

For the near-term, the Objective Criteria are critical to implementing SB 19-181. The Objective Criteria trigger the additional analysis, notice and measures necessary to fulfill SB 19-181's purpose by identifying pending permits and applications that may pose harm to public health and the environment or otherwise require further protective actions by the Director and/or the COGCC. Without broad Objective Criteria, Colorado's decision makers will not be able to carry out the mandates of SB-19-181.

For the most part, the draft Objective Criteria fulfill SB 19-181's mandate. The undersigned citizen groups strongly support the criteria as proposed. They represent hard work by the COGCC to identify the kinds of projects that are most likely to necessitate additional scrutiny, notice and safeguards. Crucially, the undersigned organizations believe that all 15 of the currently proposed Objective Criteria are necessary, and do not believe that any of the 15 proposed Objective Criteria should be removed from the final version.

Initially, we note that the Director of COGCC has stated that when the Objective Criteria indicate that additional review and additional protective measures are warranted, "[w]here appropriate, staff will engage local governments, state agencies or other appropriate stakeholders for additional consultation."³ However, given that some of the Objective Criteria are triggered when state agencies express concern or make specific comments—for example, when Colorado Parks and Wildlife ("CPW") submits "site- or species-specific" comments—there must be some mechanism for notifying relevant state agencies about the details of pending permits and applications. Otherwise, for example, CPW may not know whether a particular oil and gas proposal threatens specific habitat or species, and therefore would not be in a position to make the comments that would warrant additional analysis and action. Therefore, the Objective Criteria must include notice to the local governments and state agencies whose comments and expertise would indicate when additional analysis and action is mandated.

We also ask that the following be added to the Objective Criteria:

(16) Locations that raise concerns about environmental justice, based on, but not limited to, the following criteria:

(a) Locations within a census tract in which more than 25% of the population meets the U.S. Environmental Protection Agency's (EPA's) definition of a "minority population," according to the most recent Census Bureau data available; or,⁴

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https://cogcc.state.co.us/documents/reg/SB_19_181/COGCC_Directors_Draft_Objective_Criteria_20190419.pdf

⁴ See EPA, *Technical Guidance for Assessing Environmental Justice in Regulatory Actions* at pp. 6–7 (2016),

https://www.epa.gov/sites/production/files/2016-06/documents/ejtg_5_6_16_v5.1.pdf

(explaining how EPA identifies whether a project will impact an area with a minority population for the purposes of Executive Order 12,866 based on either the percentage of minority

(b) Locations within a census tract classified by the Federal Financial Institutions Examination Council's (FFIEC) definition as a "low" income area.⁵

We also ask that the following amendments, highlighted to show additions to the text of the draft Objective Criteria, be made to strengthen the draft Objective Criteria so that they carryout SB-19-181:

(3) Locations within a municipal growth area or within 1500 feet of a municipal boundary, platted subdivision, or county boundary.⁶

(5) Locations that raise concerns for the protection of wildlife and drinking water and other water resources within:

a) a 100-year⁷ floodplain;

b) 500 feet of a perennial water body, wetland, riparian area or fen;⁸

population in the area, or whether the minority population percentage in the affected area is meaningfully greater than the minority population percentage in the relevant area of geographic analysis); see also EPA, *Toolkit for Assessing Potential Allegations of Environmental Injustice* at pp. 44–45 (2004), <https://www.epa.gov/sites/production/files/2015-04/documents/toolkit.pdf> (providing additional metrics and tools for agencies to assess whether a project with impact an area with a minority population for the purposes of Executive Order 12,866, including the percentage of the population that is literate in languages other than English).

⁵ See FFIEC, *Online Census Data System*, <https://www.ffiec.gov/census/> (last visited Apr. 25, 2019) (allowing users to search for census tract data for minority population percentage and income characteristics by county); see also FFIEC, *2015 Based Census Information (Years 2017 and Forward)* (Aug. 16, 2018), <https://www.ffiec.gov/census/htm/2015CensusInfoSheet.htm#Income> (explaining how the FFIEC determines whether a census tract is "low" income by comparing median family income to average metrics of median family income in the relevant metropolitan or other geographic area).

⁶ Municipal Growth Areas are authorized by C.R.S. 31-12-105 *et. seq.* Most municipal governments have growth boundaries that are set out in their land use plans.

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<https://data.colorado.gov/Environment/Oil-and-Gas-Floodplain-Colorado-100-year-Effective/49i7-pqgv>

⁸ This criterion would allow additional review to safeguard the proper functioning condition of the waters and to protect water quality and fish and wildlife habitat. Wetlands, floodplains, riparian areas, water influence zones, and fens store water, stabilize valley floors, enhance water quality, embody recreation and aesthetic values, foster biological diversity, and provide habitat, water, food, cover, and travel routes for wildlife. These waters are highly sensitive to ground-disturbing activities that can cause soil erosion, soil compaction, and adverse changes to the hydrologic function and the ecological integrity of these and surrounding lands.

c) 2,500 feet of a major river;⁹

d) .25 miles of a lake or reservoir with a surface area of one or more acres;¹⁰

e) .5 miles of¹¹ an identified public drinking water supply zone or area (i.e. Rule 317B buffer zone, or the Brighton Public Water System) or .5 miles of the surface above a subsurface water or well that is a source of public drinking water;¹² or

f) 500 feet of¹³ a sensitive area for water resources.¹⁴

6) Locations that raise concerns for the protection of wildlife and wildlife habitat within:

⁹ This criterion would allow additional review to ensure adequate protection of rivers and adjacent aquatic habitat, fish and wildlife habitat, important riparian values, water quality and the high scenic and recreation values of major rivers. Stipulations are needed to minimize deterioration of water quality, safeguard high scenic and recreation values, maintain hydrologic function, preserve the condition of stream channels, banks, floodplains, and riparian communities, and protect wildlife habitat. The buffer accommodates the larger floodplains and wider riparian zones of major rivers.

¹⁰ This criterion would allow the additional review required to conserve water quality and the scenic, recreation, wetland, and wildlife values associated with the lake or reservoir and its shoreline.

¹¹ Additional review is appropriate to assess and apply measures needed to protect public water supplies, water quality, aquatic habitat and human health. Development on lands with migration potential and in close proximity to a public water supply jeopardizes human health and water quality.

¹² Similar to the City of Brighton, there are several municipalities on the Front Range that rely on shallow alluvial water wells for their public water supply. The protections afforded the City of Brighton's water supply should be extended to any water wells that are utilized as a public water supply. We would also encourage the COGCC staff to reach out to water suppliers to determine where these "sensitive water resources" exist to ensure additional review is triggered whenever oil and gas facilities are proposed within 2,640 feet of a shallow public water supply water well.

¹³ Development on lands with migration potential and in close proximity to sensitive areas jeopardizes water quality, hydrological and ecological function and wildlife habitat.

¹⁴ It is unclear what this references. The 100-Series Rules define "sensitive area" as:

an area vulnerable to potential significant adverse groundwater impacts, due to factors such as the presence of shallow groundwater or pathways for communication with deeper groundwater; proximity to surface water, including lakes, rivers, perennial or intermittent streams, creeks, irrigation canals, and wetlands. Additionally, areas classified for domestic use by the Water Quality Control Commission, local (water supply) wellhead protection areas, areas within 1/8 mile of a domestic water well, areas within 1/4 mile of a public water supply well, ground water basins designated by the Colorado Ground Water Commission, and surface water supply areas are sensitive areas.

This is an appropriate definition for the purposes of the Objective Criteria.

a) any Restricted Surface Occupancy Area (“RSO”) or Sensitive Wildlife Habitat (“SWH”) or any component habitat or area of a RSO or SWH as defined by the 100-Series rules (excluding that rule’s reference to particular dates and maps) identified on any map maintained by Colorado Parks and Wildlife (“CPW”);¹⁵

b) Crucial habitat for Tier 1 terrestrial animal and plant species of greatest conservation need, habitat priority levels 1 and 2;¹⁶

c) Priority watersheds for aquatic Tier 1 species of greatest conservation need, species richness levels 6, 7 and 8;¹⁷

d) the priority migration corridors for the Bear’s Ears/White River and San Juan Basin mule deer and elk herds as identified by CPW in its *Action Plan for Implementation of Department of the Interior Secretarial Order 3362*;¹⁸ and,

e) locations receiving site- or species-specific CPW comments.

Thank you again for the opportunity to comment on this first, critical phase of the implementation of SB-19-181. We look forward to continuing to participate in the public processes engendered by this important legislation.

Joro Walker, General Counsel
Western Resource Advocates
joro.walker@westernresources.org

Joel Minor, Senior Associate Attorney

¹⁵ It is unclear to what this refers. The COGCC wildlife maps have not been updated since September 2013 and therefore do not provide an adequate guide to the Director and the COGCC. <https://www.coga.org/regulations.html>. This provision should be clarified to refer to the most up-to-date maps maintained by CPW relating to RSOs or SWHs as defined by the 100-Series Rules.

¹⁶ https://cpw.state.co.us/Documents/WildlifeSpecies/SWAP/CO_SWAP_Chapter8.pdf figure 21 at 404. SB-19-181 strengthens by a considerable degree manner in which oil and gas development will be regulated to safeguard wildlife from both individual and cumulative adverse impacts. To carry out this mandate plainly requires more than what is dictated by the current 1200-Series Rules. Therefore, the Objective Criteria must reference more than the RSO and SWH categories and maps and must expand the habitats that will be considered for protection from the adverse individual and cumulative impacts of oil and gas development.

¹⁷ https://cpw.state.co.us/Documents/WildlifeSpecies/SWAP/CO_SWAP_Chapter8.pdf figure 20 at 399.

¹⁸ <https://www.nfwf.org/westernmigrations/Documents/colorado-state-action-plan.pdf> figure 1.2 at 4 and figure 2.1 at 14.

Earthjustice
jminor@earthjustice.org

Ean Tafoya
Treasurer
Colorado Latino Forum
ean@clfdenver.org

Josh Joswick
Earthworks' OGAP Organizer
970-903-0876
josh_joswick2004@yahoo.com

Sara Loflin
Executive Director
League of Oil and Gas Impacted Coloradans
303-819-6531
sloflin@coloradoLOGIC.org

Emily Hornback
Director
Western Colorado Alliance
emily@westerncoloradoalliance.org

Rebecca Fischer
Climate & Energy Program Attorney
WildEarth Guardians
(406) 698-1489
rfischer@wildearthguardians.org

Mark Pearson
Executive Director
San Juan Citizens Alliance
office: 970.259.3583 Ext. 1
Sanjuancitizens.org

Sophia Mayott-Guerrero
Energy and Transportation Advocate
Conservation Colorado
719-588-8851
sophia@conservationco.org

