

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

This statement sets forth the basis, specific statutory authority, and purpose for new rules and amendments to the Rules and Regulations and Rules of Practice and Procedure (“Rules”) promulgated by the Colorado Oil and Gas Conservation Commission (“COGCC”) on December 11, 2008. These rules are promulgated to protect public health, safety, and welfare, including the environment and wildlife resources, from the impacts resulting from the dramatic increase in oil and gas development in Colorado. They also implement new statutory authority and update existing regulations where appropriate. They are intended to foster the responsible and balanced development of oil and gas resources.

Unless otherwise specified, the new rules and amendments become effective on May 1, 2009 on federal land and April 1, 2009 on all other land.

In adopting the new rules and amendments, the Commission relied upon the entire administrative record for this rulemaking proceeding, which formally began in March 2008 and informally began in the summer of 2007. This record includes the proposed rules and numerous recommended modifications and alternatives; thousands of pages of public comment, written testimony, and exhibits; and 12 days of public and party hearings. The Commission spent another 12 days deliberating on the rules before taking final action.

Statutory Authority

The additions and amendments to the rules are promulgated pursuant to the authority granted to COGCC by House Bills (“HB”) 07-1298 and 07-1341, codified at sections 34-60-106 and 34-60-128, C.R.S., of the Oil and Gas Conservation Act (“Act”). Additional authority for the promulgation of the rules is provided by sections 34-60-102, 34-60-103, 34-60-104, 34-60-105, and 34-60-108, C.R.S. of the Act. The Commission also adopted the following statement of basis and purpose consistent with section 24-4-103(4), C.R.S., of the Administrative Procedure Act. This statement is hereby incorporated by reference in the rules adopted.

The rulemaking hearing for these rules was held on May 22, 2008 (initial motions); June 10, 2008 (public testimony); June 23-27, 2008 (public and party testimony); June 30-July 1, 2008 (party testimony); July 15-17, 2008 (party testimony); August 19-20, 2008 (deliberations); September 9-11, 2008 (deliberations); September 22-23, 2008 (deliberations); October 26-27, 2008 (deliberations); and December 9-11, 2008 (deliberations).

Purpose

Address Growing Impacts of Increase in Oil and Gas Activity

A major reason for adopting these regulations was to address concerns created by the unprecedented increase in the permitting and production of oil and gas in Colorado in the past few years. In 1996, the COGCC, through its Director, approved 1,002 applications for permits to drill (“APD”). In 2004, that number increased to 2,915 approved APDs. In 2007, the COGCC approved 6,368 APDs. The COGCC anticipates that it will approve approximately 7,500 APDs in 2008. This increase in permitting levels generally corresponds to an increase in drilling activity, particularly in the Piceance Basin, where drilling has extended into new areas with more extensive wildlife and water resources, more challenging terrain, and additional people. These

Throughout this period, the COGCC staff was in frequent discussion with parties regarding the draft rules. Based upon these discussions and its own further evaluation, the COGCC staff issued clarifications to several of the proposed rules in May and June 2008. In consideration of arguments and alternative proposals contained in the parties' responsive prehearing statements and rebuttal statements, the COGCC staff issued a comprehensive set of suggested revisions to the proposed rules on June 18, 2008. The Commission invited groups of parties to submit alternative language for the proposed rules by July 30, 2008. Each of the party groups submitted alternative language, and some party groups submitted additional material in support of their proposed alternative approaches. The COGCC staff reviewed these submittals and, on August 11, 2008, submitted alternative recommended language for several of the draft rules.

The Commission closed the evidentiary record and commenced deliberations on August 19-20, 2008 in Denver on those rules for which the COGCC staff had developed alternative recommended language. During these deliberations, the Commission initially approved each of these rules, subject to changes provisionally approved in the deliberations. During these two days of deliberations, the Commission gave initial approval to fifty of the proposed rules.

The COGCC staff then reviewed the parties' July 30, 2008 submittals for the balance of the proposed rules and, on September 3-5, 2008, submitted recommended alternative language for each of the remaining draft rules. The Commission conducted deliberations on these draft rules on September 9-11 and 22-23, 2008 and on October 26-27, 2008. During these deliberations, the Commission gave initial approval to the remainder of the proposed rules.

At the conclusion of the initial deliberations, COGCC staff reviewed the transcripts of the proceedings and prepared final rule language. Where the Commission directed the staff to prepare new language for particular rules, the staff gave the parties an opportunity to review and comment to the Director on that new language. On November 7, 2008, the COGCC staff submitted final rule language for the Commission's review and consideration. The Commission conducted final deliberations on this language and adopted the final rules on December 9-11, 2008.

This was the most extensive rulemaking hearing in the Commission's history. All told, the Commission held twenty-two days of hearings, with some the days lasting almost twelve hours. The Commission heard approximately twelve hours of public comment by approximately two hundred people. It heard from approximately one hundred sixty party and staff witnesses and heard approximately seventy-five hours of testimony, cross, examination, and answers to Commissioner questions on twelve days of hearings. The Commission also considered more than thirty legal motions and conducted nine days of initial and final deliberations totaling more than seventy additional hours. Throughout the hearing, the Commission listened to all of the witnesses, questioned aspects of witnesses' written testimony, directed its staff to work with parties, and asked clarifying questions as necessary. The Commission repeatedly extended the rulemaking hearing in order to hear additional testimony and argument and conduct additional deliberations. It also directed and approved numerous changes to the draft rules that reflect input from the parties.

The Commission believes that the resulting final rules responsibly address the recent increase in oil and gas development, implement the 2007 legislation, and update the prior rules where appropriate. It also believes that these rules will ensure the protection of the public health, safety and welfare, including the environment and wildlife resources, while also fostering the responsible, balanced development, production, and utilization of oil and gas resources. C.R.S. § 34-60-102(1)(b). These rules will, among other things:

response to the desire of the COGCC to ensure a smooth transition to the new rules and to provide the regulated community with time to prepare appropriately for compliance with the rules. One representative of the regulated community suggested that the rules go in effect on July 1, 2009. Other affected stakeholders argued against this date, saying that Colorado's environment and wildlife resources would be adversely affected each day the rules were not in effect. The Commission listened to both of these concerns and chose May 1, 2009 for federal land and April 1, 2009 for all other land as the general effective dates. These dates allow operators sufficient time to plan their oil and gas activities with the new rules in mind while being protective of the environment and wildlife resources. They also give the COGCC, CDPHE, and CDOW the ability to train employees properly regarding correct and efficient implementation of these rules.

Making the rules generally effective on federal land one month after they become generally effective on other land is intended to provide additional time for the COGCC to work with federal officials to determine the relationship between the COGCC rules and federal regulations on such lands, and to update the existing Memorandum of Understanding between the COGCC and the Bureau of Land Management accordingly.

The Commission also reiterates that the amendments and new rules adopted on December 11, 2008 shall not apply to new or existing gas storage projects or operations that are subject to the jurisdiction of the Federal Energy Regulatory Commission, the safety aspects of projects that are regulated by the U.S. Department of Transportation, or midstream operations until the Commission conducts a further regulatory proceeding to address the manner in which such amendments and new rules shall apply to such projects and operations.

2. Rule 216., COMPREHENSIVE DRILLING PLANS

Basis: The statutory basis for this rule is section 34-60-106(11)(a)(I)(A), C.R.S. In addition, the basis for this rule is HB 07-1298, as codified at section 34-60-128(3)(d)(II), C.R.S.

Purpose: This rule provides an opportunity for operators, via Comprehensive Drilling Plans (CDPs), to identify reasonably foreseeable oil and gas activities in a defined geographic area and to facilitate early and collaborative planning with broad involvement about associated potential impacts and measures for minimizing them. The rule requirements are designed to offer flexibility and incentives for operators to take this broad approach to oil and gas development planning and permitting, effectively allowing the "bundling" of Form 2A requirements, presented in Rule 303. The Commission intends that if a CDP satisfies all of the informational and procedural requirements for a Form 2A, then no individual Form 2As will be required for wells covered by the CDP. The Commission also wishes to emphasize that satisfaction of the Form 2A informational and procedural requirements by a CDP will need to include measures that are substantially equivalent to those included in the public notice and comment requirements as provided in Rule 305., requirements to consult with CDPHE and DOW, where applicable, as provided in Rule 306., and the basic Form 2A informational requirements listed in Rule 303.

The Commission also intends the rule to allow operators to develop CDPs that are more narrowly focused, effectively allowing the "bundling" of consultation requirements presented in Rule 306. For example and with respect to drinking water protection, an

operator may want to address in a CDP only variances from Rule 317B drinking water provisions. In this case, the CDP would focus only on how the operator plans to mitigate and protect drinking water resources and not necessarily involve other protected resources, such as wildlife. Such a CDP would also involve consultation with CDPHE and thus eliminate the need for consultation with CDPHE regarding drinking water relative to the identified oil and gas wells at any future date, unless the operator wishes to alter the terms of the CDP. As such, subsequent satisfaction of Form 2A procedural and public notice and comment requirements could be tailored to fit the contents of the CDP. However, the Commission wishes to emphasize that the CDP can not “shield” operators from Form 2A and associated public notice and comment, informational and other applicable requirements not otherwise addressed in the CDP. In other words, the operator may develop a draft CDP however it chooses, but the information that is included or not included will have a significant bearing on what kind of procedural benefits result from the CDP. A narrowly focused CDP will result in fewer procedural benefits and thus a broader Form 2A process. This underscores the importance for operators to discuss with the COGCC, CDPHE, and CDOW their plans and expectations for a CDP before initiating work on it.

Thus, the Commission intends CDPs to be a flexible planning and permitting tool, which operators can tailor to their needs and circumstances. In this way, the Commission seeks to encourage landscape level planning and regulatory review as contemplated by HB 07-1298 and supported by a number of parties. This should help to better address cumulative effects, promote efficiently, and facilitate more win-win situations. It is the opposite of a one-size-fits-all approach.

The Commission also recognizes that CDPs by their very nature address more comprehensive oil and gas activity and associated impacts. Furthermore, activities contemplated within the CDP are likely to occur over a potentially longer period of time and involve greater up-front planning and negotiations. In view of this, the Commission believes it is appropriate that the CDP term be extended beyond that for Form 2As; from three to six years, and that the Commission itself consider CDPs through its hearing agenda.

The Commission wishes to clarify how the provision relating to confidentiality in Rule 216.d.(6) works. The rule says the Director will post accepted CDPs on the COGCC web-site, subject to any confidential or proprietary information belonging to the operator being withheld. This means that the Director will not post information the operator designates as confidential. However, if any person makes a Colorado Open Records Act (“CORA”), sections 24-72-100.1 *et seq*, C.R.S., request for the information, labeling a document “confidential” does not end the inquiry as to whether it is exempt from disclosure. If the COGCC receives a CORA request for information labeled “confidential”, the COGCC staff, as custodian of the records, will independently determine whether such information is exempt from disclosure pursuant to CORA. If the COGCC staff determines a document is exempt from disclosure pursuant to CORA, it will keep such information confidential to the maximum extent allowed by law.

The Commission intends that for purposes of mapping riparian areas when submitting information for a CDP, an operator need only make reasonable good faith effort to identify such areas and they may rely on any appropriate and credible source of information on riparian areas in doing so.