

# Political Wave Hits Colorado Industry

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DENVER—The consequences of a blue tidal wave that carried Colorado Democrats to power washed sweeping changes over the state's oil and natural gas regulations. However, observe leaders of the Colorado Oil & Gas Association following the May 3 adjournment of the 72nd Colorado General Assembly, those revisions' on-the-ground impacts must be wrung out over a two-year rule-making process with the implementation of SB 181 (AOCR, May 2019, pg. 14).

"We succeeded in getting a few critical amendments added, but we still oppose the bill," COGA President and Chief Executive Officer Dan Haley says.

The passage of SB 181 has launched a lengthy rule-making process in which COGA says it will remain actively engaged. The new law's forthcoming changes include broader jurisdiction for local governments that want to expand their oil and gas oversight, but some industry representatives say, SB 181's language to overhaul the Colorado Oil & Gas Conservation Commission's mission and structure may prove the most significant.

Growing Denver-Julesburg Basin oil and gas development has helped propel Colorado to fifth among oil producing states. U.S. Energy Information Administration data shows. That growth, numerous media accounts assess, has generated a three-way tug-of-war between the industry, environmental activists and communities expanding into areas with existing or prospective oil and gas production and infrastructure. One press account describes the three interests as "all fighting for the same space."

The regulatory revisions SB 181 outlines are to be worked out in a series of COGCC hearings, the first of which was a May 15 stakeholder session. This was to be followed by a two-day rule-making session set for June 17-18, according to a commission notice.

## Friday Surprise

Following a January decision by the Colorado Supreme Court in *Martinez et. al. v. COGCC*, which overturned an earlier appeals court decision, press accounts note, anti-development activists began clamoring for a revision to the commission charter, which sought to balance resource development, correlative rights and environmental protection. Instead, activists

argued, COGCC decisions should focus above all on protecting human health and the environment. In *Martinez v. COGCC*, a group of young people sued the commission to review their petition that sought to reject the COGCC's balanced approach. A March 2017 appeals court sided with the plaintiffs (AOCR, May 2017, pg. 90), but the Colorado Supreme Court overturned that ruling in January.

Although results from the 2018 elections had Colorado's oil and gas industry celebrating voters' decisive, 10-point defeat of Proposition 112, which sought to impose 2,500-foot setbacks from drilling sites to buildings and so-called vulnerable areas, those same elections also handed Colorado Democrats majorities in both legislative chambers, the governor's office and nearly every statewide elected office.

"We saw people elected simply because they did not have an 'R' behind their names," Haley observes. "This was a nationalized election with people voting against Donald Trump by voting for Democrats down the ballot. However, before long, they found out that by voting against Trump, they got a single-party political agenda they did not like either."

COGA met several times with leading Democrats to gauge their plans, and the group pledged to work with them during the session, Haley describes. The meetings instilled him with foreboding about the new majority's plans for sweeping changes, he says, but provided relatively few details.

"We had preliminary discussions, but they did not include us in a true stakeholder process," Haley relates. "We recognized they won the election, so they could do what they wanted. We offered to help them see the practical implications of what they were planning. Unfortunately, that never took place before the bill was introduced."

Late in the afternoon on Friday, March 1, SB 181 was introduced with the majority leaders of both chambers as sponsors. "As a former journalist, I knew that when a bill dropped at 4:30 on a Friday, no one was expected to see it," Haley says. "A committee hearing was held one business day later and we knew they wanted to push it through quickly."

Drawing on the industry unity and grass-roots support generated by opposition to Prop. 112, COGA and the Colorado Petroleum Council called for a rally at the Capitol to protest the apparent fast-track for SB 181. According to published reports, the rally drew approximately 1,000 workers, who demonstrated support for the industry and protested the bill. An estimated 500 workers packed the gallery in the House and Senate chambers, Haley adds.

A detectable shift in the Capitol's political climate followed shortly thereafter, he describes. "The speed at which this bill and a few others were moving, combined with the rally on the steps, had an effect," Haley assesses.

Within two weeks, some Democratic leaders signaled a willingness to discuss



Pausing at the post-session review COGA hosted May 7 at the Denver Athletic Club are, from left, House Majority Leader Alec Garnett D-Denver, Senator Rachel Zenzinger, D-Arvara, Senator Dennis Hisey, R-Fountain, and Representative Hugh McKean, R-Loveland.

possible amendments. “We heard several say ‘this is not how we do things in Colorado,’” Haley reports. “Make no mistake, this was a bill we strongly opposed, but by then, they said they were willing to discuss changes to add a degree of certainty.”

### Reasonable Language

Sweeping changes to the COGCC’s mission and structure remained a significant concern for COGA, Haley states, but Democrats refused to budge on that matter. Fortunately, Haley notes, industry representatives were able to tweak other issues, including some that COGA deemed too broadly written or excessively open to interpretation.

The bill’s sponsors agreed to add phrases such as “in a reasonable manner” where local governments otherwise could add unrealistic fees or financial assurances to local ordinances or impose impossible setbacks. According to press accounts, industry opponents cried foul when the reasonable manner language replaced the phrase “arbitrary and capricious” in the original version, which presents a much higher legal hurdle for companies that would challenge an ordinance.

“I fear that the industry will use (necessity and reasonable) against local communities to remove some of the authority that we are attempting to give them through the bill,” commented Senate Majority Leader Steve Fenberg, D-Boulder.

“For the opposition to say we dramatically changed the bill is silly,” Haley reasons. “We heard from legislators frustrated that their constituents complained the bill did not include setbacks. Let’s be clear, even with the addition of ‘reasonable and necessary’ this bill is all about making it difficult for oil and gas to operate in Colorado.”

### Goodbye Balance

Section 6 of SB 181 revises the governing authority of the commission under the Oil and Gas Conservation Act by removing reference to “foster the responsible, balanced development” of oil and gas. In its place, the commission is now directed to regulate the industry in a manner “that protects public health, safety and welfare, including protection of the environment and wildlife.”

According to Denver law firm Davis Graham & Stubbs, the bill omits prior reference to cost-effectiveness and technical feasibility, while also narrowing the definition of waste by excluding nonproduction of oil or gas if leaving it in place is necessary to protect people and the environment.

“Language regarding technical feasibility and economic practicality has been included in every environmental regulation the legislature has approved in the past,”

Haley observes. “This time, legislators stripped it out and would not listen to our arguments until late in the process.”

The Colorado General Assembly website reveals that Section 7 of SB 181 repeals the requirement for the commission to consider development’s economic and technical effects when weighing environmental impacts. Meanwhile, Sections 1, 2 and 4 of SB 181 tip the scales away from state primacy in land use decisions. The bill gives local governments explicit authority to determine location siting and to regulate effects such as air emissions, water discharge, noise, odors and reclamation, the law firm reports.

### Commission Structure

SB 181 also revises the COGCC’s makeup. Effective immediately and for the next year, the nine-member commission will include only one member with substantial oil and gas experience, down from the prior three members. And, rather than one member with environmental or wildlife protection experience, now one member will have environmental experience and one will have wildlife experience. Other commissioners include two state department heads, one local government official, one with soil conservation experience, one with public health expertise, and one representing agriculture or royalty owners.

That structure changes again July 1, 2020. At that time, members of the commission become paid state employees and their number shrinks to seven, with the two department heads becoming non-voting members.

The new commission will include one petroleum expert, one with expertise in either the environment, wildlife or soil reclamation, one land-use planning expert, one with public health expertise and one with “an ability to contribute the commission’s expertise in making sound, balanced decisions.”

Drilling and spacing conflicts, which the commission claims account for 81% of its disputes, will be resolved under an administrative law section, which the commission says will “enable quicker resolutions and free up the board for policy decisions and rule makings.”

### Criteria Trigger

Shortly after Governor Jared Polis signed SB 181, new COGCC Director Jeff Robbins issued a draft “objective criteria” document that defines how permits will be reviewed as the rule-making process rewrites state regulations. According to media reports, Robbins stated he was not directed to stop issuing permits until rule making concluded, but indicated he could delay permits until he was satisfied their applications complied

with SB 181’s intent.

However, the first version of the legislation would have created significant problems for companies submitting applications for permits to drill, Haley contrasts. “The original bill allowed the director to put a moratorium on a permit APD based on criteria the director came up with,” Haley recalled. “Legislators amended that to a review process that has a beginning and an end.”

According to the draft, the COGCC criteria are to be applied to forms for permitting drilling, flaring, well plugging, disposal and comprehensive drilling plans. Any application that meets one or more of the criteria requires an additional review. An additional review calls for stakeholder engagement, including public hearings, to provide “a timely and constructive dialogue to ensure permit compliance,” it states.

The 16 criteria that trigger an additional review include:

- APDs or flaring permits for sites within 1,500 ft. of a high occupancy building;
- Any location within a municipality or within 1,500 ft. of a municipal boundary;
- Flood plains;
- Wildlife habitats;
- Locations with more than 18 tanks or 5,200 barrels of liquid storage;
- Any centralized waste disposal facility; or
- No surface use agreement.

Significantly, operators are required to gain approval for their development plans from the local jurisdiction before they can file their state APD.

Other revisions in SB 181 subject to rule making include a revised pooling rule that requires agreement from at least 45% of mineral holders before a pool is formed, a decrease from the initial bill’s 50% threshold.

The devil is ultimately in the details, Haley reflects, and those details have yet to be worked out. During the next two years, Robbins notes, the commission will hold additional rule makings for revised flowline regulations, alternative site analysis, cumulative impacts and improving collaboration between the commission and local governments.

SB 181 also includes a section on air quality issues. It directs the Air Quality Control Commission to review and tighten the state’s leak detection and repair rules to further minimize oil and gas facilities’ methane and other hydrocarbon emissions. Colorado pioneered methane emissions control regulations following a contentious AQCC rule making in 2014 (AOCR, April 2014, pg. 197).

## Cease Fire?

"It is our hope the oil and gas wars that have enveloped our state are over," Polis expressed during the bill signing ceremony for SB 181. "Let me be clear: This bill gives the industry and residents certainty and comfort, and Colorado will be the better for it."

The sentiment was echoed by legislators at the annual end-of-session breakfast COGA hosted at the Denver Athletic Club on May 7. House Majority Leader Alec Garnett, D-Denver, said SB 181 was the "most significant step in the oil and gas wars in the last ten years" and he predicted it would increase certainty for industry and communities.

Hashing things out during the rule-making process is a better way to revise oil and gas rules than through the sort of ballot initiatives that appear each election, Garnett concluded.

The defeat of the most recent ballot initiative came at a turning point for Colorado politics, Haley observed.

## Climate Priority

"One side definitely had its way," Senate Minority Leader Chris Holbert, R-Parker, told reporters after the session. "We used the process and legislative rules to our benefit whenever we could."

For example, Republicans invoked a rule that slowed some rapidly moving legislation by allowing bills and amendments to be read at length upon request. Near the session's end, Garnett voiced concern that "In the future some of the obstructionist tactics used will become commonplace."

COGA's membership demonstrated considerable industry support and solidarity during the legislative session, Haley reflects. "Last year, Initiative 112 brought the industry together as never before," he recalls. "SB 181 showed that unity is still present, and it is real. When we can rally 1,000 industry people at a moment's notice, that is a true grass-roots movement."

According to Haley, SB 181 and other bills clearly demonstrated the majority's agenda to advance Colorado as a leader in fighting climate change. More than a dozen bills passed this session that either set climate policy, regulated emissions or incentivized renewables. Five of them aim to speed the transportation sector's adoption of electric vehicles, reports the Colorado Energy Office. For his part, Polis issued an executive order in January that directed the Colorado Department of Public Health and the Environment to draft rules mandating how many zero emissions vehicles manufacturers must sell.

Based on similar rules enacted in Cal-

ifornia, the department issued a draft in May to require between 5% and 9% of new autos and light trucks sold in 2023 to qualify as zero emission vehicles. The legislature pitched in by approving a pair of bills to facilitate EV growth. The first, SB 77, incentivizes public utilities to build a network of EV charging stations. A final version of the bill allows utilities to recover charging station costs from ratepayers at a faster pace than standard return-on-investment rates.

The second bill, HB 1159, emphasizes demand-side economics by extending Colorado's existing EV tax credit to 2026. The state tax credit offers buyers between

\$2,000 and \$10,000 on the cost of an EV depending on the year and vehicle type. The intent, published reports indicate, is to bring EV prices into parity with gasoline-fueled vehicles.

However, Haley worries, the majority's agenda overlooks the tremendous gains Colorado's oil and gas industry has made in reducing emissions. "We know what they are thinking, and that has us concerned," he acknowledges. "We must not get so far down the road that the gains already made are overlooked. Colorado cannot start picking winners and losers when it comes to energy. Bringing all sides together to work these issues out is the Colorado way." □