

2018 Election Results and COGCC Rule Changes: How will these impact Colorado's Energy Industry in 2019?

February 6, 2019



Topics of Discussion

- ❖ Main Election Issues - Proposition 112 & Amendment 74
 - ❖ How did they get on the Ballot?
 - ❖ Industry implications?
 - ❖ How should industry prepare for 2020?
- ❖ 2019 Colorado Legislative Session
 - ❖ Democratic Senate and House
 - ❖ Likely legislation & affect on Industry
- ❖ COGCC Rulemakings
 - ❖ Overview of new 500-Series Pooling/Process Rules
 - ❖ Overview of new school setback Rules
- ❖ Current Relevant Colorado cases
 - ❖ Martinez v. COGCC
 - ❖ Wildgrass Oil and Gas Committee v. State of Colorado, et al.
- ❖ Question and Answer Session

Proposition 112 – Brief History

- ❖ Proposition 112 did not come up overnight
- ❖ In 2011, Colorado local governments started initiating changes to their Land Use Regulations to include requiring local government permits for oil and gas operations within with jurisdiction
 - ❖ Many of the local government permits included heightened best management practices and mitigation measures associated with oil and gas operations, including the siting of a location near residential homes
- ❖ In 2012, the COGCC setback rulemaking established 500' setbacks from “building units” and 1,000' setback from High Occupancy Building Units

Proposition 112 – Brief History

- ❖ In 2014, proponents of a ballot initiative for greater setbacks, the government and industry engaged in the “Governor’s Blue Ribbon Task Force” which addressed numerous issues relating to oil and gas development and locations
- ❖ In 2015, the COGCC held a rulemaking to establish heightened mitigation measures for Large Scale Urban Mitigation Area Oil and Gas Facilities within 1,000’ of a Building Unit and “affected Local Government”
- ❖ In 2016, the proponents of a ballot initiative for increased setbacks failed to make the ballot
- ❖ In 2018, the proponents of Initiative 97 were successful in getting the 2,500’ on the 2018 ballot

Proposition 112 – Ballot Language

- ❖ Shall there be a change to the Colorado Revised Statutes concerning a statewide minimum distance requirement for **new** oil and gas development, and, in connection therewith, changing existing distance requirements to require that any new oil and gas development be located at least **2,500 feet** from any structure intended for human occupancy and any other area designated by the measure, the state, or a local government and authorizing the state or a **local government** to **increase** the minimum distance requirement?

Proposition 112 – Proposed Definitions

34-60-131. Mitigation of adverse oil and gas impacts to health and safety — buffer zones — legislative declaration - definitions.

(2) As used in this section, unless the context otherwise requires:

(a) “Occupied structure” means any building or structure that requires a certificate of occupancy or building or structure intended for human occupancy, including homes, schools, and hospitals.

(b) “Oil and gas development” means exploration for, and drilling, production, and processing of, oil, gas, or other gaseous and liquid hydrocarbons, and flowlines and the treatment of waste associated with such exploration, drilling, production and processing. “Oil and gas development” includes **hydraulic fracturing**.

(c) “Vulnerable areas” means playgrounds, permanent sports fields, amphitheaters, public parks, public open space, public and community drinking water sources, irrigation canals, reservoirs, lakes, rivers, perennial or intermittent streams, and creeks, and any additional vulnerable areas designated by the state or a local government.

(d) “Local government” means any statutory or home rule county, city and county, city, or town located in the state of Colorado.

Proposition 112 – Statutory Language

34-60-131. Mitigation of adverse oil and gas impacts to health and safety — buffer zones — legislative declaration - definitions.

(3) The people of the state of Colorado hereby establish that all new oil and gas development **not on federal land** must be located at least **two thousand five hundred feet** from an occupied structure or vulnerable area. For purposes of this section, the **reentry** of an oil or gas well previously plugged or abandoned is considered new oil and gas development.

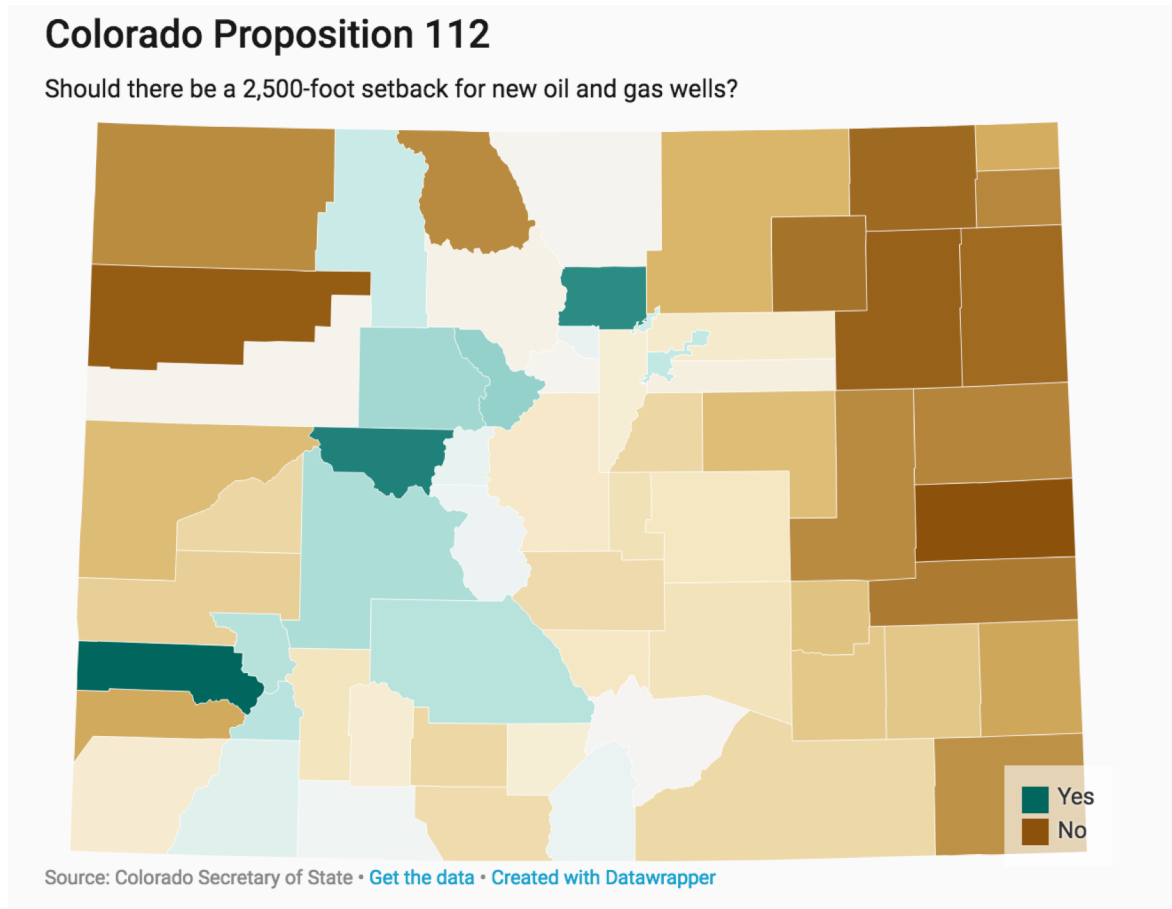
(4) The state or a local government ***may require that new oil and gas development be located a larger distance away from occupied structures or vulnerable areas*** than required by subsection (3) of this section. In the event that two or more local governments with jurisdiction over the same geographic area establish different buffer zone distances, the larger buffer zone governs.

(5) This section takes effect upon official declaration of the governor and is self-executing.

(6) This section applies to oil and gas development **permitted on or after the effective date**.

Proposition 112 – Election Results

- ❖ YES Votes: 1,016,242 – 43%
- ❖ NO Votes: 1,290,321 – 57%
- ❖ 91% reporting
- ❖ Denver County: Yes 57%, No 42%
- ❖ Weld County: Yes 25%, No 75%
- ❖ Boulder County: Yes 70%, No 30%



Proposition 112 – Impacts

- ❖ Proponents of 112 will be motivated to seek a legislative solution, likely in the form of local control
- ❖ Industry can negotiate development agreements with local governments – Memorandums of Understanding or Operator Agreements
- ❖ Heightened COAs/BMP's on state and/or local government permits
- ❖ Understanding that defeating 112 is not a “victory” for the industry, but a charge to engage with local communities earlier and more often
- ❖ Litigation against COGCC/industry to block development in other ways

Amendment 74 – Ballot Language

Shall there be an amendment to the Colorado constitution requiring the government to award just compensation to owners of private property when a government law or regulation reduces the fair market value of the property?

Amendment 74 – New Constitutional Language

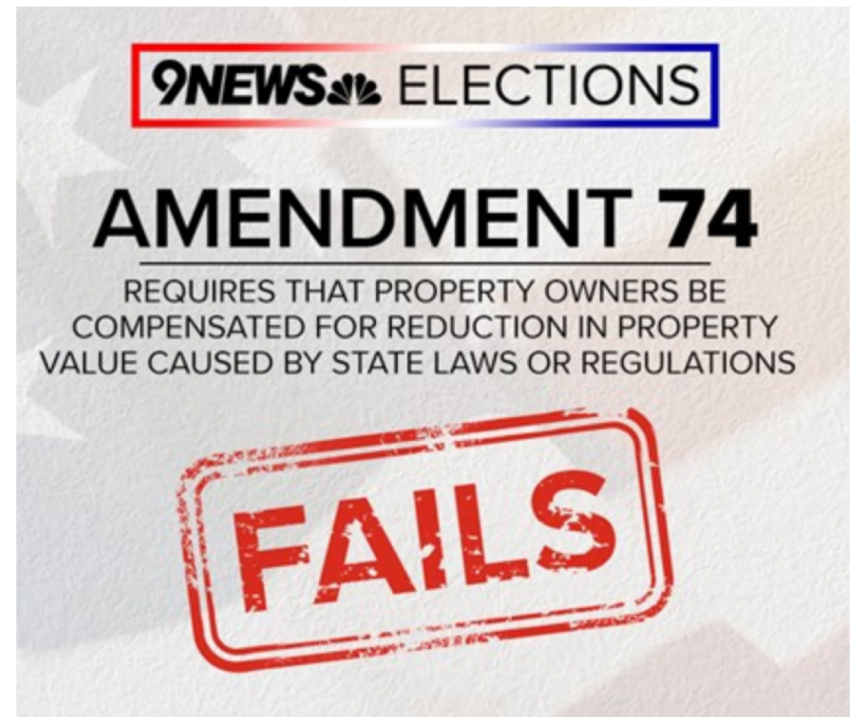
Section 15. Taking property for public use — compensation, how ascertained.

Private property shall not be taken or damaged, **or reduced in fair market value by government law or regulation** for public or private use, without just compensation. Such compensation shall be ascertained by a board of commissioners, of not less than three freeholders, or by a jury, when required by the owner of the property, in such manner as may be prescribed by law, and until the same shall be paid to the owner, or into court for the owner, the property shall not be needlessly disturbed, or the proprietary rights of the owner therein divested; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.

Amendment 74 – Election Results

Colorado election: Voters dump Amendment 74's 'just compensation' proposal

- ❖ Needed 55% to pass
- ❖ YES: 46%; NO: 54%



2019 Legislative Session

- ❖ Setbacks: We are likely to see bills that reflect the failed Proposition 112 campaign and requesting higher setbacks than those currently in place under Commission rules.
- ❖ Moratoria: Some legislators would like to see a freeze on all oil and gas development until there are increased setbacks or more local control.
- ❖ Statutory Pooling : Although updated during the 2018 session, certain legislators want to re-open the pooling statute and set a threshold for pooling allowances.
- ❖ Local Control: This may be the hot-bed issue of the session as many legislators are pushing to strengthen local government powers relating to the siting and permitting of oil and gas operations.
- ❖ COGCC: There may be a bill to change the make-up of the Commission.
- ❖ Renewable Energy: Governor Polis has a 100% renewable by 2040 campaign that will likely be brought into certain bills this session.
- ❖ Climate Change: Certain legislators are pushing for a variety of bills associated with addressing climate change.

COGCC – Changes All Around

- ❖ Acting Director – Jeffrey Robbins

- ❖ Robbins is a long-term Durango-based local government attorney representing La Plata County and numerous front range counties, towns and municipalities with establishing oil and gas regulations and permitting processes.

- ❖ Executive Director of Department of Natural Resources – Dan Gibbs

- ❖ Gibbs served as county commissioner in Summit County and was in that role since 2010. Prior to his tenure as a commissioner, Dan represented Summit County in the Colorado House of Representatives and in the State Senate.

- ❖ Executive Director of Colorado Department of Public Health and Environment – Jill Hunsucker-Ryan

- ❖ Ryan was a two-term Eagle County Commissioner, and a public health professional with more than two decades of experience in the field. She is the current President of Colorado Communities for Climate Action and past Vice President of the Colorado Board of Health. Before becoming Commissioner, Ryan managed Eagle County's Public Health Agency and is the former Director of the Office of Health Disparities at CDPHE.

- ❖ July 2019 – Four of the nine commissioners terms expire – Polis appoints successors

New 2019 COGCC Regulations

- ❖ Amended Rule 500-Series adopted October 30, 2018; effective **January 1, 2019**; first effective Commission hearing cycle April 29-30, 2019
 - ❖ Scope: to implement SB 18-230 (increased time for unleased mineral owners to review a lease offer from 35 days to 60 days) and to “clean up” hearing processes and procedures to alleviate the COGCC backlog
 - ❖ Robust local government participation and comment
 - ❖ Commissioners rejected most local government changes as outside of the scope
- ❖ School Setback Rules adopted December 18, 2018; effective **February 14, 2019**
 - ❖ Expands the 1000’ setback from a physical school to a broader definition of “School Facility”, including outdoor areas and future schools

New 500-Series Regulations

- ❖ Adopted new filing deadlines to allow Staff more time for review
- ❖ Application Filing Date: 90 days before hearing
- ❖ Application Mailing Date & Notice of Hearing: 60 days before hearing
- ❖ Rule 511 Filing Date: 30 days before hearing
- ❖ Protest Filing Date: 30 days before hearing

New 500-Series Regulations

- ❖ Local Government Requested Changes to Local Public Forum Rules and to the Protest and Intervention Rules
- ❖ COGCC rejected many of the proposed changes as outside of the scope
- ❖ Lowered the threshold for local governments with jurisdiction to intervene by right (no longer required to show concerns related to public health, safety, welfare, environment)
- ❖ Rule 530 now requires evidence that the applicant “tendered” a reasonable offer to lease and well elections **90 days** prior to hearing (to allow the 60-day review period prior to the Protest deadline)
- ❖ COGCC rejected minimum % ownership requirements for pooling, and proof of title
 - ❖ Potential Legislation is being considered about a % ownership

New School Setback Regulations

- ❖ The “LOGIC” (League of Oil and Gas Impacted Coloradoans) Petition for Rulemaking on School Setbacks was heard on December 17-18, 2018
- ❖ LOGIC requested a Rulemaking to establish a 1000’ setback from a school property **boundary**, rather than the school building
- ❖ COGA, CPC & API requested flexibility in establishing setback distances as circumstances may require
- ❖ Staff draft rules: (1) add new definitions of School, School Facility, and Governing Body; (2) require notice of a proposed location within 1000’ of a property line or a school facility; (3) require consultation with the school governing body to discuss BMPs; and (4) establish new setback rules

New School Setback Regulations

❖ Adopted: New Definition of School Facility:

SCHOOL FACILITY shall mean any discrete facility, whether indoor or outdoor, associated with a school, that students use commonly as part of their curriculum or extracurricular activities. A school facility is either adjacent to or owned by the school or school governing body, and the school or school governing body has the legal right to use the school facility at its discretion. The definition includes Future School Facility.

New School Setback Regulations

❖ Adopted: New Definition of Future School Facility:

FUTURE SCHOOL FACILITY shall mean a school facility that is not yet built, but there are plans to be built and used within 3 years of date the pre-application notice received, and one of the following requirements must be satisfied:

Public: governing body must affirm in writing the nature, timing and location of the future school facility

Private: the school governing body must be registered with SOS when pre-application notice received, and must provide documentation with SOS registration and plans submitted to local government and planning office

Charter: the school must have been approved when pre-application notice is received, and the governing body must affirm the nature, timing and location in writing.

New School Setback Regulations

❖ Adopted: New Definition of Childcare Center:

CHILDCARE CENTER as defined in § 26-6-102(5), C.R.S., and that is in operation at the time of the pre-application notice pursuant to Rule 305.a(4). A child care center will include any associated outdoor play area adjacent to or directly accessible from the center and is fenced or has natural barriers, such as hedges or stationary walls, at least four (4) feet high demarcating its boundary.

New School Setback Regulations

❖ Adopted: New Form 2A requirements

Rule 303.b.(3): Operator is required to provide a map and a statement on whether the school governing body has requested a consultation with the operator when pre-application notice is required.

❖ Adopted: New Notice requirements

Rule 305.a.(4): Prior to a 2A being submitted to the Commission, the operator must file pre-application notice to any school within **1,320 feet** or less of a proposed facility. The operator must include their contact information, school facilities map with setbacks, construction schedule, Local Government Designee information, possible BMPs and mitigation measures, right to request a hearing, and consultation offer.

New School Setback Regulations

- ❖ Adopted: New Consultation requirements

Rule 306.h: the operator must offer to consult with the school governing body and share information with an attempt to reach agreement

- ❖ Adopted: New waiver provisions

Rule 604.a: the 1000' setback may be waived if the governing body agrees in writing to a location less than 1000', or the Commission authorizes approval following application and hearing.

Martinez - Colorado Supreme Court Decision

The Colorado Supreme Court **reversed** the Court of Appeals and ruled that the Colorado Oil and Gas Conservation Commission (COGCC) **properly declined** to consider a proposed rule which would have precluded COGCC from issuing permits for drilling oil and gas wells *“unless the best available science demonstrates, and an independent, third-party organization confirms, that drilling can occur in a manner that does not cumulatively, with other actions, impair Colorado’s atmosphere, water, wildlife, and land resources, does not adversely impact human health, and does not contribute to climate change.”*

Martinez - Colorado Supreme Court Decision

In its ruling, the Colorado Supreme Court found that:

The COGCC had correctly determined that the Oil and Gas Conservation Act did not allow COGCC to condition new oil and development on the absence of cumulative adverse public health and environmental impacts.

Specifically, the COGCC was required to foster the development of oil and gas resources, protecting and enforcing the rights of owners and producers, and in doing so, to prevent and mitigate significant adverse environmental impacts to the extent necessary to protect public health, safety, and welfare, but *only after taking into consideration cost-effectiveness and technical feasibility*.

Therefore, COGCC did not abuse its discretion in declining to engage in the rulemaking.

Martinez - Colorado Supreme Court Decision

Other important points:

- ❖ The Supreme Court noted that its review of agency decisions regarding whether to engage in rulemaking was “limited and highly deferential.” The agencies get to determine which rulemakings they should participate in based on their schedule and resources.
- ❖ The Supreme Court found that COGCC reasonably relied on the facts that it was already working with the Colorado Department of Public Health and Environment to address the concerns to which the rulemaking petition was directed and that other COGCC priorities took precedent over the rulemaking requested by the Plaintiffs.

Wild Grass Litigation – U.S. District Court of Colorado

On January 22, 2019, the Wildgrass Oil and Gas Committee, a group of mineral owners in a residential subdivision in Broomfield, filed a Complaint in the Federal District Court of Colorado requesting an order for:

- ❖ 1) declaratory judgment challenging the constitutionality of the pooling statute; and
- ❖ 2) a temporary restraining order to prevent the Commission from entering any additional pooling Orders until a decision is made.

Wild Grass Litigation – U.S. District Court of Colorado

Under the § 34-60-116, C.R.S. the Commission is allowed to combine mineral interests in an established unit so that all mineral interest owners receive payment for their just and equitable share of produced oil and gas.

Each mineral interest owner is given an opportunity to lease their minerals, to participate, or their interest can be considered nonconsenting and a penalty imposed on their share.

Wild Grass Litigation – U.S. District Court of Colorado

The Complaint focuses on the development occurring in Broomfield County with Extraction Oil and Gas as the operator and lists the Applications and the Operator Agreement. Additionally, the Application raises a list of health concerns which they allege are associated with oil and gas development.

The Plaintiffs argue that the Act:

- ❖ Allows the COGCC to access the non-consenting owners' minerals for the benefit of a private corporation, and without protection of the mineral owners' substantive and procedural due process rights;
- ❖ Interferes with the owners' right to freedom of association and allows unlawful trespass;
- ❖ Interferes with Plaintiff members' right to freedom of association; and
- ❖ Impairs the right to contract.

The Plaintiffs also requested a Temporary Restraining Order preventing the Act and any associated COGCC Rules from being enforced.

Current COGCC Litigation – Denver District Court

- HighPoint Resources Corporation v. Colorado Oil and Gas Conservation Commission, Airport Land Partners, Ltd., Antero Resources Corporation, and Ursa Operating Company, LLC (Denver Dist. Ct. Case No. 18CV33289)
- Board of County Commissioners of Boulder County and City of Lafayette v. Colorado Oil and Gas Conservation Commission and 8 North, LLC, (Denver Dist. Ct. Case No. 18CV33238)
- City and County of Broomfield v. Colorado Oil and Gas Conservation Commission, Crestone Peak Resources Operating, LLC, and Kjersti Drott, (Denver Dist. Ct. Case No. 18CV33663)

Questions? Thank you!



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