

MEMORANDUM

DATE: August 27, 2019

TO: County Attorney John Baier
District No. 1 Commissioner Mike Lane
District No. 2 Commissioner Don Suppes
District No. 3 Commissioner Mark Roeber
Delta County Planning Commission via planningcommission@deltacounty.com

District 1-Delta:

- Angela Mackey, Chair
- Steve Shea
- Steve Schrock
- Dick Gilmore, Associate Member

District 2- Surface Creek:

- Lucinda Stanley--Cedaredge
- Layne Brones--Cedaredge
- Tate Locke--Cedaredge

District 3-Hotchkiss/Paonia/Crawford

- Kim Shay--Hotchkiss
- Jacob Gray--Hotchkiss
- Tom Kay--Hotchkiss
- Eli Wolcott, Associate Member--Paonia

FROM: Citizens for a Healthy Community

RE: Preserving Local Authority Over Oil and Gas Development to Update Regulations

This memorandum is on behalf of Citizens for a Healthy Community and is intended to provide the Delta County Board of County Commissioners and the Delta County Planning Commission with guidance on preserving local authority in adapting to the shifting regulatory landscape in light of Senate Bill 19-181 (“SB 181”) and House Bill 19-1261, in particular local government authority to issue a temporary moratorium on the processing of oil and gas applications. This memorandum will address: (I) Background of SB 181 (II) the consequences of waiving local authority, (III) Delta County’s powers under SB 181, (IV) what a moratorium is, and (V) preserving local authority through a moratorium.

I. BACKGROUND

On April 16, 2019, Colorado Gov. Jared Polis signed SB 181 into law. SB 181 mandates that the Colorado Oil and Gas Conservation Commission (“COGCC”) regulate oil and gas development in “a manner that protects public health, safety, and welfare, including protection of

the environment and wildlife resources.”¹ Thus, oil and gas development is no longer prioritized, but rather “subject to the protection of public health, safety, and welfare, the environment, and wildlife resource and the prevention of waste.”²

To further solidify the legislative intent to prioritize public safety and the environment, SB 181 empowers local governments with land use authority to regulate the siting of oil and gas development and surface impacts to “protect and minimize adverse impacts to public health, safety, and welfare, and the environment.”³ To effectuate that goal, the General Assembly waived State preemption of local land use regulation, allowing local governments to enact regulations on oil and gas development that are more protective than the State’s.⁴ Further, the General Assembly delegated a host of powers to local governments to regulate land use and surface impacts.

To adapt to the changing regulatory landscape, local governments around the state are adopting different approaches. For example:

- Many local governments are exercising their lawful power to enact temporary moratoriums on the processing of oil and gas applications for the purpose of taking a step back and crafting regulations that are in line with the public interest and beneficial to local needs.⁵
- Weld County attempted to use SB 181 to sidestep State requirements and regulate below the State floor. The Colorado Attorney General’s Office immediately shot down Weld County’s attempts to circumvent State regulation, specifically stating that “[u]nder SB19-181, local governments may impose regulations that are “more protective or stricter than state requirements,” but they are not authorized to bypass COGCC’s regulations.”⁶
- Rio Blanco County is advocating for “a common set of Piceance Basin-specific land use regulations for oil and gas development” that would be more lenient than the State’s oil and gas regulations.⁷ The basin specific regulations seek to subvert the clear mandate of SB 181 to regulate oil and gas development in “a manner that protects public health, safety, and welfare, including protection of the environment and wildlife resources,”⁸ and revert back to a pre-SB 181 scheme of “balanc[ing]... oil and gas development [in a way] that is protective of human health, safety and welfare, as well as the environment and wildlife.”⁹
- To date, Delta County is the only County in the state proposing to waive its local authority over oil and gas. That is despite Delta County historically advocating for local control,

¹ C.R.S. § 34-60-102(1)(a)(I).

² *Id.* at (1)(b).

³ C.R.S. § 29-20-104(1)(h).

⁴ C.R.S. § 34-60-131.

⁵ As of July 16, 2019, Boulder County, Erie, Timnath, Berthoud, Adams County, Lafayette, Superior, and Broomfield have enacted temporary moratoriums on the processing of oil and gas applications for the purpose of updating their oil and gas regulations.

⁶ *SB 19-181: COGCC Notice To Operators Concerning Form 2A in areas where the Local Government has adopted 1041 regulations*, Natural Resources and Environment Section of the Colorado Attorney General (July 22, 2019) (http://cogcc.state.co.us/documents/reg/OpGuidance/NTO_1041_2A_20190722.pdf).

⁷ Interoffice Memorandum, *Oil and Gas*, Jeff Rector, Rio Blanco County Commissioner (June 26, 2019) (https://garfield-county.granicus.com/MetaViewer.php?view_id=3&event_id=1823&meta_id=150730).

⁸ C.R.S. § 34-60-102(1)(a)(I).

⁹ Rio Blanco Interoffice Memorandum, *Oil and Gas*, *supra* n. 7.

even going so far as to file a lawsuit against the COGCC in 2002 to enforce its local authority over oil and gas.¹⁰

II. WAIVING REGULATORY AUTHORITY OVER OIL AND GAS ALSO MEANS WAIVING OVERSIGHT AUTHORITY OVER OIL AND GAS.

Pursuant to SB 181, Delta County is proposing waiving its regulatory authority over oil and gas operations entirely during the period it crafts new regulations. While SB 181 allows for a local government to waive its authority such a short-sighted decision would cause Delta County to forfeit any statutory ability to hold operators accountable for adverse impacts for the interim period of no regulatory authority. SB 181's amendments to the Local Government Land Use Control Enabling Act expressly tie the back-end oversight authority to the front-end regulatory authority.¹¹ Waiving regulatory authority would be a *de facto* waiver of oversight authority.

Additionally, if the County waives its oil and gas regulations, the operator will be under no obligation to notify the County of any adverse impacts – such as a leak – and the County will have no authority to inspect. Furthermore, if any adverse impacts do occur during the interim of no regulatory authority, and Delta County attempts to impose a fine, the County may subject itself to legal liability from the oil and gas operator for acting outside the scope of its regulatory authority (because there would be no regulatory authority).

It should be clearly noted that Delta County has acknowledged a similar limitation on its authority before in the context of the lawsuit CHC filed against the County.¹² CHC argued that the County was required to regulate impacts resulting from geological hazards due to its performance standards on geology and soils and impacts on agriculture. However, the County responded on the record that because the oil and gas regulations did not specifically include a performance standard for geology and soils that it is not allowed to regulate outside of the authority granted to it in the specific development regulations.¹³

As such, Delta County knows that it is limited by what is contained in its regulations. If the County's regulations do not contain authority to regulate oil and gas operations, especially under SB 181, then it simply can't regulate under the auspice of some other authority. If Delta County proceeds with waiving its oil and gas regulations, it will knowingly be putting its residents at risk to the adverse impacts of oil and gas operations for an interim period.

¹⁰ Colorado Oil and Gas Conservation Commission, *Monthly Staff Report* (August 19, 2002) (https://cogcc.state.co.us/Staff_Reports/2002/08-19-02.htm).

¹¹ C.R.S. § 29-20-104(2) (“To implement the powers and authority granted in subsection 1(h) of this section, a local government within its respective jurisdiction has the authority to:” inspect, impose fines, and impose fees.).

¹² *Citizens for a Healthy Community v. Delta Board of County Commissioners, et al.*, 19CV30057.

¹³ On another instance, when CHC requested a stay on the approval of the development agreements for the Iron Point and Trail Gulch 3D Seismic Projects until the BOCC made a decision on appeal, the undersigned counsel was specifically told by the Planning Department that: “Our regulations are silent on a stay of activity during an appeal. While I respect your desire for a formal stay, I don't have the regulatory authority absent a specific clause in our regulations to stay the project since our regulations are silent on the matter. This request is something only the Board of County Commissioners can determine absent language in our regulations.” May 30, 2019, Email between Chris Mochulsky and Elyse Casselberry.

As a final note, it is also worth raising the probability that Delta County could lose oversight authority over *existing* oil and gas operations. Delta County’s specific development agreements expressly state that the agreements are “issued pursuant to Delta County Regulation of Specific Development.” If the very basis for the specific development agreements is waived by the County, what authority does it have to enforce the contract? A civil lawsuit in district court for breach of contract is not the proper mechanism that a local government should use to regulate oil and gas development. Rather, local government regulatory power is the proper way to regulate oil and gas development, and that power has been significantly expanded under SB 181.

III. SB 181 GRANTS BROAD AUTHORITY TO LOCAL GOVERNMENTS TO REGULATE OIL AND GAS OPERATIONS

SB 181 overhauls the Local Government Land Use Control Enabling Act by providing local governments with jurisdiction to “regulate the surface impacts of oil and gas operations... and protect and minimize adverse impacts to public health, safety, and welfare and the environment.”¹⁴

Delta County now has authority to regulate the following matters as they relate to oil and gas development:

- land use
- location and siting
- impacts to public facilities and services
- water quality and source
- noise
- vibration
- odor
- light
- dust
- air emissions and air quality
- land disturbance
- reclamation procedures
- cultural resources
- emergency preparedness and coordination with first responders
- security
- traffic and transportation impacts
- financial securities, indemnification, and insurance, and
- all other nuisance type effects of oil and gas development.¹⁵

To implement the foregoing power and authority, SB 181 gives Delta County the authority to inspect all facilities subject to local government regulation, impose fines for leaks, spills, and emissions, and impose fees on operators or owners to cover the direct and indirect costs of

¹⁴ C.R.S. § 29-20-104(1)(h).

¹⁵ *Id.* at 1(h)(I)-(VI).

permitting and regulation.¹⁶ Thus, new regulations under SB 181 could be made cost neutral for the County, and even allow the County to impose fines on actors for contaminating the environment and impacting the health and well-being of the community.

Further, SB 181 takes into account that a local government may not have the resources or technical expertise to ensure that its land use decisions protect public health and the environment without negatively impacting oil and gas resource recovery and offers technical review of decisions by the COGCC.¹⁷ After making a preliminary or final decision on the siting of oil and gas facility, Delta County can request a technical review of the decision from the COGCC.¹⁸ The COGCC's technical report would not bind the County to any course of action, but would give the County the option to either amend its decision or stick with its regular course of action.¹⁹

It should also be noted that SB 181 amends C.R.S. § 30-15-401, removing the prohibition on county authority to adopt noise ordinances for oil and gas development, and reaffirming the General Assembly's intent that a local government have authority over noise created by oil and gas development.

Finally, SB 181 amends the Colorado Oil and Gas Conservation Act ("COCGA") at C.R.S. § 34-60-105(b) to once again reaffirm the express legislative intent to preserve local regulatory authority over oil and gas as itemized under the Local Government Land Use Control Enabling Act.

In granting these explicit powers to local governments, SB 181 gives a local government two options: (1) to regulate oil and gas at or above the state floor in a way that protects public health, safety, and welfare, the environment, and wildlife resources, or (2) waive its local authority and hand over control on matters of local concern to decisionmakers located over 250-miles away in Denver. The former is clearly the better choice both politically and for the well-being of Delta County residents, and new regulations can be crafted during a temporary pause in the processing of new oil and gas applications.

IV. A MORATORIUM IS A TEMPORARY DELAY ON PROCESSING FUTURE OIL AND GAS APPLICATIONS AND IS EXPRESSLY ALLOWED BY LAW AS AN ESSENTIAL TOOL FOR SUCCESSFUL DEVELOPMENT

A moratorium is *not* a ban on oil and gas activity. It would not halt or suspend current oil and gas activity. It would not affect oversight of current oil and gas activity. It would not burden current oil and gas operations in any way. It is not dependent on current drilling operations.

Rather, a moratorium is a temporary tool employed by a local government that is, by its very nature, of limited duration and designed to preserve the status quo in a particular area while

¹⁶ *Id.* at (2)(a)-(c).

¹⁷ *Id.* at (3)(a)-(c).

¹⁸ *Id.*

¹⁹ *Id.*

developing a long-term plan for development.²⁰ In that vein, both the Supreme Court of the United States and the Colorado Supreme Court have defined a moratorium as an “essential tool of successful development.”²¹

A moratorium is a particularly useful grant of authority when the regulatory landscape is changing. Such is the case with SB 181. The very nature of SB 181 – a fundamental shift in the public interest at the state level and a grant of new powers to local governments to implement the public interest – fosters uncertainty. Uncertainty can spur actions made with haste that lack due consideration of long-term impacts – such as waiving local government regulatory authority on oil and gas operations entirely.

A moratorium acts as temporary shield for a local government against adverse impacts of rash decisions. It is a pause on the processing of new oil and gas applications so that a local government can make smart, strategic decisions on implementing new rules and regulations.

Colorado law expressly allows for local governments to enact a temporary moratorium for a reasonable period of time necessary for the purpose of developing new regulations.²² The Colorado Supreme Court has held that 10-months is a “reasonable period of time” for a moratorium.²³ Moratoriums on the processing of oil and gas applications issued in light of SB 181 have ranged from as short as 90-days in Timnath,²⁴ to as long as 9-months in Boulder County.²⁵

Suggestion: Delta County should enact a moratorium on the processing and consideration of new oil and gas operation applications for a time period it deems reasonable to draft new oil and gas regulations. The moratorium can include a clause that states “The term of the administrative suspension shall be for the shorter of _____ days, or until the County adopts new oil and gas regulations” so as not to stifle the processing of oil and gas applications past the time it takes to adopt new regulations. Further, the Moratorium can allow for an oil and gas operator to request an exemption from the moratorium if the operator believes certain activity is not subject to the temporary moratorium. Criteria for evaluating the exemption should be included in the moratorium.²⁶

²⁰ *Droste v. Board of County Com'rs of County of Pitkin*, 159 P.3d 601 (Colo. 2007) (citing *Tahoe -Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 353 U.S. 302, 337 (2002)).

²¹ *Id.*

²² *Id.*

²³ *Id. C.f. City of Fort Collins v. Colorado Oil*, 369 P.3d 586 (Colo. 2016) (5 year moratorium is not reasonable as it substantially disrupts the status quo, while a 10 month moratorium constitutes a “temporary time out” and preserves the status quo).

²⁴ Town of Timnath, Colorado, *A Resolution Imposing a Temporary Administrative Suspension of Consideration of Oil and Gas Permit Applications*, Res. No. 24, Series 19 (April 4, 2019) (<https://timnath.org/wp-content/uploads/2019/04/024-2019-Imposing-Temporary-Administrative-Suspension-of-on-Oil-and-Gas-Permit-Applications.pdf>).

²⁵ Boulder County, Colorado, *Moratorium on Processing Oil and Gas Development Applications*, Res. 2019-59 (June 28, 2019) (<https://assets.bouldercounty.org/wp-content/uploads/2019/06/2019-59-boulder-county-resolution-oil-gas-emergency-temporary-moratorium.pdf>).

²⁶ See Boulder County Moratorium, *supra* n. 11, for an example of moratorium exemption criteria and evaluation.

V. A TEMPORARY MORATORIUM ON THE PROCESSING OF NEW OIL AND GAS OPERATION APPLICATIONS PRESERVES LOCAL CONTROL.

A temporary moratorium provides a shield for the County and its residents for its duration. It will ensure that current oil and gas operations remain subject to the specific development regulations and the conditions of approval, while placing a temporary pause on the processing of new oil and gas operations until comprehensive regulations are enacted. A moratorium would preserve Delta County's local authority to ensure that the County's environment and residents are not harmed by new oil and gas developments that would move forward without any local oversight.

Delta County is in the best position to regulate activities that happen in Delta County and affect its residents, not the State. That is why the General Assembly gave local governments such expansive authority under SB 181. A moratorium is necessary to preserve that authority and to govern in a way that best benefits Delta County. Waiving oil and gas regulations entirely would be an abdication of duty and would place the County and the people who live there at risk of adverse impacts from unregulated oil and gas developments.

In light of the foregoing, Citizens for a Healthy Community urges the Board of County Commissioners to consider a temporary moratorium on the processing of new oil and gas applications as it is the best tool the County has to both preserve its local authority and protect the residents of Delta County.

Sincerely,



Chris Mochulsky
Legal Counsel
Citizens for a Healthy Community