



GUIDANCE

RULES 309.F AND 314 - CONSULTATION WITH CPDHE

Document Change Log

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Purpose and Goals

This living document describes how the Colorado Department of Public Health and Environment (“CDPHE”) and the Colorado Oil and Gas Conservation Commission (“COGCC”) implement the consultation process provided for under COGCC rules that became effective January 15, 2021 (Mission Change Rules or revised rules).¹ It will be updated on an ongoing basis to impart additional knowledge and perspective as CDPHE and COGCC gain experience implementing the Mission Change Rules. The primary audiences for this guidance include industry permitting staff, local governments, COGCC staff and the public. CDPHE and COGCC encourage suggestions on how to maximize the usefulness of this guidance. This guidance as well as other useful COGCC Mission Change guidance can be found on the following COGCC website: <https://cogcc.state.co.us/sb19181.html#/guidance>.

CDPHE has developed this guidance in collaboration with COGCC to achieve several important goals. First, a high priority is to offer a framework for how we plan to consult on Oil and Gas Development Plan (“OGDP”) or Comprehensive Area Plan (“CAP”) applications, and variance requests associated with OGDPs; as well as how we intend to respond to consultation requests made by local governments or the COGCC Director. Second, this guidance will afford the regulated community, local governments and the public a desired transparency and certainty regarding CDPHE’s involvement pursuant to the revised rules. Third, this guidance encourages and helps focus regular communications among COGCC, CDPHE, operators, local governments and the public. Finally, and most importantly, this guidance will help both CDPHE and COGCC fulfill our shared mission to protect public health and the environment.

¹ This guidance document only addresses CDPHE consultations under COGCC rules and it does not address consultations that may be required under Air Quality Control Commission (AQCC) rules. For example, local government consultations on air quality monitoring plans pursuant to AQCC Regulation Number 7, Part D, Section VI.C. are outside of the scope of this guidance. Questions about local government consultations on air quality monitoring plans pursuant to Regulation Number 7 should be directed to the Air Pollution Control Division at cdphe_oilgasreg7_airmonitoring@state.co.us.

Disclaimer

The policies and procedures set out in this guidance are intended solely for informational guidance for CDPHE and COGCC personnel, operators, local governments and interested members of the public. This guidance describes general practices and recommendations regarding CDPHE consultation pursuant to the revised rules. The provisions of this guidance are not binding for any specific consultation actions and CDPHE intends that case by case circumstances will be taken into account as appropriate. It is not intended and cannot be relied upon to create rights, substantive or procedural, enforceable by any person in litigation with the CDPHE. Finally, CDPHE may need to deviate from or change this guidance. CDPHE will make every effort to widely distribute and make available any subsequent revisions to the guidance.

Background

In 2019, the General Assembly passed legislation (Senate Bill 19-181 or SB19-181) to ensure that oil and gas development and operations in Colorado are regulated in a manner that protects public health, safety, welfare, the environment and wildlife resources. Among the revised rules adopted by COGCC in 2020 to implement SB19-181, were additional requirements for consultation with CDPHE on matters relating to the protection of public health, safety, welfare and the environment. This guidance document discusses CDPHE consultation requirements in revised COGCC Rule 309.f, Consultation with CDPHE, and Rule 314, Comprehensive Area Plans and should be used in conjunction with the COGCC Statement of Basis and Purpose to the Rules.

Risk-Based Approach to Consultation

When reviewing an application for an OGD, CAP, or variance, CDPHE will evaluate the facility's relative risk based on the potential to impact public health, safety, welfare, or the environment, and whether the potential risks can be minimized or mitigated in accordance with SB19-181. For example, the factors that contribute to a facility's relative risk to public health include, but are not limited to, the number of residential homes near the proposed facility, the spatial relationship of those homes, the vulnerability of the people that live, work, or attend school near the facility, proximity to disproportionately impacted communities, the potential impacts associated with the facility, and the proposed minimization or mitigation measures. When CDPHE consults on a proposed oil and gas operation, CDPHE will begin with identifying and considering the potential impacts and whether the proposed minimization and mitigation measures appropriately reduce those potential impacts. CDPHE may discuss additional mitigation measures recognizing that, based on site-specific circumstances, there may be other measures that also appropriately reduce risk.

Consultation Process

Rules 309.f. and 314 set forth when CDPHE consultation is to occur, the procedures for consultation, and the results of consultation.

To ensure an efficient process, all parties are encouraged to notify CDPHE of a potential consultation as soon as they become aware that a consultation may be required, rather than waiting until a consultation is formally prompted by the rule. As soon as possible, COGCC staff will notify CDPHE that a CDPHE consultation is required and what the consultation deadline is. CDPHE will ask the COGCC Director to consider CDPHE's reasonable requests concerning the consultation timeline; the Director may extend the consultation period by 60 days upon the request of CDPHE if additional time is necessary to avoid, minimize, and mitigate potential adverse impacts.

Upon notification of a consultation requirement, CDPHE will conduct an initial screening of the consultation request based on the relative risk presented by the proposal. If CDPHE determines that consultation is not necessary and that it will not submit recommendations to COGCC (or it will waive the consultation requirement), CDPHE will alert COGCC as soon as possible in writing of its decision. If consultation proceeds, CDPHE and COGCC will initiate discussions with representatives of the Relevant and/or Proximate Local Government, the Operator, Surface Owner, Surface Owner's tenant, emergency responders, School officials, hospital administrators, Public Water System administrators or any other potentially Affected Persons, as appropriate, as part of its consultation review.

At any time during the consultation and public comment period², a local government may request a consultation with CDPHE in the Director's consideration of an OGD or CAP based on concerns regarding public health, safety, welfare, or impacts to the environment by formally notifying the COGCC of a request to consult with CDPHE. CDPHE encourages the local government to copy the CDPHE Energy Liaison on this request to facilitate a decision on whether to consult and, if applicable, to complete its review and discuss considerations with the COGCC. In order to allow the maximum amount of time for a consultation, CDPHE strongly encourages local governments to notify CDPHE and COGCC of a request for consultation as early as possible. CDPHE also strongly recommends that local governments include with any consultation request information conveying the need and basis for the consultation, as well as additional information regarding identified potential impacts that would be relevant to the consultation. Such information should include, but is not limited to, any specific concerns about potential adverse impacts to public health and the environment and what the local government's preferred outcome is (for example, does the local government generally support approval of the location and is just asking for additional air quality monitoring, or does the local government generally oppose approval of the location and is providing relevant information from which the CDPHE may recommend denial). CDPHE encourages representatives of the Relevant Local Government to coordinate with local environmental health directors as well as representatives from Proximate Local Governments regarding questions and concerns involving public health and the environment associated with oil and gas development. CDPHE places great weight on the local perspective and strongly encourages neighboring

² COGCC Rule 303.d

governments to coordinate early and often on proposed oil and gas development near their shared jurisdictional boundaries.

Operators are encouraged to fill out the CDPHE consultation tab in the Form 2A and identify all of the BMPs they plan on implementing at their location, along with an explanation³ as to why other BMPs were not selected for implementation (e.g., why a new facility will not be designed as a tankless facility). In coordination with COGCC, CDPHE will communicate with the operator concerning questions about the proposal. Then CDPHE and COGCC will meet to discuss the proposal. If necessary, CDPHE, COGCC and the operator will meet to discuss the proposal. CDPHE and COGCC may meet again to discuss the proposal and any measures under consideration to appropriately address risk to public health and the environment. Additional meetings with the operator may be held to address any pending questions or issues, if necessary. If the operator agrees to additional BMPs as a result of the consultation process, the operator may submit an updated BMP list to CDPHE and COGCC. COGCC will attach the operator's completed BMP list to the Form 2A. In advance of submitting its written recommendations, CDPHE and COGCC staff will discuss CDPHE's proposed recommendations regarding monitoring requirements or best management practices necessary and reasonable to protect public health, safety, welfare, or the environment.

CDPHE's consultation on a proposed OGDG will be a relative risk assessment and will: 1) provide a summary description of the potential risks to public health, safety, welfare, or the environment; 2) identify potential impacts to public health, safety, welfare, or the environment from activities associated with the proposed OGDG; 3) recommend conditions of approval or other measures to avoid, minimize and mitigate the identified potential impacts. Such measures may include, but are not limited to, monitoring requirements or Best Management Practices. CDPHE may also recommend that the Commission deny an OGDG or CAP if necessary and reasonable to protect public health, safety, welfare, or the environment.

If CDPHE includes written recommendations that raise concerns for COGCC staff due to other unintended impacts (ie, that raise worker safety, feasibility, or redundancy concerns), CDPHE will note the differing perspectives in its written letter to the Director. If the Director agrees that the monitoring requirements and/or best management practices recommended by CDPHE are necessary and reasonable and do not create other unintended impacts, the Director will incorporate them or other measures appropriate to reduce impacts into the Director's Recommendation regarding the OGDG or CAP.⁴ If the Director determines that further minimization or mitigation of impacts discussed by CDPHE are not necessary and reasonable to protect public health, safety, welfare, or the environment, or that the discussed measures create unintended impacts, the Director will explain the grounds for the disagreement in the Director's Recommendation.⁵ Where consultation occurs, the Director will provide the Director's Recommendation to CDPHE on the same day that it announces the decision.⁶ CDPHE may petition

³ Explanations may be entered in the Comments box on the Submit Tab, or uploaded to the Form 2A as an attachment.

⁴ 309.f.(3).B.

⁵ Id.

⁶ Rule 309.f.(3).C.

the Commission to review the Director's Recommendation.

CDPHE Approach to Consultation on Specific COGCC Rules/Variance Requests

Because the Mission Change Rules significantly revised COGCC's regulatory framework, it is still uncertain which specific rules operators will seek variances from and how often variance requests will prompt CDPHE consultations. As such, CDPHE's approach to consultation on specific rules/variance requests is a work in progress that will need to account for real world considerations as specific variance requests are received. This section will be updated on an ongoing basis as variance requests are received in order to provide consistent guidance for how CDPHE intends to consider variance requests for specific provisions within key COGCC rules involving public health, safety, welfare and the environment. For each rule, CDPHE will offer its views on:

1. Information the Department believes would help it to effectively and efficiently evaluate variance requests⁷;
2. General criteria CDPHE will use in evaluating specific variance requests; and,
3. Typical options for alternatives that CDPHE believes should generally qualify for a variance, where applicable.

CDPHE wishes to remind the reader that, in most cases, information contained in this section is general by design, so that specific case by case circumstances can be considered during consultation. CDPHE also strongly encourages operators to provide relevant information in narrative form, with supporting maps and data easily used to develop recommendations. Failure to do this could force CDPHE to recommend not approving a variance based on a lack of information necessary to evaluate the request.

CDPHE again emphasizes that its role is limited to consulting with COGCC regarding relative risk of potential impacts from a variance request. The decision on whether to approve the request and what, if any, conditions to impose, will be made by the COGCC, under COGCC rules.

⁷ Note: recommendations listed in this document do not constitute additional information requirements of the COGCC rules. They are merely recommendations developed by CDPHE technical experts that CDPHE believes would help inform an evaluation of variance requests. CDPHE will evaluate variance requests regardless of whether this information is provided.