

TYPICAL QUESTIONS FROM THE PUBLIC ABOUT OIL AND GAS DEVELOPMENT IN COLORADO

The following is reproduced from the Colorado Oil and Gas Conservation Commission (COGCC) and is provided simply as an informational reference.

1. HOW CAN WE STOP OIL AND GAS DEVELOPMENT IN COLORADO?

STOPPING OIL AND GAS DEVELOPMENT IN GENERAL

Question 1.a.: I own only the surface and have no interest in the oil or gas underlying my land. How can I stop oil and gas development on my property or in my area of the state? What can the Colorado Oil and Gas Conservation Commission (COGCC) do to stop additional oil and gas development?

Answer 1.a.: Colorado, like all other western states, recognizes separate ownership of the surface estate and the mineral estate and the distinct private property rights associated with each. Often, different parties own the surface and the subsurface, commonly referred to as severed or split estate lands. The different ownership may have been created through the reservation of the minerals to the government when the lands were originally patented, or may result from a decision by a previous landowner to separately sell or lease the subsurface mineral interest.

Because each party has property rights associated with the ownership of their respective estate, oil and gas companies that have purchased or leased mineral rights are entitled to exercise their property rights to develop the resource. Colorado law recognizes that access to the mineral estate from the surface estate is necessary in order to develop the mineral interest. The law provides for access to the mineral estate by allowing subsurface owners "reasonable use" of the surface estate. The COGCC did not create these legal relationships, and it does not have the statutory authority to alter these private property rights. Instead, surface and mineral interests are created or transferred through private party contracts, including deeds and leases.

In contrast, the COGCC is a state regulatory agency created by the Colorado General Assembly to promote development of the oil and gas resources throughout the state, consistent with the protection of public health, safety and welfare. Thus the COGCC may suspend operations if it finds a company is violating COGCC rules, or to protect the public from significant injury, but the COGCC cannot interfere with the private party contracts establishing the surface and mineral owners' rights to the property.

STOPPING OIL AND GAS DEVELOPMENT TO PROTECT AN INDIVIDUAL'S PROPERTY VALUE OR QUALITY OF LIFE

Question 1.b.: If COGCC is obligated to protect public health, safety and welfare, why won't they stop oil and gas development that threatens my property values or my quality of life?

Answer 1.b.: The law that created the COGCC and empowers their regulation of the oil and gas industry provides for the COGCC to promulgate rules to protect the health, safety and welfare of the general public in the conduct of oil and gas operations. The law is intended to keep the general public safe when drilling and development occurs, and is not directed at protecting individual property values or a preferred quality of life.

An example of COGCC rules enacted to protect public health, safety and welfare are the "high density rules" that apply significant restrictions on oil and gas development in areas where there is dense surface residential development on 2 acre or less equivalent lot sizes. In some cases these rules essentially preclude new oil and gas development because of safety concerns.

STOPPING OIL AND GAS DEVELOPMENT WITH RULES FOR PREVENTION AND PROTECTION

Question 1.c.: The COGCC says it has authority and rules to prevent and mitigate significant adverse environmental impacts and to provide certain types of "protection". Why won't the COGCC use those rules to stop oil and gas development?

Answer 1.c.: The COGCC's authority to prevent and mitigate significant environmental harm does not negate its obligation to encourage development of the oil and gas resource. Generally, the COGCC's authority requires it to find solutions that prevent or mitigate significant adverse environmental impacts as well as provide for oil and gas development. The COGCC therefore focuses on environmentally safe operations. In this regard, the COGCC often conditions its drilling permits to include environmental protections, and otherwise enforces its rules to prevent and mitigate significant adverse environmental impacts. In rare cases if there is no identifiable solution to prevent or mitigate significant adverse environmental impacts or to meet its "protection" type charges, the COGCC does prohibit oil and gas development by denying drilling permit application approval or through Commission orders.

2. WHY DOESN'T THE COGCC DO MORE FOR SURFACE OWNERS?

SURFACE OWNER COMPENSATION AND SURFACE DAMAGE BONDS

Question 2.a.: I thought the COGCC was supposed to "balance" oil and gas development with surface development. Why doesn't the COGCC require the oil and gas companies to pay me for the economic loss I suffer when the oil company uses part of my property for oil and gas development? Why does the COGCC grant companies permits to drill on my property when I haven't signed a surface use agreement with them?

Answer 2.a.: An oil company's right to use the surface is created by the oil and gas lease or other contract that establishes the company's right to drill. The COGCC does not create these interests and it is not authorized to interfere with these interests unless it has evidence that the operations are in violation of COGCC rules and regulations.

The law creating the COGCC requires oil companies to post a bond with the COGCC that is intended to protect surface owners from "unreasonable crop losses or land damage from the use of the premises" when a company and the surface owner have not otherwise reached agreement on surface use compensation. The COGCC's statute recognizes the existing law that provides for reasonable surface use to access the mineral estate. Therefore, only if crop losses or land damages are "unreasonable" based on what is needed to access the mineral estate does the law provide for compensation to the surface owner.

In practice, companies generally pay surface owners for access despite the fact the law permits reasonable access without compensation. The surface use payments companies voluntarily make to surface owners may or may not be equivalent to the economic losses perceived by

those surface owners. The COGCC is not authorized however to order companies to compensate surface owners for crop loss or land damage considered "reasonable."

REQUIRING DIRECTIONAL DRILLING OR PITLESS DRILLING SYSTEMS

Question 2.b.: Why doesn't the COGCC prevent or mitigate environmental impacts by requiring companies to spend more money for special equipment and technology such as directional drilling or pitless drilling systems?

Answer 2.b.: The law empowers the COGCC "to regulate oil and gas operations so as to prevent and mitigate significant adverse environmental impacts ... resulting from oil and gas operations to the extent necessary to protect public health, safety and welfare, taking into consideration cost-effectiveness and technical feasibility." Because of the statutory requirement that the COGCC take into consideration cost-effectiveness and technical feasibility the COGCC has to consider the costs of any condition imposed for environmental purposes. In some rare instances the COGCC has required directional drilling or pitless drilling systems. Generally, the COGCC does not impose these requirements because there has been no showing that the requested method is cost-effective, technically feasible, and necessary to protect the public health, safety and welfare. A surface owner may file an application for Commission hearing to make a showing that directional drilling or pitless drilling systems are necessary to protect the public health, safety and welfare taking into consideration cost-effectiveness and technical feasibility.

REQUIRING MINERAL RIGHTS HOLDERS TO ACCOMMODATE SURFACE OWNERS

Question 2.c.: In its 1997 decision in *Gerrity Oil and Gas Corp. v. Magness* the Colorado Supreme Court discussed the relationship between surface owners and mineral owners and stated that "[t]his 'due regard' concept requires mineral rights holders to accommodate surface owners to the fullest extent possible consistent with their right to develop the mineral estate." How does this decision affect the COGCC's regulatory authority?

Answer 2.c.: The COGCC receives its regulatory authority from the General Assembly. The Colorado Supreme Court Decision does not change the COGCC's statutory grant of authority, nor did the decision reinterpret the COGCC statute as it applies to surface and mineral owners. A legislative change to the Oil and Gas Conservation Act would be necessary to affect COGCC's regulatory authority.

The *Magness* decision more closely affects the private party contractual relationships between surface and mineral owners discussed above, providing that accommodation concepts be incorporated into the analysis of the reasonableness of the company's access. The decision may also affect the way lower courts decide future litigation between surface owners and mineral rights holders.

Much of the COGCC's existing statutory charge and many COGCC rules are consistent with the *Magness* decision. It is important to note however that the COGCC statute has not been changed to include authority to regulate the extent to which mineral rights holders must accommodate surface owners.

3. WHY IS THE COMMISSION COMPRISED OF PEOPLE FAMILIAR OR ASSOCIATED WITH THE OIL AND GAS INDUSTRY?

Question 3.a.: Can the Commission makeup be changed to include more environmentalists and surface owners so that it will be more likely to vote to stop oil and gas development?

Answer 3.a.: In 1994 the COGCC's law was amended to provide that the Commission's promotion of resource development is consistent with the protection of public health, safety and welfare. At the same time the General Assembly expanded the makeup of the Commission. The COGCC includes members with experience in the oil and gas industry, agriculture, real estate, range management, land reclamation and other environmental areas. In spite of these changes the Commission is sometimes viewed as unresponsive to surface owners and unwilling to stop oil and gas development.

Since the 1994 legislation the COGCC has promulgated some of the most comprehensive state oil and gas regulations with respect to environmental protection, reclamation, local governmental coordination, and public participation in the United States. The COGCC has acted to the extent of its current statutory authority to address surface owner concerns and control oil and gas operations. Further changing the Commission makeup without fundamentally changing and expanding its statutory authority would not make it more responsive to surface owners, or allow it to stop drilling more often. Accordingly, as long as there is severed mineral interest ownership in Colorado and law which protects the property rights of mineral rights holders to access their mineral estate, and as long as the COGCC's statute charges the COGCC with promotion of oil and gas development, the COGCC will be limited in its ability to satisfy surface owners or to stop oil and gas development, regardless of Commission makeup.

COMMISSIONER INDUSTRY EXPERIENCE REQUIREMENTS AND RELIANCE ON STAFF

Question 3.b.: The COGCC has a staff of specially trained and experienced petroleum engineers, geologists, environmental protection specialists, and field inspectors as well as legal advice from an experienced oil and gas attorney in the Attorney General's office. Why does the Commissioner makeup need to include so many industry experienced professionals? Couldn't the Commission be made up mainly of people without professional expertise or industry experience who would rely on staff advice in making technical decisions?

Answer 3.b.: The Commission functions in two types of roles; as a legislative "rule-making" body and as a court-like "adjudicatory" body. Each role requires the Commission to assess complex technical engineering, geologic, legal, operational, and economic oil and gas issues. The Commission must also have a thorough understanding of these issues in order to fulfill its statutory charges. Although staff is available in an advisory capacity, the Commissioners must exercise independent judgment on complex technical and legal issues which requires substantial experience and expertise. Accordingly, it is very typical for the General Assembly to require state boards and commissions to be composed of individuals with experience and expertise in the businesses they oversee. It would be inappropriate and in some instances illegal for staff to substitute its judgment for that of the appointed Commission officials.

COMMISSIONER CONFLICTS OF INTEREST.

Question 3.c.: Because there are so many industry-experienced professionals that serve as COGCC Commissioners isn't there a danger of conflicts of interest leading to a "fox guarding the hen house" situation?

Answer 3.c.: All appointed officials are required by law to separate their personal interest from the state interests they represent. In addition, the COGCC has promulgated rules that require very high standards of professional conduct and comprehensively address conflicts of interest which meet and exceed those contained in state statutes. In practice, the Commissioners are thorough and deliberate in disclosing potential conflicts of interest and appropriately removing themselves when relevant matters come before the Commission.

4. HOW DOES THE COMMISSION PROTECT THE SAFETY OF THE GENERAL PUBLIC?

The COGCC applies a multitude of rules and permit conditions to protect the safety of the general public including: safety setbacks from dwellings for wells and production equipment; blowout prevention equipment; well and equipment safety specifications and design standards; security fencing in high density areas; and special operations safety procedures. Copies of the Commission Rules are available at no cost from our web site at www.cogcc.state.co.us or they can be ordered through the mail by calling our main number, 303.894.2100, or sending an e-mail to dnr.ogcc@state.co.us. Moreover, cases of public safety impacts from oil and gas operations are extremely rare and generally non-existent in Colorado.

5. HOW DOES THE COMMISSION'S AIR AND WATER QUALITY REGULATION FIT IN WITH THAT OF THE COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT (CDPHE)?

The COGCC has broad statutory authority with respect to "...impacts on any air, water, soil, or biological resource resulting from oil and gas operations...". The Air Quality Control Commission, through its staff, the CDPHE Air Pollution Control Division (APCD) regulates air quality over the entire state to minimize emissions from a variety of sources, and to ensure air quality on a statewide basis meets federal air quality standards. In addition, the COGCC has a few air-related rules specific to oil and gas operations such as flaring gas wells. The COGCC also cooperates and coordinates closely with CDPHE-APCD with respect to oil and gas operations, with the COGCC generally deferring to the expertise of CDPHE-APCD on air quality issues such as emissions and potential health impacts.

With respect to water quality the COGCC coordinates its monitoring and enforcement with the CDPHE Water Quality Control Commission (WQCC) which sets water quality standards and classifications statewide. The COGCC is responsible (and accountable to the CDPHE-WQCC) for implementing those standards and classifications with respect to ground water. The COGCC requires that operators design and construct wells and facilities to protect ground water from contamination during oil and gas operations. If oil and gas operations entail discharges to surface waters the operator must obtain a permit prior to discharging from the CDPHE-WQCC. As an additional safeguard, the COGCC has several rules aimed at preventing unpermitted discharges to surface waters.

6. HOW ARE OIL AND GAS IMPACTS TO WILDLIFE AND AGRICULTURAL LANDS ADDRESSED?

Oil and gas development generally affects relatively small areas averaging roughly 2 acres per well. Therefore, impacts to wildlife habitat and agricultural lands are generally relatively small. The COGCC has reclamation rules that require impacted lands to be restored to their original condition after the well is abandoned. Those rules have recently been expanded and strengthened.

Compared to other forms of land use, such as rural residential development, oil and gas development is relatively benign in its impact on wildlife and agriculture. It is temporary in that after the well is abandoned the lands can be reclaimed for wildlife habitat and agriculture. Rural residential development is generally more permanent. Wildlife biologists from the Colorado Division of Wildlife (CDOW) have advised that there are generally more impacts to wildlife from a typical rural residence than from a typical oil and gas well. State law in Colorado restricts regulation of rural residential land development to parcels smaller than 35 acres. The CDOW wildlife biologists have confirmed that gas wells developed at one well per 40 acres typically have less impact on wildlife than 35 acre ranchette development does. The COGCC considers impacts to wildlife in its regulation, and in certain cases issues orders or applies permit conditions to prevent or mitigate impacts to wildlife.

The National Environmental Policy Act (NEPA) provides for a defined "cumulative impacts" analysis for proposed projects classified as "federal actions". Colorado law does not provide for a NEPA "cumulative impacts" analysis for projects proposed on private or state-owned lands. The COGCC can consider cumulative impacts within the limits of its authority under state law.

A wildlife policy has been adopted by the oil and gas industry trade associations and many companies operating in Colorado. The CDOW and the COGCC encourage voluntary commitment to measures that prevent and mitigate impacts to wildlife.

7. WHAT IS THE BASIS FOR THE COMMISSION'S SOUND RULES AND HOW ARE THEY APPLIED?

The state noise law specifies levels of sound that the courts use to determine the extent to which the noise constitutes a public nuisance. The Commission has adopted sound rules which incorporate the same levels of sound specified in the state noise law.

The Commission's field inspectors are equipped with sound level meters and frequently take field measurements in response to complaints. If sound levels measured from oil and gas operations exceed those specified under Commission rules, enforcement action is initiated to bring them into compliance.

8. HOW ARE THE COMMISSION RULES ENFORCED?

The Commission staff initiate enforcement actions as a result of alleged violations encountered through inspections and complaints. If the operating company fails to voluntarily agree to appropriate corrective action or an order setting fines, a hearing is scheduled for the Commission to determine if a violation exists and to order appropriate corrective actions and assess fines.