OPPORTUNITY KNOCKS: HOW THE COLORADO GOVERNOR’S OIL AND GAS TASK FORCE CAN FIND SUCCESS

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INTRODUCTION

To avoid a drawn-out and expensive ballot box battle over oil and gas development and regulation in Colorado, Governor John Hickenlooper recently announced the creation of a 21-member task force charged with finding ways to protect Coloradans from the impacts of the current oil and gas boom.¹

The governor’s task force – made up of industry, community, political, and environmental leaders² – will meet throughout the coming fall and winter. The group is tasked with identifying thoughtful and workable policy recommendations to the state legislature and to state agencies that will reduce the mounting conflicts between Colorado’s communities and the oil and gas industry.

Considering how contentious oil and natural gas policy has been in Colorado in recent years, the commission faces numerous challenges in finding consensus recommendations. And even if the commission agrees on recommendations, there is no guarantee that a bill will be signed into law or new rules will be adopted.

While success is far from guaranteed, the cost of failure would be significant. The growing tensions between communities and the oil and gas industry in Colorado are arising because of tangible impacts to local communities. Without measurable policy improvements over the coming months, the controversies surrounding oil and gas drilling will remain a major part of Colorado’s political discourse throughout 2015, 2016, and the foreseeable future.

In this white paper, we lay out how a confusing array of case law led to today’s situation, and the need to clarify the role local governments play in controlling how and where heavy industrial oil and gas development happens in residential areas.

We also make three recommendations – alongside local control – where the governor’s task force has an opportunity to make measurable improvements. Policy fixes in these areas will be key to addressing the current regulatory shortfalls by enhancing community and environmental protections, better involving local governments, and ensuring transparency and accountability by the public and private sectors. Our recommendations are:

1) Clarify the rights of local governments to regulate oil and gas development
2) Establish setbacks for drilling activities near waterways
3) Make the Colorado Oil and Gas Conservation Commission’s website more transparent and accessible
4) Close hydraulic fracturing chemical disclosure loopholes

At present, Colorado has relatively robust oil and gas regulations compared to other producing states. The state, for example, recently adopted air quality rules that have become a model for other states and the federal government.³

But loopholes and problem areas remain. The governor’s task force now has the opportunity set an example for the nation, demonstrating that we can have strong protections for communities alongside a healthy oil and gas industry.
Colorado is in the midst of an oil and gas boom driven by unconventional drilling practices including hydraulic fracturing and horizontal drilling. As the U.S. Energy Information Administration notes, “From 2007 to 2013, crude oil production in Colorado rose 146%,” while “marketed natural gas production rose 38% between 2007 and 2012.”

This has provided an economic lift. But at the same time, communities in Colorado are experiencing the downsides of the boom: wells and rigs are inching closer to homes and schools, wildlife populations are on the decline, and there is more than one chemical spill from oil and gas development every day in the state. While oil and natural gas plays an important role in Colorado’s economy, the state’s renowned outdoor spaces and way of life should not be sacrificed in a rush to drill for energy resources.

It was against a backdrop of rising conflict that communities in Colorado took matters into their own hands and attempted to exert local control over oil and gas drilling. In 2012, Longmont became the first Colorado town to ban fracking. Other towns, including Boulder, Lafayette, Broomfield and Fort Collins followed suit with bans and moratoria.

While there remain questions about the legality of local fracking limits – courts recently have struck down local control efforts in Longmont, Fort Collins, and Lafayette (Longmont and Fort Collins have appealed) – these local efforts are symptomatic of the larger problem: The state is not doing a sufficient job of protecting communities from booming oil and gas development. And, unlike their authorities when it comes controlling where other heavy industrial land uses happen – for example, a refinery or a gravel mine – local governments currently do not have the tools to protect residents from the impacts of oil and gas development. Further, affected residents lack a say in how and where drilling occurs within their communities and feel powerless as drilling moves...
into populated areas.

These problems are compounded by the perception—both historically and under Governor Hickenlooper—that the Colorado Oil and Gas Conservation Commission (COGCC) is too close to the industry and has discounted legitimate concerns about the impacts of oil and gas drilling on communities, health, and quality of life. It was not until 2007, when the Colorado legislature passed a law to refocus the mission of the COGCC, that the agency began putting the protection of the environment and public health on equal footing with its mission to promote development.¹¹

Still, the agency has struggled to show that it is equipped to balance its dual mandate: promoting efficient oil and gas development and protecting Colorado residents from its impacts. Current COGCC director Matt Lepore, for example, was roundly criticized last year for suggesting that community concerns over the growing impacts of oil and gas drilling were not grounded in reality.¹² ¹³

Nevertheless, Colorado has continued to make progress in recent years to protect residents from the side effects of oil and gas development. The state was one of the first in the nation to require companies to disclose the chemicals used during fracking, albeit with a controversial provision to conceal “trade secrets.”¹⁴ And earlier this year the state adopted the strictest rules in the country to limit methane emissions from oil and gas operations.¹⁵

For the new task force to succeed, it must continue taking Coloradans’ concerns seriously and address them with smart policies that give a voice to local communities while striking a better balance between oil and gas drilling and the health of communities and Colorado’s outdoor spaces.
The linchpin of the ongoing oil and gas conflict in Colorado remains the extent to which local government can regulate where and how drilling happens, and the commission is right to focus its efforts first and foremost on this issue.

Oil and gas development is an industrial land use. With drilling comes increased traffic, noise, and fumes. Local governments deserve to have significant input into how and where development occurs.

In his Executive Order describing the task force’s mandate, Governor Hickenlooper outlined ten local control issue areas that merit attention. These include setbacks, how to manage local regulations more stringent than those of the state, and traffic management and impacts.

There is a long history of local governments having the authority to regulate land use. Almost a century ago the United States Supreme Court cemented the right for local governments to regulate land use through zoning. But Colorado’s courts and archaic mineral right laws together have muddied if, when, and how local governments may use local land use laws to regulate oil and gas drilling.

This began in 1992, when the Colorado Supreme Court issued a series of rulings that form the bedrock of today’s fight. In one decision – Voss v. Lundvall Brothers – the court ruled that the City of Greeley cannot ban oil and gas drilling outright within the city limits because the state’s interest in oil and gas development “preempts” Greeley’s interest in keeping development out.

On the same day, however, the court issued a decision – Board of County Commissioners v. Bowen/Edwards – indicating that the state’s interest in oil and gas does not always and unequivocally prohibit a local government from regulating oil and gas operations. But, the court noted in the Bowen/Edwards decision that local land use regulations may impose an “operation conflict” – where a local rule would “materially impede or destroy the state interest” in oil and gas development. The determination of an “operational conflict” must be determined on “an ad-hoc basis.”

To this day, local governments are still navigating this complexity of court rulings. On the one hand, a municipality cannot ban oil and gas development outright; on the other, a municipality can pass rules so long as they do not “operationally conflict” with the state, but the determination of “operational conflict” is made on an ad-hoc basis. In practice, this means each time a town or city uses its land use powers to protect residents from drilling it risks a lawsuit from the oil and gas industry and the state.

This untenable situation can be resolved by the governor’s task force by clarifying exactly what authority local governments have to regulate oil and gas drilling. Local governments play a critical role in land use planning and development, including regulating other industries like mining. As one legal analysis put it, the mining industry is a “prime example” of an industrial activity that is “heavily regulated by local governments.”

The state needs to make it absolutely clear what rights local government has to regulate oil and gas development. This will protect them from expensive and drawn out lawsuits for simply attempting to protect residents from the impacts of oil and gas development.
The mandate of the governor’s new oil and gas task force is relatively narrow. A press release from Governor Hickenlooper states that it “will address land use issues and the role of state and local government in siting oil and gas facilities.” But even within the confines of this mandate, the task force has a number of policy opportunities which merit serious consideration beyond zoning and local control:

- Establish setbacks for drilling activities near waterways
- Make the COGCC’s website more transparent and accessible
- Close hydraulic fracturing chemical disclosure loopholes

We describe each of these policies in detail below.

1) CREATE SENSIBLE SETBACKS FOR DRILLING ACTIVITIES NEAR WATERWAYS

Colorado is currently home to more than 52,000 active oil and natural gas wells across the state. Much of this drilling occurs near rivers, streams, and other riparian areas – in fact, a recent analysis from the COGCC determined that “there are 20,850 wells within 500 feet of rivers, streams and drainages, including 5,900 near significant waterways.”

Water contamination from drilling is a serious issue. There are nearly 500 spills per year in the state, approximately 10 percent of which affect water resources. Recently, problems with oil and gas wells, tanks, and other infrastructure located near water bodies have come to a head. The September 2013 flooding along the Front Range, for example, threatened more than 1,600 wells located in the flood zone, resulting in nearly 100,000 gallons of drilling-related fluids spilled in Colorado’s streams and rivers. And, just months earlier, a major spill in Parachute Creek caused more than 10,000 gallons of natural gas liquids to leak into the creek, which is a tributary to the Colorado River.
Communities have pushed for riparian and waterway setbacks for many years, and as late as December 2013 state officials were stating publicly that they are open to such a rulemaking. But the issue remains unaddressed – as the Grand Junction Sentinel put it, some “consider [riparian setbacks] to be unfinished business that recent events have shown needs revisiting.”

The need for such a law is obvious – according to one news outlet, current rules from the COGCC “prohibit drilling within 300 feet of streams that provides municipal drinking water – extending five miles upstream of the water intake – but that setback doesn’t apply to bodies of water in general.”

While we do not call for a particular distance for riparian setbacks, it is worth noting that a coalition of sportsmen’s groups has called for setbacks of 500 feet from rivers and creeks, and up to a quarter-mile if cutthroat trout are present.

Setbacks are not a new policy idea – in fact, increased setbacks from homes and schools was one of the main ballot measures proposed during the 2014 election cycle before it was tabled in Governor Hickenlooper’s compromise.

2) MAKE THE COGCC’S WEBSITE MORE TRANSPARENT AND ACCESSIBLE

Public access to information about oil and gas development can go a long way towards better consensus on policy and more fact-based debates. According to the COGCC’s strategic plan, one of the agency’s key objectives is to “serve as the primary government resource to the public regarding oil and gas development in Colorado.”

Unfortunately, the current COGCC website has the accessibility of a bygone era. It lacks a basic search option and much of the content is stored in PDF documents, which are not optimized for Google or other search engines. Locating information often requires a phone call into the COGCC offices to have a staff member walk one through the process of accessing the desired information.

To meet its objective of providing the public with accurate and up-to-date information, the agency needs the financial and staffing resources to build a website that reflects 21st-century technologies. This goes beyond the front-end “look and feel” and means a more transparent and logically organized site. It also means that the website’s databases and other search functions allow the user to easily query for past and present information on drilling, production, spills, inspections, enforcement, and other relevant information. For example, a homeowner should be able to tell if a nearby well has multiple violations. Additionally, the website should provide an open forum for citizens to comment on agency proposals and decisions.

The COGCC deserves credit for making some key information publicly available that other states in the West do not, such as the number, location, and type of spills related to oil and gas activities. The state could take it one step further by summarizing Colorado oil and gas statistics and communicating those with the general public.
Coloradans deserve an improved and modernized COGCC website that provides a transparent and user-friendly source of information on oil and gas activities within the state. The task force and state legislature can provide both the directives and the funding to turn this need into a reality.

3) CLOSE CHEMICAL DISCLOSURE LOOPHOLES

One of the most salient issues around oil and gas drilling, and particularly the unconventional drilling technique of hydraulic fracturing, is chemical disclosure laws. Due to an exemption in the Safe Drinking Water Act, oil and gas companies are not required by federal law to publicly disclose the chemicals in hydraulic fracturing fluids. This regulation is instead left to the 34 states where oil and gas drilling occurs, which range from strong disclosure rules to none at all.  

In 2011, the state’s regulators led the way with a rulemaking regarding chemical disclosure laws that addressed a number of aspects of hydraulic fracturing. Importantly, Colorado’s disclosure rules require that the specific chemicals be identified by Chemical Abstract Service number and that the maximum concentration of all components of hydraulic fracturing fluid be disclosed. 

However, one important shortfall of Colorado’s hydraulic fracturing rules is that they allow for trade secret exemptions. This means that companies can claim that the ingredients of their hydraulic fracturing chemicals are proprietary and do not need to be reported. A company does not even need to provide substantiation when claiming a trade secret exemption. Instead, Colorado’s law should be written like Wyoming’s where the “agency decides whether information is exempt from public disclosure” rather than the rule “not provid[ing] for evaluation of claims.”

It is also noteworthy that one of the country’s largest drillers, Baker Hughes, announced earlier this year that it would no longer claim trade secrets. The company has committed to disclosing “100 percent of the chemical ingredients” that it uses during the drilling and fracking process.
CONCLUSION

Tensions between oil and gas development and community wellbeing have peaked in Colorado. As drilling moves closer to homes and open spaces, communities and citizens are feeling intruded upon.

Governor John Hickenlooper, the state legislature, the governor’s new task force, and other leaders involved in oil and gas policy in Colorado have the chance to find workable solutions. By addressing tensions and by finding balance between energy development and Colorado’s unique way of life, the state can cement itself as an energy policy leader. The task force now has a few short months to make strong recommendations to the state legislature and state agencies, which then need to step up and turn good policy ideas into law.
REFERENCES


