

Wildlife Protection in COGCC's Amended Rules

As unanimously adopted, House Bill 1298 directs that oil and gas operations in Colorado were to be managed in a way that balances development with wildlife conservation and declared it to be the policy of the State that wildlife and their environment are to be protected, preserved, enhanced, and managed for the use, benefit and enjoyment of the State's residents and visitors. It directs the COGCC to provide for consultation with the Wildlife Commission and the Division of Wildlife on decisions that impact wildlife resources. It also directs the COGCC to adopt rules to minimize adverse impacts to wildlife resources, which is defined to mean avoiding adverse impacts where possible, minimizing the extent of impacts that cannot be avoided, and mitigating the effects of unavoidable remaining impacts. Finally, it provides that permit-specific conditions for wildlife habitat protection were to be attached only with the consent of the surface owner.

The COGCC's amended rules respond to this legislative direction by providing for consultation with the Division of Wildlife regarding development in sensitive wildlife habitat and avoidance of the most critical habitat where feasible. They also impose certain operating requirements to protect wildlife and ensure that surface owner consent is obtained before permit-specific wildlife conditions are imposed.

Identification of Sensitive Wildlife Areas

In order to ensure that potential impacts to wildlife habitat are taken into account, the amended rules identify two categories of valuable habitat which are designated on maps incorporated into COGCC's rules. The first category is "sensitive wildlife habitat," which is largely found in western Colorado and includes areas such as mule deer critical winter range, bighorn sheep winter range, and greater sage grouse production areas. An operator locating a new facility within sensitive wildlife habitat will consult with the COGCC, the Division of Wildlife, and the surface owner, as discussed below. The second category is "restricted surface occupancy areas," which are likewise mostly found in western Colorado and include the highest-value habitat such as lands within 1/4 mile of an active Bald Eagle nest sites, areas within 0.6 mile of any greater sage-grouse lek, and areas within 300' of designated Cutthroat Trout stream segments or "Gold Medal" fisheries. Operators must avoid new development in these relatively small areas to the extent technically and economically feasible. If avoidance is infeasible, then the operator may develop in these areas after consultation with the COGCC, the Division of Wildlife, and the surface owner, as discussed below. The number of species covered by these sensitive wildlife areas was reduced during the rulemaking to ensure that only the most valuable species and habitats were included.

Consultation with the Division of Wildlife

The amended rules provide for consultation with the Division of Wildlife on decisions that impact wildlife resources, as directed in HB 1298. C.R.S. §§ 24-60-128(3)(a). An operator will be required to consult with the COGCC, the Division of Wildlife, and the surface owner in limited circumstances, such as where an oil and gas facility is proposed in sensitive wildlife habitat, where the operator seeks a variance from one of the wildlife rules, or where the Division of Wildlife requests consultation because a proposed development site is in habitat of a threatened or endangered species. The consultation approach taken by the COGCC with regard to wildlife protection was proposed by industry during the rulemaking process.

The COGCC's amended rules:

- Identify sensitive wildlife areas, largely located in western Colorado
- Provide for limited consultation with the Division of Wildlife on permit applications
- Require surface-owner consent on permit-specific conditions for wildlife habitat protection
- Require the use of certain best management practices to protect wildlife

Consultation with the Division of Wildlife will take place within a 40-day period that runs concurrently with the public comment period on and the COGCC's consideration of the application. This will ensure that the COGCC permitting process remains timely and efficient, as directed by the General Assembly in HB 1298.

During consultation, the operator will work with the Division of Wildlife to identify measures to minimize impacts to sensitive wildlife habitat. As a result of this consultation, the Division of Wildlife may make written recommendations to the COGCC on conditions of approval necessary to minimize adverse impacts to wildlife. Where the operator, the surface owner, the COGCC, and the Division of Wildlife agree to such conditions of approval, they will be incorporated into the COGCC's permit approvals. The COGCC staff believes that many consultations will require less than 40 days.

Where the parties to the consultation do not reach agreement on conditions of approval, the COGCC Director will decide whether to attach conditions on the permit approval. In making this decision, the Director will consider several factors, including a list of potential best management practices for the geologic basin, the anticipated effects of the proposed action on wildlife, the extent to which acceptable alternative sites exist for the proposed operation, the extent to which the operator proposes to use technology or practices that are protective of the environment, and any lease terms or surface use agreements predating these rule amendments. In no case, however, will the Director attach permit-specific conditions for wildlife habitat protection without the consent of the surface owner, as described below.

Finally, consultation under the amended rules will not be required in certain circumstances, such as where the proposed oil and gas site is covered by an approved Comprehensive Drilling Plan, where the Division of Wildlife has previously approved a wildlife mitigation plan covering the proposed site, or where the operator voluntarily agrees to limit its surface disturbance in the sensitive wildlife area.

Surface Owner Consent for Permit-Specific Conditions

As directed by the General Assembly, the amendments prohibit the COGCC from attaching permit-specific conditions for wildlife habitat protection without the consent of the surface owner. C.R.S. § 34-60-128(3)(b).

Where such permit-specific conditions are suggested by the Division of Wildlife or the COGCC and the surface owner withholds consent, the COGCC will work with the surface owner, the Division of Wildlife, and the operator to identify acceptable alternate conditions.

In the rare instance where conditions acceptable to the surface owner cannot be identified, the COGCC will decide whether to issue the permit without permit-specific wildlife conditions or to deny the permit. Ultimately, the COGCC has the responsibility to balance development of oil and gas resources with minimizing adverse impacts to wildlife resources. C.R.S. § 34-60-128(2).

Best Management Practices for Wildlife Protection

HB 1298 also directs the adoption of standards for minimizing adverse impacts to wildlife resources and the implementation, wherever reasonably practicable, of best management practices to conserve wildlife. C.R.S. §§ 24-60-128(3)(c) & (d).

The COGCC's amended rules contain several operating standards -- many of which are already being implemented by operators in Colorado -- such as utilizing bear-proof containers for food-related trash, disinfecting certain equipment before using it in designated Cutthroat Trout habitat, planning transportation networks to minimize the number and length of oil and gas roads, and establishing refueling and chemical storage areas outside of riparian zones and floodplains. Other operating standards will only apply in areas of particularly sensitive wildlife habitat, such as constructing escape ramps for certain pipeline trenches during installation, consolidating new facilities, minimizing rig mobilization where practicable, using boring instead of trenching across critical fish streams, and treating certain wastewater pits to prevent the spread of West Nile Virus. Finally, other operating requirements will only apply in sensitive wildlife areas and only with the consent of the surface owner, such as using wildlife-appropriate fencing or seed mixes during reclamation, limiting access to oil and gas roads, and using topographic features and vegetative screening to create seclusion areas.

The amended rules do not include mandatory timing limitations, as had been previously proposed.

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