Earth Guardians’ Initial Party Input on Mission Change Rulemaking

On behalf of Earth Guardians, a party to the Colorado Oil and Gas Conservation Commission’s Mission Change rulemaking, please find attached redline edits to the 200, 300, 400, 500, and 600 Rule Series, along with summaries of the top issues for the 200, 300, 400, 500, and 600 Rule Series. These redline edits and issue summaries constitute Earth Guardians’ “Initial Party Input” and are being filed via electronic mail to, DNR_COGCC.Rulemaking@state.co.us, and consistent with the requirements of the Colorado Oil and Gas Conservation Commission's May 04, 2020 Case Management Order.

We are happy to meet with Director Robbins or COGCC staff to explain the redline edits and the issue summaries to allow for a better understanding of Earth Guardians’ concerns.

Sincerely,

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Exhibits:
Earth Guardians Exhibit 1, Redline Edits to 200 Series Rules
Earth Guardians Exhibit 2, Redline Edits to 200 Series Rules
Earth Guardians Exhibit 3, Redline Edits to 200 Series Rules
Earth Guardians Exhibit 4, Redline Edits to 200 Series Rules
Earth Guardians Exhibit 5, Redline Edits to 200 Series Rules

Earth Guardians is represented by Nathan Bellinger, Senior Staff Attorney, Our Children’s Trust; 413-687-1668; nate@ourchildrenstrust.org
ISSUE ONE: Rules inadequately address the Commission’s obligation to “protect public health, safety, and welfare, including protection of the environment and wildlife resources” and the Commission’s obligation to “evaluate and address the potential cumulative impacts of oil and gas development.”

It is of great concern to see the 200 Series Rules, and the 300, 400, 500, and 600 Series Rules, minimize and misstate the Commission’s legal obligation to “regulate the development and production of the natural resources of oil and gas in the state of Colorado in a manner that protects public health, safety, and welfare, including protection of the environment and wildlife resources” and to “evaluate and address the potential cumulative impacts of oil and gas development.” §§ 34-60-102(1)(a)(I); 34-60-106(11)(c), C.R.S (emphasis added). Protecting public health and the environment is the Commission’s number one obligation.

Earth Guardians and Colorado youth have been trying since at least 2013, to protect public health and the environment from dangerous oil and gas operations and from the climate crisis. On November 15, 2013, eight Colorado youth (including members of Earth Guardians) filed a petition for rulemaking to the Commission seeking the promulgation of rules to protect public’s health, safety, and welfare, the environment, and wildlife resources from the adverse impacts of Colorado’s rampant oil and gas operations. The Commission spent over five years fighting the youth in administrative proceedings and judicial proceedings (Martinez v. COGCC) and resisting the youth’s request to comply with the law and protect them and all Coloradans from oil and gas operations and climate change. Notwithstanding the Commission’s resistance to change and demonstrated commitment to the promotion of oil and gas operations, regardless of the catastrophic impacts, the youth’s requests finally came to fruition when Governor Polis signed SB 19-181 into law on April 16, 2019.

The General Assembly has unequivocally made protecting public health, safety, and welfare, the environment, and wildlife resources the Commission’s first priority and obligation. The General Assembly also required that the Commission to evaluate and address the cumulative impacts of oil and gas operations, which includes climate change. As bill sponsor Senator Fenberg stated, “the objective of this bill is to ensure that we are protecting the health and safety and welfare of Coloradans, of the environment, of wildlife, etc. . . . The COGCC’s role is to regulate the oil and gas industry, not to foster or promote the industry . . . In regulating the industry, it will [have] a priority of protecting health and safety, both for workers in the industry as well as for people who live near oil and gas activities.”

The proposed rules, however, fail to fulfill the Commissions’ legal obligation to protect public health and the environment and address the cumulative impacts of oil and gas operations, including impacts on the climate crisis. Pursuant to the Act, only if public health and the environment are adequately protect from the direct, indirect, and cumulative impacts of oil and gas operations can they proceed. See redline edits to fix the shortcoming of the proposed rules.

Issue Summary for 300 Series Rules

ISSUE ONE: Rules fail to conduct a preliminary analysis of the current status of impacts to public health, safety, welfare, the environment, and wildlife resources before granting additional permits for oil and gas operations.

A new Rule 301 is proposed that would require the Commission, in consultation with the CDPHE, and using the best available science, to conduct a Baseline Assessment of the current baseline conditions of Coloradans’ public health, safety, and welfare, the environment, and wildlife resources. No such comprehensive Baseline Assessment has been completed by the Commission or CDPHE and it is critical for allowing the Commission to fulfill its mandate to protect public health, safety, and welfare, the environment, and wildlife resources. Without knowing the current state of public health, safety, and welfare, the environment, and wildlife resources, the Commission cannot be expected to know if it is fulfilling its duty to protect them. The Baseline Assessment must consider the current state of climate change and how climate change is impacting public health, safety, and welfare, the environment, and wildlife resources. For all instances where the Baseline Assessment reveals that public health, safety, and welfare, the environment, or wildlife resources are not adequately protected from oil and gas operations, the Commission, in order to comply with its mandates in the Act, must delineate what measures need to be taken to ensure that they are protected.

Relatedly, the full extent of the greenhouse gas emissions attributable to the oil and gas industry and its contribution to climate change is not fully known because the Commission has never calculated the lifecycle greenhouse gas emissions attributable to the industry. That first step, calculating the lifecycle greenhouse gas emissions attributable to the industry, is essential and responds directly to Commission’s mandate to “evaluate” the cumulative impacts of oil and gas development. § 34-60-106(11)(c)(II), C.R.S.

In addition to evaluating the cumulative impacts of oil and gas development, the Commission is also obligated to “address” the cumulative impacts of oil and gas development. § 34-60-106(11)(c)(II), C.R.S. Therefore, the new proposed Rule 302 requires the Commission to prepare a plan, setting biennial lifecycle greenhouse gas emission reduction targets, to ensure that the Commission is addressing the cumulative impacts of oil and gas development in Colorado and its contributions to climate change. Colorado’s carbon dioxide budget set forth in the rule is consistent with the best available science and which requires that global carbon dioxide concentrations return to 350 ppm by 2100. Only with such a Climate Recovery Plan in place can the Commission fulfill its obligation to address the cumulative impacts of oil and gas development, including climate change.

No permits should be granted by the Commission until the Baseline Assessment and Climate Recovery Plan are completed. Once they are completed, permits for oil and gas development and operations should only be granted if they are consistent with protecting public health, safety, welfare, the environment, and wildlife resources and are also consistent with the Baseline Assessment and Climate Recovery Plan. Edits are made throughout the 300 Series Rules to incorporate the requirement that only when permits are consistent with the Baseline Assessment and Climate Recovery Plan can they be approved.
ISSUE ONE: Rules inadequately address the Commission’s obligation to “protect public health, safety, and welfare, including protection of the environment and wildlife resources” and the Commission’s obligation to “evaluate and address the potential cumulative impacts of oil and gas development.”

The 400 Series Rules again fail to fulfill the Commission’s obligation to “protect public health, safety, and welfare, including protection of the environment and wildlife resources” and the Commission’s obligation to “evaluate and address the potential cumulative impacts of oil and gas development.” See edits to Rules 401 (new rule); 402(c) (old rule 401); 410 (old rule 409).

Relatedly, better reporting requirements are necessary so an annual reporting requirement was added. See Rule 414 (new rule). While oil and gas operators are subject to various reporting requirements, none of the existing reporting requirements cover the material contained in the annual reporting requirements proposed here in a new Rule 414. These additional requirements are necessary to allow the Commission to stay informed on whether it is fulfilling its obligation to regulate the oil and gas industry in a manner that protects public health, safety, welfare, the environment, and wildlife resources as well as its obligation to evaluate and address the cumulative impacts of oil and gas development. See, e.g., §§ 34-60-106(2.5)(a); 34-60-106(11)(c)(II), C.R.S. The reporting requirements will result in critical information regarding whether Colorado’s oil and gas operations are consistent with the Baseline Assessment and Climate Recovery Plan.

ISSUE TWO: Lacking a Climate Adaptation and Mitigation Program – New Rule 438

Colorado heavily subsidizes the oil and gas industry, especially when including the negative externalities associated with oil and gas development, including, but not limited to, grave impacts to public health and significant contributions to the climate crisis. The purpose of the Climate Adaptation and Mitigation Program (“CAMP”) rule is to aid the Commission in meeting its legal obligations to protect public health, safety, and welfare, the environment, and wildlife resources, and evaluate and address the cumulative impacts of oil and gas operations by requiring oil and gas operators to start to pay the full price of their oil and gas operations. The rule is within the Commission’s authority. See, e.g., §§ 34-60-105(1)(a), 34-60-106(13), C.R.S. The CAMP rule would require owners and operators to provide financial assurance that they are meeting the obligations imposed by the Act, and specifically the obligations to protect public health, safety, and welfare, the environment, and wildlife resources from the unmitigated lifecycle greenhouse gas emissions that result from oil and gas operations. Given that greenhouse gas emissions from oil and gas operations harm public health, safety, and welfare, the environment, and wildlife resources, the financial assurances owners and operators provide through the CAMP would be used to help repair the harm done and prevent future harm from greenhouse gas emissions associated with oil and gas operations. The assurance that the obligations imposed by the Act are being met would come in the form of a fee paid to the CAMP fund. In order to allow the Commission to consistently calculate the fee owners and operators will be required to pay to satisfy the assurances, the social cost of carbon shall be used. The rule specifies that a discount rate of zero shall be used because a zero discount rate takes into consideration intergenerational impacts and indicates that the Commission takes serious the costs to be borne by future generations.
Earth Guardians’ Initial Party Input on COGCC “Mission Change” Rulemaking

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Issue Summary for 500 Series Rules

ISSUE ONE: Rules inadequately address the Commission’s obligation to “protect public health, safety, and welfare, including protection of the environment and wildlife resources” and the Commission’s obligation to “evaluate and address the potential cumulative impacts of oil and gas development.”

The 500 Series Rules again fail to fulfill the Commission’s obligation to “protect public health, safety, and welfare, including protection of the environment and wildlife resources” and the Commission’s obligation to “evaluate and address the potential cumulative impacts of oil and gas development.” In order to address the shortcoming in the proposed rules language was added to the definitions section and Rules 501(a); 502; 525(b)(3)(B); 525(c)(2)(A); and Rule 528(a).

Additionally, given that SB 19-181 made clear that protecting public health, safety, and welfare is the number one priority of the Commission, changes were made to Rule 525. Two factors were added to Rule 525(c)(2) making clear that the Commission, Administrative Law Judge, or Hearing Officer should consider public health, safety, and welfare when determining the penalty for a violation.

Rule 525(c)(3)(A), Aggravating factors, was amended and an aggravating factor for when a violation impacted or threatened public health, safety, or welfare was added. Additionally, given that violations of the Oil and Gas Conservation Act and/or the Commission’s rules, regulations, or orders poses grave risks to public health, safety, and welfare, and given the industry history of spills and other violations, the mitigating factors in Rule 525(c)(3)(B) should be removed. Oil and gas operations are inherently dangerous activities and so the industry should be held to the highest standard and violations should not be allowed to be mitigated. Relatedly, Rule 525(e)(2) is amended to make clear that no penalty reduction is available if the violation resulted in harm to public health, safety, or welfare.

ISSUE TWO: Rule 529, Rulemaking Proceedings, gives Commission discretion to not initiate rulemaking, even when rulemaking is required by law, and lets the Commission ignore petitions for rulemaking that are filed without the Commission.

The proposed revisions to Rule 529(a) are intended to clarify that the Commission must initiate rulemaking when doing so is necessary for the Commission to comply with Oil and Gas Conservation Act or the Colorado Constitution. The Commission does not have discretion not to initiate rulemaking required by law. Additionally, the proposed revisions add a requirement that the Commission respond to petitions for rulemaking submitted to the agency by a person within 30 days and requires that any petitions for rulemaking that are denied include an explanation in writing as to why the petition was denied. This is necessary to avoid the current situation facing 65 Colorado youth, including members of the party Earth Guardians, who filed a petition for rulemaking with the Commission on November 8, 2019, and now, over six months later, have received no updates or communications about their petition, despite multiple requests (in writing) for a status update. The Commission should be required to provide a timely, written response to petitions for rulemaking.
Issue Summary for 600 Series Rules

ISSUE ONE: Rules inadequately address the Commission’s obligation to “evaluate and address the potential cumulative impacts of oil and gas development.”

The 600 Series Rules, again, fail to meet the Commission’s obligation to “evaluate and address the potential cumulative impacts of oil and gas development.” In order to address this omission, a reference to cumulative impacts was added to Rule 602(c).