General Assembly
State of Colorado
Denver

Commissioner Bill Gonzalez
Commissioner Karin McGowan
Commissioner John Messner
Commissioner Priya Nanjappa
Commissioner Jeff Robbins

August 14, 2020

Dear Chairman Robbins and Commissioners Gonzalez, McGowan, Messner, and Nanjappa:

We, the bill sponsors of Senate Bill 19-181 ("SB 181" or "the Act"), appreciate the opportunity to submit comments about your ongoing mission change rulemaking to the Commission pursuant to Rule 510 of the COGCC rules. We have closely followed the changes already made by the COGCC and discussions of proposed future changes since the passage of SB 181, and we appreciate the tremendous amount of work undertaken by the Commission and its staff to implement the Act since last April.

We wish to submit these comments during this mission change rulemaking because of the centrality of the matter before you in implementing the spirit and intent of SB 181. We also want to clarify a major misperception of legislative intent by some of the parties to the rulemaking.

It is important to note that SB 181, like many pieces of legislation, was not introduced in a vacuum. Many Coloradans recognized the system for permitting and monitoring oil and gas operations in our state needed major reform. Since the fracking boom began in earnest at the beginning of the 2010's, oil and gas operations quickly multiplied, grew in footprint, and moved much more into densely populated areas. Public health, safety, and welfare concerns quickly escalated given the industrial and potentially dangerous nature of oil and gas extraction. The General Assembly attempted to address some of these concerns through a series of unsuccessful bills from 2011 through 2018. Some of those bills sought to address issues like setbacks, local authority over oil and gas siting, forced pooling, the COGCC's mission, and pipeline safety.

During that same period of time, we watched as more major oil and gas facilities were approved and began operating increasingly closer to homes and schools. The operators followed siting rules that existed at that time; for example, they adhered to the 500-foot setback rule. But that was the problem. The COGCC rules were not enough to protect public health and safety, and most local governments that attempted to put into place more protective rules were sued by the COGCC, industry parties, or both. So, the COGCC had the final word on whether an oil and gas

operation would go forward and the final word was never "no." The question before the COGCC – practically speaking – was not *whether* the oil and gas operation would be approved, but *under what conditions* it would proceed. Changing that dynamic was one of our main priorities in passing SB 181.

Mission Change. Under the new rules, we believe the overriding question should first be whether the proposed oil and gas operation can occur while ensuring the protection of public health and safety, and if so, what are the best ways to avoid or minimize the adverse impacts that accompany oil and gas operations. Section 6 of the Act changed the COGCC's mission from a directive to "foster the responsible, balanced development" to "regulating the development" of oil and gas resources. Put another way, oil and gas development should not be presumptively permitted under SB 181. If the proposed oil and gas development cannot occur in a manner that protects public health and safety it simply must not be approved. Section 7 of the Act made this point even more clear by specifically prioritizing public health over resource waste considerations, and section 12 eliminated the requirement to consider cost-effectiveness and technical feasibility as part of the COGCC's health and safety analysis.

We recognize this shift in thinking represents a major change in how the COGCC has operated since its inception. It must be viewed as a sea change rather than merely a course correction. Some places are just too dangerous and/or too impactful to conduct an oil and gas operation given the current extraction processes. Permit approval should not be a question of whether the operator checks all of the boxes in its permit application; it should be a question of whether COGCC staff and Commissioners believe (for example) a proposed 30 well pad just 520 feet from the nearest home and less than 1000 feet away from dozens of others can truly be operated in a manner protective of public health and welfare. Or whether the cumulative impacts of proposing a dozen new and largely simultaneous multi-well operations within one small city prove a step too far for public health and safety. We can't imagine a scenario where those types of operations would be consistent with the intent of SB 181.

Setbacks. We recognize the possibility of permit denial is written many places in the current draft rules. Stating the possibility with nothing more does not effectively implement SB 181, however. We believe one proposed rule in particular does not adequately put that principle into practice: Rule 604 – setbacks.

We did not mandate specific setback distances in statute through SB 181, but that should not be misinterpreted to indicate our approval for the current COGCC setback distances. We believe them to be severely insufficient and not protective of public health and safety. We did not think the bill would be an appropriate place for such a technical mandate, however. Any setback distance involves an exercise in line-drawing, but we note most of the available studies, investigative reports, and anecdotal evidence from residents close to oil and gas operations confirms the current 500-foot minimum is not nearly enough to protect health and safety as envisioned by SB 181.

The proposed rules leave in place a 500-foot setback from the nearest residence (while still allowing for an overly generous variance process) and only increases that distance to 1,500 feet if there are ten or more buildings within that radius of a proposed operation. Moreover, even the 1,500-foot distance includes broad exclusions that make it unclear how often it will be applied in practice. This proposal reflects thinking that SB 181 was designed to change. It reflects a bias towards approving the oil and gas operation. Oil and gas operators should not be allowed to

build an industrial facility that close to a residence simply because the operator claims it is the only way – or the only cost-effective way – to get minerals with existing technology. Public health and safety is the paramount concern under SB 181, even if that means some minerals are inaccessible until extraction technology improves.

As you are aware, Section 12 of the Act allowed the Director to issue objective criteria for delaying the issuance of permits until the new rules mandated by SB 181 were implemented. First, the Director announced permits under 1,500 feet away from a building would fall under the objective criteria, then in response to the October 2019 CDPHE oil and gas health effects study expanded the "precautionary review" to 2,000 feet away. We realize the objective criteria was limited to reviewing certain permits more closely, but it appropriately recognized the potential public health and safety risks associated with oil and gas operations between 500 and 2,000 feet away from buildings. The draft rules take a large step backwards from this apparent recognition, however. The Statement of Basis for draft rule 604.c notes that a 1,500 feet setback from ten buildings – while leaving in place a 500 foot setback from less than ten buildings – is "reasonable" and "workable for all stakeholders." That assertion does not seem correct based upon prehearing statements filed by several parties asking for a strengthening of the rule, but on top of that SB 181 is decidedly *not* about achieving stakeholder harmony at the expense of public health and safety.

Local government authority. We feel a responsibility to weigh in on one particular argument put forth by industry parties and some local governments led by Weld and Garfield Counties: whether SB 181 allows for local government preemption of state rules. Industry parties have argued the legislative intent of SB 181 was to allow local governments to site oil and gas operations closer to buildings than state regulations would authorize. That assertion is false. We believe the language of SB 181 is clear and accurately reflects our intent, which was to designate local governments and the COGCC as co-equal authorities in permitting oil and gas operations. Operators must obtain permits from both local and state entities (assuming the local government regulates oil and gas), and the local permit does not supersede the state permit process. Operators must obtain a permit from the local authority first, but if that permit does not adhere to state regulations, the COGCC must not issue its own permit. The proposed oil and gas operation cannot proceed without a local *and* a state permit.

To argue otherwise flies in the face of the history, discussion, intent, and language of SB 181. We always recognized that some local governments would choose to be more accommodating to the oil and gas industry than others. The residents of those industry-friendly jurisdictions still deserve baseline health and safety protections, however. In other words, COGCC regulations should provide a "basement" and SB 181 does not allow industry-friendly local governments to "dig a new basement." We did not believe, nor did we intend to write anything into SB 181, that would allow lax local regulations to usurp more protective measures from the state.

In its July 31 Response Statement, the American Petroleum Institute of Colorado wrote: "[T]he Act seems to have envisioned the Commission as a backstop that could evaluate local government decisions and step in on those rare occasions where the Director finds, after due consideration, that a local government decision may not protect human health and the environment." That claim is incorrect. The Act envisions two separate permitting processes where neither entity preempts the other, neither can overrule the other, and neither serves merely as a "backstop" to the other.

We did not intend to swap one type of preemption for the other, and the practical results of doing so would fly in the face of the overriding health and safety focus of SB 181. We believe the residents of Weld and Garfield Counties should have the baseline health and safety protections promulgated by the COGCC. We also believe other counties like Adams, Boulder, and Broomfield have the authority to put in more protective regulations than the COGCC if they choose. Both of these policy goals were included in SB 181 and it should be interpreted accordingly.

Again, we appreciate this opportunity to comment on your forthcoming mission change rulemaking and hope this letter will assist in your deliberations.

Sincerely,

Representative KC Becker, Speaker of the House

Representative Yadira Caraveo

Senator Steve Fenberg, Senate Majority Leader

Senator Mike Foote