

**BEFORE THE OIL AND GAS CONSERVATION COMMISSION  
OF THE STATE OF COLORADO**

IN THE MATTER OF CHANGES TO THE RULES	)	CAUSE NO. 1R
OF PRACTICE AND PROCEDURE OF THE OIL	)	
& GAS CONSERVATION COMMISSION OF THE	)	DOCKET NO. 181200714
STATE OF COLORADO	)	
	)	TYPE: RULEMAKING

**ALLIED LOCAL GOVERNMENTS’ PRE-HEARING STATEMENT**

The undersigned local governments, Boulder County, the City of Lafayette, the City and County of Broomfield, and the City of Longmont, participating together as the Allied Local Governments (“ALG”), respectfully submit this Pre-Hearing Statement.

**I. Introduction**

The ALG applauds the COGCC for taking up the school setback rulemaking proposed by the League of Oil and Gas Impacted Coloradans (LOGIC). The health and safety of students of all ages should be paramount in all state activities, and this rule-making is an important step in effectuating COGCC’s duty to protect children with regard to oil and gas operations near their schools and related facilities.

The ALG urges COGCC staff to keep four goals foremost in the development of the rule changes: (i) creating the best protections possible for students and staff in all of their activities; (ii) creating a clear description of those areas to be protected; (iii) keeping the burden off of schools and school boards to engage in location designations; (iv) maintaining a fair and open process. To these ends, the ALG has the following responses to the proposed rules and attaches proposed alternative rule language.

The ALG notes that many of the concerns raised by industry groups during the stakeholder process can be solved with a single, inexpensive method: calling relevant school administrators to talk. In discussion with school representatives, operators can learn of the off-site locations the school uses regularly for student activities and can learn of future facility planning in the works. Moreover, talking to administrators, rather than hoping to rely solely on internet searches, will further foster the kind of collaboration with neighbors that industry groups often tout as one of their goals. Industry’s insistence that they must be able to discover all they need to know from computer work stations without talking to local landowners seeks to impose significant burdens on schools and school boards to publicize every nascent plan and every extracurricular activity. The burden to discover necessary information should be on the operators proposing oil and gas facilities and, in this instance, by using the phone or requesting a meeting, the burden is extremely light.

## II. Responses to Proposed Rules

1. The definition of School Facility should be modified to be more inclusive and accurate.

The efficacy of the proposed rule changes depends on an accurate, clear definition of a School Facility. The ALG opposes three aspects of the currently proposed definition: (i) the limitation to properties where a school “can limit or control access;” (ii) the limitation on future facilities to those under contract and with “design plans” to be completed within five years; and (iii) the failure to include child care centers.

- a. The right to limit or control access is not an appropriate descriptor.*

A School Facility should not be limited to those areas where a school or its governing body “can limit or control access.” Outdoor areas used by schools are often not completely fenced or gated, even when they are located on school-owned property. In many instances, schools have permission to use outdoor facilities that they do not own and where they cannot control access, such as neighboring sports complexes belonging to a municipality or another school. A school’s right to control or limit access is irrelevant to the regularity and importance of its use of an outdoor area and the need to protect students and others in those areas from the impacts of oil and gas development. As stated above, an operator can determine what off-site areas are used regularly for school purposes by contacting the relevant administrators. The ALG proposes elimination of the phrase “and can limit or control access” from the definition of School Facility.

- b. School Facilities should not be limited to those that will be used within three years.*

The proposed definition of School Facility includes future, planned facilities, but only those “to be used by students within three years.” Given the complicated nature of school board budgeting and planning, the necessary public processes, funding issues and ballot measures, school facilities in the planning stages will rarely be complete and occupied within three years. Similarly, “design plans” may or may not be available despite the intention to construct a new facility. Important school facilities can be in the development process but not intended for use by students for several years. Again, operators can learn of such future plans by contacting school administrators; this type of communication should be standard practice.

The ALG proposes elimination of the phrase “but that are contracted to be used by students within three years of the date the school or its governing body receives a preapplication notice pursuant to Rule 305.a(4) and have design plans that show the boundary of the future school facility” from the definition of School Facility. Instead, future facilities can be defined as those that can be identified and designated in writing for student and staff use within five years of receiving notice from an operator.

- c. *Child Care Centers should be included in the definition of School and School Facility.*

Currently, Child Care Centers are identified in COGCC rules as High Occupancy Buildings and subject to a 1000' setback. However, the same policy reasons to extend the setback to include outdoor areas for schools applies to Child Care Centers, and potentially more so. Young children spend significant time in the (usually small) playgrounds associated with their centers. Moreover, they occupy the building and the play areas year-round. The statutory definition of Child Care Center at 26-6-102(5), C.R.S. is currently referenced in the definition of High Occupancy Building and that reference can simply be added to the proposed definitions of School and School Facility. However, the ALG recommends that a more certain way to identify these facilities is to reference the list of licensed child care facilities maintained by the Colorado Department of Human Services Office of Early Childhood. This sister state agency maintains a dataset including all non-24-hour licensed child care facilities in Colorado. The dataset provides the physical locations of those sites with latitude-longitude values, is updated twice a month, and is intended for public use. See <https://data.colorado.gov/Early-childhood/Colorado-Licensed-Child-Care-Facilities-Report/a9rr-k8mu>.

2. Exceptions from the setback must require a significant showing of necessity.

The ALG is concerned with the proposals for waiving the school setback without sufficient clarity. Specifically, proposed Rule 604.a(6)(A)(ii) allows the Commission to waive the school setback if it “determines that unusual circumstances” require a waiver. The operator is directed to demonstrate “unusual circumstances” at a hearing. There is no definition or description of what constitutes “unusual circumstances.” Leaving such a critical issue undefined sets up significant future dispute between operators and other stakeholders.

The ALG includes in its alternative proposed rule language a set of criteria that operators must show to obtain an exception from the school setback based on analysis of alternate sites and a showing of economic or technological infeasibility. The ALG’s proposed language also clarifies that the operator bears the burden of proof on these issues, which is a clearer statement than requiring a “demonstration.”

3. Changes to Rule 503.b(9) are beyond the scope of this rule-making and would radically restrict access to COGCC proceedings.

The proposed rules include a new Rule 503.b(9) that allows only operators to request hearings not only on school facility determinations, but also apparently on any Form 2 or Form 2A at all. In the current rules, surface owners and the relevant local government may request hearings on Form 2s and 2As under Rule 503.b(6). Without explanation, the proposed rule eliminates that important right.

The ALG hopes that this proposed language is a mistake. For example, it may have been intended to refer to Form 2s and 2As specifically for sites that are based on a school facility determination and incorporate the required setback. If not, the proposal goes far beyond the proposed scope of this rulemaking identified in the August 15, 2018 Notice of Rulemaking and attached Statement of Basis and Purpose (the most recent available to the parties). None of those documents refer to 503.b or changing the rights of surface owners and local governments to request hearings on Form 2s and 2As in general.

Even if the ALG supposes correctly and the language was not intended as written, it still has unnecessary implications. Schools may be surface owners otherwise entitled to request a hearing on a Form 2 or 2A under 503.b(6), and those rights should not be eliminated with these proposed rules.

The Commission has made it clear in recent proceedings that it wishes its proceedings to be *more* accessible and transparent, not less. Preventing a surface owner or a local government from requesting a hearing on a Form 2 or 2A has no relation to the purpose or scope of the proposed rules and flies in the face of the intent of both the existing rules and the Commissioners' stated intentions.

The ALG proposes clarifying language to separate Form 2 and 2A proceedings from those related to school facility determinations.

### **III. Exhibits**

The ALG hereby reserves the right to submit exhibits throughout the rulemaking process, including in its case in chief and as rebuttal to any other party's presentation or comments from members of the public.

### **IV. Witnesses**

The ALG hereby reserves the right to designate, prior to the rulemaking hearing, one or more witnesses to testify at the December 17-18, 2018, hearing.

### **V. Reservation of Rights**


The ALG expressly reserves the right to amend or supplement the discussion of the issues contained in this PHS, to rebut or otherwise respond to statements of other parties or additional drafts issued by the COGCC. If the ALG does not expressly raise issues or support positions taken, such decision is not a waiver of its right to raise such issues on appeal or in a collateral challenge to rules adopted in this rulemaking process.

### **VI. Request for Time at Hearing**

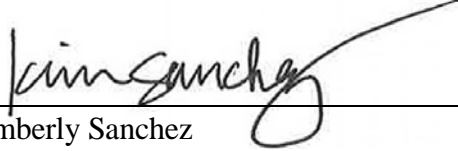
The ALG requests 20 minutes to present its position, exclusive of Commissioner questions and ALG responses.

**RESPECTFULLY SUBMITTED** this 16th day of November, 2018.

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **ALLIED LOCAL GOVERNMENTS' PRE-HEARING STATEMENT** was served electronically, this 16th day of November, 2018, to the following:

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A handwritten signature in blue ink that reads "Cathy Peterson". The signature is written in a cursive style and is positioned above a horizontal line.

Cathy Peterson  
Senior Legal Assistant

~~Proposed New Rules~~ ALLIED LOCAL GOVERNMENTS' ALTERNATIVE RULE LANGUAGE

100-Series

**SCHOOL FACILITY** shall mean any discrete facility, whether indoor or outdoor, associated with a school that students use commonly during the academic year as part of their curriculum or extracurricular activities and that the school or its governing body has the legal right to use ~~and can limit or control access~~. The definition includes facilities that are not yet built, but that ~~are contracted to be used by students within three years of the date the school or its governing body receives a preapplication notice pursuant to Rule 305.a.(4) and have design plans that show the boundary of the future school facility~~ the school or its governing body has designated in writing for intended use by students and staff within five years of the date preapplication notice pursuant to Rule 305.a(4) is received.

**SCHOOL** shall mean any operating Public School as defined in § 22-7-703(4), C.R.S., or Private School as defined in § 22-30.5-103(6.5), C.R.S., or licensed child care facility as recognized by the Colorado Department of Human Services – Office of Early Childhood at <https://data.colorado.gov/Early-childhood/Colorado-Licensed-Child-Care-Facilities-Report/a9rr-k8mu>.

**GOVERNING BODY** shall mean the school district board for public schools or the board of trustees, board of directors, or any other body or person charged with administering a private school or group of private schools or child care facility. A governing body may delegate its rights under these rules to any school that is in proximity to the proposed oil and gas location.

300-Series

303.b.(3)U. Schools. If an operator provides notice pursuant to Rule 305.a.(4), the operator will:

- i. Include a copy of the map provided; and
- ii. State whether the governing body requested consultation and whether, after consultation, the governing body and operator reached agreement regarding identification of school facilities.

305.a.(4) Notice to a school and its governing body.

A. For a proposed oil and gas location, an operator will notify any school and its governing body if the proposed oil and gas location is within 1,000 feet of:

- i. A property line of a parcel owned by a school or its governing body as identified through county assessor records; or
- ii. What reasonably appears to be a school facility (regardless of property ownership) based on the operator's review of current aerial maps that show surface development or surveys of the area and a consultation pursuant to 306.h.

B. The operator must provide a "Notice of Intent to Conduct Oil and Gas Operations" to the principal or senior administrator of the school and its governing body no less than 30 days before the operator submits the Form 2A, Oil and Gas Location Assessment, to the Director.

C. The Notice must include:



- i. The operator's contact information;
- ii. The location and general description of the proposed oil and gas location, including a map showing the proposed wells and production facilities in proximity to any school facility;
- iii. Contact information for the local governmental designee (LGD);
- iv. The anticipated date construction will begin and expected schedule of drilling and completion activities;
- v. Whether the operator anticipates the proposed wells and production facilities will be subject to the mitigation measures in Rule 604.c.;
- vi. Whether the oil and gas location, wells, or production facilities is or are subject to a memorandum of understanding or other agreement with or approval from the local government regarding location;
- vii. Notice that the governing body for the school facility may request a consultation to discuss the proposed operations by contacting the Operator or may delegate the consultation process to the school in proximity to the oil and gas location and that the Director may be invited to any meeting; and
- viii. Notice that the school or governing body may submit comments regarding the proposed oil and gas location to the Commission as part of the Rule 305.d. public comment period.

D. A governing body may waive the right to Notice for it and all schools within the area subject to the governing body's oversight under this provision at any time by providing written notice to the operator and the Director.

306.h. School and its Governing Body. The operator will offer to consult with the governing body that received notice pursuant to Rule 305.a.(4). During the consultation, the governing body may identify other areas it considers school facilities and the operator will provide information regarding best management practices, operations, traffic management, and phases of development for the proposed oil and gas location. Operators and governing bodies are encouraged to provide a forum for information sharing regarding operations and reach agreement regarding school facilities.

*600-Series*

604.a.(6) School Facility.

A. No well or production facility will be located within 1,000 feet of a school facility, unless:

- i. The school facility's governing body agrees in writing to the location of the proposed well or production facility in which circumstance the Director may approve the Form 2, Application for Permit to Drill, or Form 2A, Oil and Gas Location Assessment; or
- ii. The Commission authorizes the Director to approve a Form 2, Application for Permit to Drill, or Form 2A, Oil and Gas Location Assessment, following application and a hearing. The Commission may allow a well or production facility to be located within 1,000 feet of a school facility if, after the hearing, the Commission determines that all other sites are technically infeasible and economically impracticable to allow for recovery of all of the mineral resource

~~and sufficient mitigation measures are in place to protect public health, safety and welfare. The operator must file an application with the Commission requesting the hearing and prove that all other sites are technically infeasible and economically impracticable. At a minimum, mitigation measures pursuant to Rule 604.c. will be required for Oil and Gas Locations permitted within 1,000 feet of School Facilities. The Commission may allow a well or production facility within 1,000 feet of a school facility if the Commission determines that unusual circumstances warrant locating a well or production facility closer to a school facility. The operator must file an application with the Commission requesting the hearing and demonstrate the unusual circumstances. Mitigation measures pursuant to Rule 604.c. will be required for Oil and Gas Locations, unless the Commission determines otherwise~~

- B. If the operator and school or governing body disagree regarding whether the proposed well or production facility is greater than 1,000 feet from a school facility, the operator must file an application with the Commission requesting a hearing to determine the matter. At a hearing, the operator must ~~demonstrate~~ prove that why the well or production facility is more than 1,000 feet from any school facility.

### Conforming Changes (changes in redline)

#### HIGH OCCUPANCY BUILDING UNIT shall mean:

- any operating Public School as defined in § 22-7-703(4), C.R.S., ~~Nonpublic-Private~~ School as defined in § 22-30.5-103-6(6.5), C.R.S., Nursing Facility as defined in § 25.5-4-103(14), C.R.S., Hospital, Life Care Institutions as defined in § 12-13-101, C.R.S., or Correctional Facility as defined in § 17-1-102(1.7), C.R.S., provided the facility or institution regularly serves 50 or more persons; or
- a licensed child care facility as recognized by the Colorado Department of Human Services – Office of Early Childhood at <https://data.colorado.gov/Early-childhood/Colorado-Licensed-Child-Care-Facilities-Report/a9rr-k8mu>. an operating Child Care Center as defined in § 26-6-102(1.5), C.R.S.

#### **305.a. Pre-application notifications.** ~~For Oil and Gas Locations proposed within an Urban Mitigation Area or within the Buffer Zone Setback, an Operator shall provide a “Notice of Intent to Conduct Oil and Gas Operations” to the persons specified in subparts (1) and (2) not less than 30 days prior to submitting a Form 2A, Oil and Gas Location Assessment, to the Director.~~

- (1) Urban Mitigation Area Notice to Local Government. For proposed Oil and Gas Locations within an Urban Mitigation Area, an Operator shall notify the local government in writing that it intends to apply for an Oil and Gas Location Assessment. The operator must provide a “Notice of Intent to Conduct Oil and Gas Operations” to the Local Governmental Designee in those jurisdictions that have designated an LGD or to the planning departments in jurisdictions that have not designated an LGD no less than 30 days before the operator submits a Form 2A, Oil and Gas Location Assessment, to the Director. Such notice shall be provided to the Local Governmental Designee in those jurisdictions that have designated an LGD, and to the planning department in jurisdictions that have no LGD. The notice shall

include a general description of the proposed Oil and Gas Facilities, the location of the proposed Oil and Gas Facilities, the anticipated date operations (by calendar quarter and year) will commence, and that an additional notice pursuant to Rule 305.c. will be sent by the Operator. This notice shall serve as an invitation to the local government to engage in discussions with the Operator regarding proposed operations and timing, local government jurisdictional requirements, and opportunities to collaborate regarding site development. A local government may waive its right to notice under this provision at any time by providing written notice to an Operator and the Director. The notice requirement of this subpart does not apply to local governments that received notice and accepted the offer to consult pursuant to Rule 305A.a.

- (2) Exception Zone and Buffer Zone Setback Notice to the Surface Owner and Building Unit Owners. For Oil and Gas Locations proposed within the Exception Zone or Buffer Zone Setback, Operators shall notify the Surface Owner and the owners of all Building Units that a permit to conduct Oil and Gas Operations is being sought no less than 30 days before the operator submits the Form 2A, Oil and Gas Location Assessment, to the Director. The Operator may rely on the county assessor tax records to identify the persons entitled to receive the Notice. Notice shall include the following:
- A. The Operator's contact information;
  - B. The location and a general description of the proposed Well or Oil and Gas Facilities;
  - C. The anticipated date operations will commence (by calendar quarter and year);
  - D. The Local Governmental Designee's (LGD) contact information;
  - E. Notice that the Building Unit owner may request a meeting to discuss the proposed operations by contacting the LGD or the Operator; and
  - F. A "Notice of Comment Period" will be sent pursuant to Rule 305.c. when the public comment period commences.

503.b.(9) For purposes of seeking a hearing on approval of an Application for Permit to Drill, Form 2, or an Oil and Gas Location Assessment, Form 2A, or a school facility determination under Rule 604.a.(6), only the operator may be the applicant.

- (10) For purposes of seeking relief or a ruling from the Commission on any other matter not described in (1) through (89) above, only those who have demonstrated that they would be directly and adversely affected or aggrieved by a Commission ruling, and that any injury or threat of injury sustained would be entitled to legal protection under the Act may be an applicant.

### **Effective Date**

The amendments to the rules will become effective, per § 24-4-103, C.R.S., twenty days after publication in the Colorado Register. Rule 604 amendments apply to new wells or production facilities, including the addition of wells or production facilities to an existing location. The amendments do not apply to existing or permitted wells or production facilities, do not prevent an operator from reentering or recompleting an existing or permitted well, and do not prevent an operator from upgrading equipment or performing maintenance on an existing or permitted well or oil and gas location.