

Counties File Lawsuit Over Air Quality Rules

Nine rural and western counties say local concerns not properly addressed during rulemaking on oil and gas industry emissions

JESSICA FOLKER
LAW WEEK COLORADO

Nine Colorado counties sued the state's Air Quality Control Commission March 12 over rules adopted in December to regulate emissions from oil and gas operations statewide.

The regulations were adopted as part of the rulemaking required under Senate Bill 181, the landmark oil and gas legislation signed into law last year, which required the commission to adopt rules to minimize harmful emissions from the natural gas supply chain and review leak detection and repair inspection requirements for oil and gas wells.

The lawsuit, which also names the Air Pollution Control Division and the

Colorado Department of Public Health and the Environment as defendants, alleges the agencies violated the Colorado Air Pollution Prevention and Control Act, the Colorado Administrative Procedure Act and the commission's own procedural rules when considering and adopting the regulations.

The plaintiffs in the case are the boards of county commissioners in nine rural and western Colorado counties: Garfield, Cheyenne, Logan, Mesa, Moffat, Phillips, Sedgwick, Rio Blanco and Yuma.

The counties, many of which rely heavily on natural gas and oil production, say the commission took a "one-size-fits-all" approach in adopting the new rules and failed to consider local



Nine Colorado counties are challenging emissions and inspection regulations for the oil and gas industry that were adopted in December as part of SB 181 rulemaking. / CL BAKER

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government concerns and properly complete economic impact and other studies required under state law and AQCC procedural rules.

Denver and areas along the northern Front Range, stretching into Larimer and Weld counties, have fallen short of federal air quality standards and, as a result, are subject to higher regulatory burdens.

The plaintiff counties argue some of the new AQCC regulations, while they may be appropriate for urban Front Range counties that need to lower their emissions, impose an economic burden while providing little environmental benefit to rural areas that already meet federal air quality standards.

"I think it's really important to understand that western counties have some of the cleanest air in the state," said Davis Graham & Stubbs partner Ben Strawn, who is representing the counties. He added that Garfield County, in particular, has gone to great lengths to monitor its air quality.

"All of these counties support regulations to protect the environment [and] air quality," Strawn said. "What they've tried to do in this complaint is pick the few things where the commission went too far."

Specifically, the counties think the commission went too far in adopting four revised provisions and are asking the court to invalidate those rules. The challenged changes include lowering the regulatory threshold for emissions controls on storage tanks and increasing the frequency of leak detection and repair inspections on certain facilities, as well as new requirements to control

emissions during the unloading of hydrocarbon liquids into trucks.

The plaintiffs allege the AQCC didn't properly consider local concerns and weigh economic, environmental and energy impacts as required by CAPPCA.

A fourth revision they're seeking to scrap would increase leak detection and repairs at facilities within 1,000 feet of "occupied areas," a term they say is poorly defined. According to the complaint, the proposed rule originally used the phrase "building unit," but the coalition of community organizations that proposed it later replaced "building unit" with "occupied areas." Among other things, the counties allege the revised proposal was introduced after the procedural deadline and wasn't accompanied by an updated economic impact analysis.

But attorney Matt Sura, who represented the community groups during the rulemaking, said the revision was not substantive. "The only difference between our initial proposal and what ultimately was adopted was the addition of playgrounds and parks," he said.

That change was important, Sura said, due to recent incidents involving oil and gas facilities near schools, such as a high-pressure gas leak at a Greeley high school in 2017 and a spike in benzene levels last fall at Greeley's Bella Romero Academy, which is located near a fracking site.

The community organizations' proposal was simply meant to require quicker fixing of leaks at facilities located within 1,000 feet of homes, schools,

CONTINUED ON PAGE 21...

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BUSINESS PROGNOSIS

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weather a financial storm?

Wallace said he'd seen some anticipation of a slowdown among clients, a number of whom were opting to sit on cash rather than buying large pieces of equipment or making investments. But it's not enough cash to cover 60 or 90 days of expenses and payroll without revenue coming in.

While some people might have been anxious about an economic downturn before the pandemic struck, Crowe said, "I don't know any lawyers that are practicing that have seen this type of confluence of events."

So, what should businesses and their legal teams be thinking about given the unexpected — and in many ways unprecedented — turn of events?

Work-from-home arrangements offer an obvious remedy to keep revenue flowing for certain industries, especially in technology, business-to-business and certain professional services. But it doesn't work for every company or client.

Finding ways to convert assets to cash is another way companies can create cash flow when times are tight, Wallace said.

Additionally, he said clients are already being proactive in working with their banks to increase their borrowing in the short term or to request a forbearance if they've already defaulted.

Companies will also want to start thinking about their force majeure clauses in commercial contracts in the event they have to suspend service, Crowe said.

PEOPLE AND UNPREDICTABILITY

"Honestly, and this may sound weird coming from an M&A guy, but I think the most important thing right now is to be watching out for your people," Crowe said.

"Making sure that people are taking the appropriate precautions is as important as anything you can be doing right now, because the fastest way to get people back to doing deals and finance is to get everybody healthy."

But paying those people tends to be one of the top expenses for any company. Given how difficult it is to predict how long the pandemic or its economic effects will last, businesses will face tough choices in whether, and when, to cut staff.

"You don't want to lay off employ-

ees too quickly," Wallace said. "But that's going to be one of the most significant or easiest levers to pull in order for companies to address their finances." A lot of companies have already started to pull that lever. In a mid-March Marist poll of more than 800 U.S. adults, 18% said they or someone in their household had already been laid off or had their hours cut due to the coronavirus outbreak. The Denver Post reported last week that attempts to file for unemployment jumped to 6,800 on March 17, compared to only 400 a week before.

"It will be interesting to see — and I don't know without a crystal ball — how long it's going to last and how quickly corporate clients are going to use their labor force to address their costs," Wallace said. •

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VIRTUAL TOWNHALL

CONTINUED FROM PAGE 5...

to pay their mortgages to make money but at the same time dealing with people facing a dire situation.

Deadlines, such as if a statute of limitations was running out, posed another set of questions. Seserman said in his employment law situations, a 90-day right to sue letter is typically issued via the mail. If an office is closed and does not receive that letter, how is that going to affect that situation?

Or, what if a motion is before the court, and the 14-day clarification question timeframe on an order is approaching, how is that addressed? Or is that just held until further notice? Another question was on jurisdictional timeframe if it was faceted on a certain date?

Many questions lingered in the air without many answers, but several attorneys expressed thanks for being able to sit and talk about these issues. •

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LOWDOWN

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JUDICIAL ANNOUNCEMENTS

The 1st Judicial District Nominating Commission has nominated three candidates for a Jefferson County court judgeship created by the resignation of Judge Jean Woodford. The vacancy will occur on April 4.

Nominees Andrew Fitzgerald of Morrison, Sara Garrido of Lakewood and Kristan Wheeler of Arvada were selected in a meeting held via video-conference on March 18.

Under the Colorado Constitution, the governor has 15 days from March 19 to appoint one of the nominees as county court judge for Jefferson County.

Comments regarding any of the nominees may be sent via e-mail to the governor at gov_judicialappointments@state.co.us. •

COVID-19 AND COURTS

CONTINUED FROM PAGE 7...

requirements to submit paper copies of briefs, appendices, and petitions for rehearing.

Jackson said federal law allows an exception in criminal speedy trial rights for a finding by a judge that delaying a trial serves the interest of justice, and federal courts are invoking that exception in their decisions to postpone trials.

But he said Colorado doesn't have an analogous law with a catch-all grant of discretion to judges to delay criminal trials if they believe it's in the interest of justice. In 2018, a Colorado House committee killed a bill that would have expanded circumstances that are exempt from the state's speedy trial statute to include trial continuances granted by judges if they are deemed necessary to protect defendants' constitutional rights.

"I think Colorado is going to have a bigger problem moving forward if this thing goes on longer, because there are just going to be more and more cases that have to go to trial, or the person gets acquitted and can never be retried." Jackson added he expects to see negotiating between prosecutors, judges and private lawyers to work within emergency rules set out and constitutional requirements to make substantial compliance work.

It's not yet clear what steps judges and prosecutors may take to manage trial backlogs once court operations return to normal. Prosecutors con-

tacted by Law Week did not comment specifically on whether they might use plea agreements or ask for expedited trial timeframes as tools to mitigate docket loads. Instead, a few offered statements on taking steps to reduce jail populations during the coronavirus pandemic, such as pretrial release of defendants on personal recognizance bonds and early release for some inmates.

Shannon Carbone, a spokesperson for 20th Judicial District Attorney Michael Dougherty, said in an email the office is specifically reviewing lists of inmates for possible early release who have pre-existing compromises to their immune systems or who have less than 45 days remaining on their sentences. The court has also approved a list of offenses for pretrial release on personal recognizance bonds.

"With law enforcement issuing more summonses, jail bookings have already declined a lot," she wrote.

ON THE CIVIL SIDE

Constitutional criminal speedy trial rights in state and federal law may mean civil trials take a backseat once court operations return to normal. Wheeler Trigg O'Donnell chair Mike O'Donnell said in a given civil case, judges have a lot of discretion to set rules for how the trial will run. They can limit the amount of time each side has to present their cases, for example.

"I've tried cases in other states where they put you on a clock," he said, referring to decisions to give the parties each a set number of hours to put

on their cases. "And anytime you're on your feet, in direct or cross-examination, or opening or closing, that goes against your time. That would, I think, be one way to unclog."

O'Donnell added he expects to see a slowdown in new case filings in the near future as courts try to catch up with caseloads. He said in a few of his out-of-state cases, judges have already planned for doing proceedings like depositions and mediations remotely.

Even though parties in civil disputes don't have the same constitutional rights as criminal defendants, O'Donnell said the need to prioritize criminal cases has a negative trickle-down effect on civil cases.

"In the court system you need to prioritize criminal cases, but you've got a bunch of civil cases with commercial disputes that are impeding business or personal injury and private liability suits where people are unemployed and waiting for their opportunity for justice and defendants are waiting for their opportunity to prove their innocence."

So far, the state's courts have announced closure and postponement orders on their websites. Jackson said going forward, he hopes Colorado's state and federal courts are proactive in notifying lawyers about new orders resulting from the coronavirus containment efforts, such as using the e-filing system for notifications.

"It's only going to help if that information is distributed as quickly as possible." •

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AIR QUALITY

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playgrounds and parks, according to Sura, as current regulations currently allow the industry to wait up to two years to make repairs.

"The reality is that we have been allowing core oil and gas facilities to be placed dangerously close to homes and schools," Sura said. "And there have been impacts from those industrial activities in the form of explosions, loss of life in some cases, and a

lot of air quality complaints over the years."

As for the counties' concerns about the economic impact analysis, Sura said the analysis that was submitted covered every address point available, including parks, schools and vacant lots. "If anything, it was an overestimate of the impact to the industry," he added.

According to the lawsuit, University of Wyoming professor of economics Timothy Considine presented expert testimony during rulemaking hear-

ings saying the new regulations could lead to halted production at smaller wells in rural and western Colorado. Considine said the well shut-ins could result in the loss of between 55 and 280 full-time jobs and between \$757,000 and \$3.8 million in local tax revenues.

The state has not yet filed a response to the counties' complaint. The CDPHE said that, as a matter of policy, it doesn't comment on pending or ongoing litigation. •

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