

**Statement of Basis, Specific Statutory Authority, and Purpose
New Rules and Amendments to Current Rules of the Colorado Oil and Gas
Conservation Commission, 2 CCR 404-1**

**Cause No. IR Docket No. 181200714
School Setback Rulemaking**

This statement sets forth the basis, specific statutory authority, and purpose for new rules and amendments (“School Setback Rules”) to the Colorado Oil and Gas Conservation Commission (“Commission”) Rules of Practice and Procedure, 2 CCR 404-1 (“Rules”). The Commission promulgated the School Setback Rules on December 18, 2018.

In adopting amendments to the Rules, the Commission relied upon the entire administrative record for this Rulemaking proceeding, which formally began on August 15, 2018, when the Commission submitted its Notice of Rulemaking to the Colorado Secretary of State.

Background

On December 6, 2017, the League of Oil and Gas Impacted Coloradans, (“LOGIC”), submitted to the Commission a petition to conduct a rulemaking to require new oil and gas wells and production facilities be sited no closer than 1,000 feet from the perimeter of a school or child care center property line. LOGIC renewed its petition for rulemaking on July 16, 2018. At the Commission’s July 30, 2018 hearing, it considered LOGIC’s petition and directed Commission staff to proceed with a rulemaking on the issue of school setbacks. The rulemaking implements changes to the Commission’s setback rules by applying the existing setback to school facilities in addition to the school buildings.

Stakeholder and Public Participation.

On August 15, 2018, the Commission noticed that it was exploring LOGIC’s proposed rule changes, as well as other stakeholder recommended rule changes to provide a buffer between oil and gas development and school areas that are outside a designated building but are part of the scholastic experience – for example, playgrounds, athletic fields, and other outdoor activity areas. In transmitting the Notice of Rulemaking to stakeholders, the Commission solicited stakeholders to submit comments regarding the proposed School Setback Rulemaking on or before November 9, 2018. Stakeholder comments were received in writing, and in person at two stakeholder meetings that were held on August 24, 2018; and October 31, 2018.

The Commission encouraged public participation in the Rulemaking by allowing the public to comment on the proposed rules in advance of or during the hearing. Persons or organizations desiring to do so could also participate in the Rulemaking as a party. Parties could submit prehearing statements and comments, including alternative

rules or amendments, and respond to the prehearing statements submitted by other parties or comments submitted by nonparties.

Statutory Authority.

The Commission's authority to promulgate amendments to the Rules is derived from the following sections of the Colorado Oil and Gas Conservation Act ("Act"), §§ 34-60-101 - 130, C.R.S.:

- Section 34-60-105(1), C.R.S. (Commission has the power to make and enforce rules);
- Section 34-60-106(2)(a), C.R.S. (Commission has the authority to regulate the drilling, producing, and plugging of wells and all other operations for the production of oil or gas);
- Section 34-60-106(2)(d), C.R.S. (Commission has authority to regulate "Oil and gas operations so as to prevent and mitigate significant adverse environmental impacts on any air, water, soil, or biological resource resulting from oil and gas operations to the extent necessary to protect public health, safety, and welfare, including protection of the environment and wildlife resources, taking into consideration cost-effectiveness and technical feasibility."); and
- Section 34-60-108, C.R.S. (Commission has authority and procedure to adopt rules).

Identification of New and Amended Rules

Consistent with its statutory authority and its legislative mandates, and in accord with the administrative record, the Commission added or amended the following Rules:

- 100-Series Rules: definition of School, School Facility, Governing Body, Child Care Center and Future School Facility.
- 300-Series Rules: 303, 305, and 306;
- 600 Series Rules: 604; and
- The Commission adopted conforming or clarifying changes to Rule 100, 305, and 503.

Overview of Purpose and Intent

Under § 24-4-103(7), C.R.S. and Commission Rule 529.b., members of the public may

petition the Commission to initiate rulemaking. LOGIC submitted to the Commission a petition to initiate a rulemaking to require new oil and gas wells and production facilities be sited no closer than 1,000 feet from the perimeter of a school or child care center property line. At the time of LOGIC's petition, the Commission's Rules provided that no oil and gas location could be within 1,000 feet from the nearest edge or corner of a High Occupancy Building. Rule 604.a.(3). The definition of a High Occupancy Building includes schools and child care centers.

The Commission considered LOGIC's petition at its July 30, 2018 hearing, which included a presentation from LOGIC, statements from representatives of industry, and comments from the Director of the COGCC on the petition. At the conclusion, the Commission directed staff to proceed with noticing a rulemaking on the issue of school setbacks.

Commission staff undertook extensive dialogue with LOGIC, representatives of industry and other stakeholders to expand the applicability of existing setback rules that preserve LOGIC's proposal to promote the safety and welfare of students attending schools in proximity to oil and gas locations. The school setback rules honor LOGIC's proposal that appropriate setbacks be required when an oil and gas location is within proximity of a school facility. The rules also succeed in facilitating greater communication between schools and school governing bodies with Commission staff and operators.

To accomplish this, the Commission has added definitions to the 100 series, and rules to the 300 Series, 500 Series, and 600 Series. Additionally, new definitions and conforming changes to portions of the 300 Series and 500 Series Rules allow for the implementation of the school setback rules.

Amendments and Additions to Rules

100 Series Rules: New Definition

Recognizing that a student's educational experience is not confined solely to buildings, the Commission sought to capture through the definition of "School Facility" those areas where students congregate as part of their curricular or extracurricular activities that are subject to setback requirements. To be considered a school facility, it must not only be a facility that students commonly use "as part of their curriculum or extracurricular activities", but the school or Governing Body must have the legal right to use the facility at its discretion. Further, a facility will be considered a school facility if it is adjacent to or owned by the school or Governing Body. For school facilities that are adjacent to a school but that are not owned by the school or Governing Body, the school or Governing Body must be able to demonstrate through a written agreement between it and a landowner or leaseholder that the school and its students have the right to access and use the property for some period of time or for some activities.

A school facility must be discrete, that is clearly distinguishable from other areas of public access or properties. It must have an identifiable boundary that allows for objective measurement of the distance between the school facility and proposed oil and gas development, which measurements are necessary to comply with the notice and setback requirements of the new rules. Examples of a school facility include an athletic field, outdoor classrooms, football stadiums and outdoor school assembly areas. Examples of facilities that would not be considered a school facility are zoological centers, museums, or performing art complexes where students frequently visit on field trips.

Additionally, there may be outdoor areas where students voluntarily congregate that a school or Governing Body do not have the legal right to use, and which is not adjacent to or owned by a school or Governing Body and, moreover, the student use is unrelated to school activities. Such outdoor areas are not considered school facilities. Instead these areas could be considered Designated Outside Activity Areas and would be subject to the setback requirements in Rule 604.a.(4).

The definition of “School Facility” also includes “Future School Facilities” that are planned for the use of students and faculty. A future school facility is a facility that has not yet been constructed but that the school or school governing board plans to build within three years from the date that the pre-application notice for oil and gas operations is received. Schools are required to affirm in writing the nature, timing and location of a future school facility. Recognizing that the governance structure of public schools, charter schools and private schools is distinct, the definition of future school facilities identifies the appropriate governing body that must supply the written confirmation.

When a school or Governing Body is planning to construct a school facility that may fall within a proposed oil and gas location, an operator may not be aware of the proposed school facility. The Commission expects that through the notice process set forth in Rule 303.b.(3)U, the school or Governing Body will engage in a robust discussion of how the current school facilities and any that are planned to be built and used within three years could be impacted by the proposed oil and gas location. The Commission encourages frequent, informative conversations outside of the permitting context. In addition, if schools have geospatial data about their existing or planned facilities, they can submit this information with the Commission so the Commission’s online map will reflect as much information as possible

In adding the definition of “School,” the Commission adopted the definitions of public school and private school as set forth in statute.

The Commission also added the definition of “Governing Body.” The Commission recognizes that schools have a variety of governance or administrative structures. The

definition is intended to include all structures and acknowledge schools may choose to keep decision making authority for purposes of these rules centralized at the level of a school board or decentralize decision making authority to the principal or other group charged with administrating the school through delegation. Regardless of which entity or person is charged with administrating a school, the Commission expects and the rules provide that only one person or entity will be responsible for consulting with the operator. For the consultation process to be effective, there must be one person or entity speaking on behalf of the school and that one person or entity must have the authority to bind the school in all negotiations that may occur with the operator.

The Commission also added the definition of “Child Care Center.” The Commission and stakeholders agree that it is important for the outdoor play areas associated with a child care center to be included in the school setback rules. For purposes of the setback, a child care center includes any associated outdoor play area that is either adjacent to or directly accessible from the child care center. The outdoor play area must have fencing or some sort of natural barrier from which the operator and COGCC Staff can verify the distance between the fence or barrier and the oil and gas location.

In promulgating the child care center definition, the Commission incorporated by reference the definition of child care center contained within § 26-6-102(5), C.R.S. of the Colorado Human Services Code. The definition of child care center set forth in § 26-6-102(5), C.R.S., includes not only “day care centers” but preschools, nursery schools, kindergartens, after school programs and day and summer camps. To be considered a child care center, § 26-6-102(5), C.R.S. provides, among other things, that the center must care for five or more children, who are not related to the owner, operator or manager of the center.

The Colorado Department of Human Services maintains a database of licensed child care centers in the State that operators may consult when determining whether a center is within the 1,320-foot notice area. The list maintained by the Department also includes “Experienced Family Child Care Homes,” “Family Child Care Homes,” “Large Family Child Care Homes,” “Infant Toddles Homes,” “School Age Child Care Centers” and other categories of child care providers. These Commission Rules apply only to child care centers as defined in § 26-6-102(5), C.R.S.

Finally, the child care center must be licensed and in operation at the time that the pre-application notice is sent. The Commission recognizes that there may be instances when a licensed child care center is for some reason not in operation. While it is expected that such instances will be rare, in such instances the Commission strongly encourages operators to reach out to the operators of child care centers to ascertain whether the center is in operation, and if not whether it will be again.

Rule 303.b.

Rule 303.b. was revised to make necessary changes to include additional informational requirements that an operator must provide when submitting its Form 2A for a proposed oil and gas location in proximity to a school or child care center. The new Rule 303.b.(3)U. requires operators include with its Form 2A a copy of the map given to the school or child care center under the Rule 305. notice provisions, as discussed below. Additionally, the operator must indicate on the Form 2A if the Governing Body of the school or child care center requested to consult with the operator, and if after a consultation there was agreement on identification of school facilities.

Rule 305.a.

The Commission revised Rule 305.a(4) to include notice provisions for oil and gas locations proposed in proximity to a school or child care center. Specifically, operators shall give notice to the school or child care center and its Governing Body when an oil and gas location is within 1,320 feet of 1) a property line that is owned by a school or child care center, or its Governing Body, 2) a property line considered a future school facility or 3) what reasonably appears to be a school facility. The distance to measure the 1,320-foot setback is from the edge of disturbance for the proposed oil and gas location to the property line of the school, child care center or edge of the school facility. While the distance to measure is 1,320 for purposes of providing a pre-application Notice of Intent to Conduct Oil and Gas Operations, as discussed below, the actual setback is 1,000 feet.

To determine property ownership, the Commission expects that operators will rely upon the county assessor records. To identify potential future school facilities, operators may review recorded plats for reservation of property for schools. While notice must be given to both the Governing Body and the school, consultation and negotiations will be with only one person or entity. As explained above, there must be one person or entity speaking and negotiating on behalf of the school. The rules presume the Governing Body will negotiate, but allow the Governing Body to delegate that role to the principal or other group charged with administering the school.

To identify school facilities, the Commission expects that an operator will review current aerial maps that show surface development in the area proposed for the oil and gas location and visit the area to look for signs or other indications of school use. Additionally, operators may consult school district websites for information concerning a district's future development plans. School districts are encouraged to make available, when possible, information concerning its future development plans. When an operator identifies a school in the area of its proposed oil and gas location, but not necessarily within 1,000 feet of the location, the operator should undertake

greater due diligence to determine whether there may be a school facility that triggers the notice provisions. The Commission recognizes that there may not always be perfect information readily available to an operator to determine whether a school facility exists that would trigger the notice requirement. However, the Commission would expect that when the information is inconclusive that the operator will engage in a dialogue with the local school to ensure that no school facilities exist within 1,000 feet from the proposed oil and gas location.

Should it be determined after an operator submits its Form 2A that a school facility or child care center is within 1,000 feet of the proposed oil and gas location, the Form 2A will need to be withdrawn and the operator will be required to comply with the notice provisions of Rule 305.a.(4). These notice provisions include that the operator must provide a “Notice of Intent to Conduct Oil and Gas Operations” to the principal or senior administrator and the Governing Body no less than 30-days before submitting a Form 2A to the Director. The notice must include among other things: contact information for the local government designee (LGD); notice that the Governing Body may request a consultation with the operator and the Director; and that the school or Governing Body may submit to the Commission written comments to the Form 2A.

The Commission understands that some schools, school districts or child care center may not wish to receive notice of proposed oil and gas locations within 1,320 feet of the school property line or of a school facility. If that is the case, the Governing Body may waive the right to notice for it and all schools or child care centers it oversees.

Finally, the 1,000 foot setbacks applies to all new wells or production facilities. This means that an expansion of an existing oil and gas location to include a new well or production facility must comply with these notice provisions.

Rule 306.h.

The Commission believes the consultation process to be a critical component of these rules. Dialogue between the Governing Body and operator is an important underlying component of the rules – increasing communication between both. The desire for more communication was expressed by school districts engaged in the rulemaking process. Communication also facilitates consideration of appropriate best management practices for the Form 2A. Further, it will only be through dialogue between the two parties that concerns regarding traffic, schedule of operations and any other considerations unique to a school can be considered.

Rule 604.a.

Rule 604.a(6) was amended to provide that no new well or production facility will be located within 1,000 feet of a school facility or child care center. The addition of Rule

604.a.(6) does not alter the 1,000-foot setback for High Occupancy Buildings set forth in Rule 604.a.(4). School buildings, including modular classrooms, are considered High Occupancy Buildings and thus continue to be subject to Rule 604.a.(4)'s setback provisions.

The Commission understands that in certain circumstances an operator may determine that to proceed with development of a well or production facility needs to be located within the 1,000-foot setback from a school facility or child care center. If the Governing Body for the school facility or child care center agrees in writing that a well or production facility may be located within the 1,000-foot setback then the Director may approve the Form 2 or Form 2A. Notably, the Director may still deny a Form 2 or 2A when a school or child care center has waived in writing the setback, if the Director determines that public health, safety and welfare are not adequately protected.

Alternatively, an operator may file an application with the Commission seeking a hearing on the Form 2 or Form 2A that would allow a well or production facility be located within the 1,000-foot setback. In filing its application for the hearing, the operator must demonstrate that the 1,000-foot setback is technically infeasible or economically impracticable and should be waived. Moreover, the application must demonstrate that sufficient mitigation measures are in place to protect public health, safety and welfare. The Commission will only grant an operator's request, and direct that the Form 2 and Form 2A be approved by the Director, if it finds that the application satisfies these requirements.

The rules provide that if a hearing is requested, it will be held at a location proximate to the affected school or child care center. As encouraged by statute, the Commission already holds at least two of its meetings each year outside of the Denver metropolitan area. *See* § 24-3.5-101, C.R.S. (all state boards and commissions are encouraged to hold at least one-third of its regularly scheduled meetings outside the Denver metropolitan area.) If a hearing is requested on a Form 2 or Form 2A the Commission may continue the hearing to a regularly scheduled Commission meeting outside the Denver metropolitan area that is closer in proximity to the affected school or child care center. Operators should expect that their request for a hearing on a Form 2 or Form 2A will not be heard promptly because of the requirement that the hearing be held at a location proximate to the affected school or child care center.

Similarly, should the Governing Body and operator fail to come to agreement as to whether a school facility or child care center lies within 1,000 feet of a proposed well or production facility the operator may file an application with the Commission seeking resolution of the matter. The burden will be on the operator to prove that there is no school facility or child care center within 1,000 feet of the proposed oil and gas facility.

Finally, the 1,000 foot setbacks applies to all new wells or production facilities. This means that an expansion of an existing oil and gas location to include a new well or production facility must comply with these setback provisions. These new requirements would not affect existing or permitted wells or production facilities. Nor do they prevent an operator from reentering or recompleting existing wells or upgrading equipment or general maintenance.

Other Rule Additions and Amendments

The Commission made the following additions and amendments to the below-listed rules. These changes were primarily designed to clarify or correct specific details of these rules or to conform them to the amendments to the 300 and 600 Series Rules.

100 Series Rules: Definitions

The 100 Series definition of High Occupancy Building was amended to correct statutory citations.

300 Series Rules: Form 2 and 2A Application Procedures

Conforming changes were made to Rule 305.a. to reflect that for oil and gas locations proposed in an Urban Mitigation Area operators must give Notice of Intent to Conduct Oil and Gas Operations to the local government designee (LGD), if there is one, and to the local planning department for areas with no LGD. The Notice must be provided no less than 30-days prior to the submission to the Director of the Form 2A. The Commission's Rules define Urban Mitigation Areas to include High Occupancy Buildings. Because schools and modular classrooms are High Occupancy Buildings the Urban Mitigation notice requirements are applicable.

500 Series Rules: All Other Proceedings Commenced by Filing an Application

Conforming changes were made to Rule 503.b. to reflect that operators may file applications with the Commission to seek approval of a Form 2 or Form 2A that waives the 1,000-foot setback from a school facility, or when an operator and Governing Body disagree on identification of a school facility or child care center.

Effective Date.

The Commission adopted the proposed amendments at its hearing on December 18, 2018, in Cause No. IR, Docket No. 181200714. These amendments will become effective, per Section 24-4-103, C.R.S., twenty days after publication in the Colorado Register.