

LAW WEEK COLORADO

Drilling Further Into 'Necessary and Reasonable'

The only sure thing about interpreting Colorado's new oil and gas regulations? It'll be a case-by-case analysis.

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Colorado's controversial regulatory overhaul of oil and gas operations passed in the House Friday morning. In the bill, an added clarification that local government regulations of the industry be "necessary and reasonable" has raised a host of unknowns about how that term will get interpreted.

The one certainty oil and gas attorneys seem to agree on? That interpreting "necessary and reasonable" will be a case-by-case analysis, both when governments impose regulations and when courts then have the task of reviewing them.

Energy and natural resources attorney Crystal McDonough said the section of Senate Bill 181 delegating powers to local governments, which contains the "necessary and reasonable language," seems to encapsulate the measure's intent in overhauling oil and gas regulations.

"That new necessary and reasonable language adds to the definition of what minimizing adverse impacts means," McDonough said. "So that's going to require local governments and agencies to analyze whether their actions are going to minimize adverse impacts."

Oil and gas attorney Phil Barber, who currently mainly represents local governments, said he's not getting any heartburn from the term's uncertain-

ties. "I think it is an elastic concept, and if you try to define it, sometimes you create [as many] problems as you solve," he said.

Barber said any particular dispute over the meaning of necessary and reasonable may not help define the term in a broader context. Necessary and reasonable regulations on oil and gas will probably mean something different on Colorado's sparsely populated Eastern Plains, for example, than on the Front Range, he said.

Necessary and reasonable standards exist in other areas of law, such as personal injury and landlord-tenant relationships. "I don't see necessary and reasonable as that foreign of a concept," Barber said.

He added even if SB 181 didn't contain the "necessary and reasonable" language, courts would probably interpret the statute as implicitly requiring local government regulations to be necessary and reasonable anyway, because a law can't be unreasonable on its face.

But McDonough believes SB 181's sweeping scope is likely to result in a lot of litigation over local government regulations and decisions that will scrutinize "necessary and reasonable."

The bill also doesn't explicitly address whether it intends for local governments to have sole authority in interpreting the term, or whether the Colorado Oil and Gas Conservation Commission will have the ability to

address the meaning of necessary and reasonable with rulemaking.

The measure also does not change the regulatory authority of the Air Quality Control Commission, Water Quality Control Commission, the State Board of Health and the Solid and Hazardous Waste Commission. McDonough said it's unclear whether the Department of Public Health and Environment would have the ability under SB 181 to make rules that interpret "necessary and reasonable."

Barber said courts analyzing local government regulations will ultimately have to look at the language and the intent of SB 181.

The law intends to create higher standards for protecting public health, safety and welfare, as well as give more control to local governments.

He added the bill doesn't seem to give the COGCC authority to define "necessary and reasonable."

Language in SB 181's local government section does appear to set up some guardrails for factors local governments would consider when regulating oil and gas operations.

Matters outlined in the bill as considerations for avoiding negative impacts from development include land use, the location of operations, impacts on public facilities and services, water and air quality and "all other nuisance-type effects of oil and gas development."

"That's what you're going to look at," McDonough said. "What is necessary and reasonable to protect all of these things?"

The bill also allows for operators and local governments to ask the COGCC to appoint a technical review board to look at a government's decision on an oil and gas development application.

McDonough said the review process seems intended as a checks-and-balances mechanism for evaluating whether local government decisions are necessary and reasonable, and the bill also allows operators to appeal a local government's decision in court after a technical review board completes its report.

But the bill does not require reviews by a commission-appointed board, and it doesn't say a local government would have to change its decision if the board's findings disagree. McDonough said an operator could then likely appeal a government's decision in court based on the review board's findings.

"They're trying to give the folks in the Oil and Gas Conservation Commission the opportunity to get technical experts to review that local government's determination, and you can bet that's going to be looking at whether or not [the determination] was reasonable and necessary."•

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