

# LAW WEEK COLORADO

## Six Words Worth a Universe of Questions

*Amendment to oil and gas bill raises new uncertainties*

BY JULIA CARDI  
LAW WEEK COLORADO

Before the bill to overhaul oil and gas operation regulations in Colorado passed out of the Senate, an amendment added six key words to the bill's mandate for minimizing adverse impacts: "to the extent necessary and reasonable."

That short phrase has the intent of soothing concerns that Senate Bill 181's grant of authority to local governments to regulate oil and gas operations could result in counties having latitude to ban operations altogether. But "necessary and reasonable" has raised a universe of questions about how it will get defined, assuming the wording stays in the bill.

"Each time this is applied, it's going to have to be applied to the specific environment, the people around it, the community's needs [and] local concerns," said energy and natural resources attorney Crystal McDonough. "It's going to be a very individual examination with very specific facts and circumstances, and maybe that's where the 'necessary and reasonable' is really implemented." Reasonable and necessary protections would probably mean something different for protecting a pristine wildlife area than reasonable and necessary protections when drilling next to a community or neighborhood, she added.

Among the questions presented: Who defines "necessary and reasonable?" How will its interpretation relate to the existing standard for evaluating the Colorado Oil and Gas Conservation Commission's regulations, which can't be "arbitrary and capricious?" And is "necessary and reasonable" one standard to meet, or two?

Senate Bill 181 has passed the Senate and its first committee hearing in the House on Tuesday after hearings that lasted well past midnight. The measure significantly overhauls regulations of oil and gas operations in Colorado, with two key components: It affects how the Colorado Oil and Gas Conservation Commission makes decisions about regulating oil and gas development and granting permits for new projects, by requiring the agency to minimize negative impacts on public health, safety, welfare and the environment. SB 181 also gives local governments authority to regulate oil and gas development within their borders — and developers will have to follow the stricter of the protection standards.

McDonough said it's not yet clear whether defining "reasonable and necessary" will be left purely up to local governments when they consider regulations of their own, whether the COGCC have authority under SB 181 to issue rules that interpret the term. Though even in light of uncertainties about the meaning of "necessary and reasonable," McDonough said the language is likely to be a useful check against local governments that want to ban all oil and gas operations within their borders.

"If a community did in fact under these new rules determine they were going to ban all oil and gas drilling ... there would have to be some necessary [and] reasonable basis for doing that in order to protect public health, safety, welfare and the environment."

SB 181 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 Hazard-

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

### A LAYER ON TOP OF 'ARBITRARY AND CAPRICIOUS'

Mark Barron, a partner at Baker-Hostetler who heads the Denver office's energy litigation practice, said "arbitrary and capricious" is the general test used to evaluate government agency actions — in the context of SB 181, the COGCC can't impose "arbitrary and capricious" regulations on oil and gas development. He said that is the standard used when there isn't a more tailored standard for a specific context.

"In the past, [courts] would've used the mission of the COGCC and determined whether the [local government] action was arbitrary and capricious in relation to the general standard," Barron said. "Now there's a new standard, and [courts] will have to determine not whether it's arbitrary, but whether [a regulation is] necessary and reasonable to protect public health, the environment and wildlife resources."

McDonough said she believes the new "necessary and reasonable" standard stacks on top of "arbitrary and capricious." Courts will have to test, she said, whether a local government regulation it deemed necessary and reasonable is actually arbitrary and capricious.

"Does that mean they're going to create a new test to decide, or are they going to use the existing test of arbitrary and capricious?" she said. "I don't know if courts will be asked to come up with new standards."

### ONE STANDARD, OR TWO?

SB 181's language doesn't seem to specify whether "necessary and reasonable" is intended as one standard to meet, or two individual elements. While the phrase creates a new standard, there are other established standards that could serve as templates for interpreting "necessary and reasonable" as either one test or two.

McDonough said she could see the phrase interpreted in two steps: First, is the regulation imposed necessary? And after that's determined, is its implementation reasonable?

She said she believes the "necessary and reasonable" standard will require a lot of due diligence from local governments to justify regulations with evidence and by showing they've thoroughly examined the potential impacts of drilling, including what can be mitigated and what is unavoidable.

"They're going to have to have a solid record to support any decision based on this 'necessary and reasonable' standard," McDonough said. "I think this adds an extra layer."

By contrast, Barron said "arbitrary and capricious" is typically reviewed as a single term.

"They're not looked at as, is it arbitrary and then let's go on and confirm that it's also capricious," he said. But he acknowledged that doesn't necessarily mean "necessary and reasonable" will also be interpreted as a single term.

"That's one of the questions that needs to be answered," Barron said. "If a challenge is brought, a court will look and see if something needs to be 'necessary and reasonable,' or just necessary and reasonable."•

— Julia Cardi, JCardi@circuitmedia.com