

Keep Moving Forward

OTTEN JOHNSON
ROBINSON NEFF + RAGONETTI, PC

>> ottenjohnson.com



OTTEN JOHNSON ALERT

Senate Bill 181: Sweeping Changes in the Pipeline

March 2019 • [Vincent P. Forcinito](#)

Following Proposition 112's defeat by voters in the November mid-term election, another major challenge to the Colorado oil and gas industry is on the horizon. On March 1, Senate Bill 181 ("SB 181") was introduced by Senate Majority Leader Steve Fenberg and House Speaker KC Becker. In what state legislators have referred to as "the most sweeping oil and gas reform" the state has ever seen, SB 181 is rapidly advancing through the Capitol. Having successfully navigated three Senate committees and a floor vote, passing each strictly along party lines, SB 181 is starting to make the rounds through the House as well. If successfully passed in the House, as all indications point that it will be, the bill will find its way to Governor Polis' desk, who has already indicated his support.

So, with the likelihood that SB 181 will become law, what does this mean for Colorado's real estate and land development industries?

SB 181: The Major Changes

Briefly, SB 181 proposes the following changes:

- Mission Change – SB 181 fundamentally shifts policy in the Colorado Oil and Gas Conservation Commission's ("COGCC") operation. Under current law, the COGCC is directed to "foster" the development of oil and gas in a manner that is "consistent with" protection of the public health. The bill amends this mission to mandate that the COGCC instead "regulate" the development of oil and gas in a

manner “that protects” the public health. This mission directs regulators to put public health and safety above all else.

- Repeal Limitation on Local Control – Currently, local governments have limited powers over select oil and gas extraction areas, but only where expressly permitted by the COGCC. SB 181 removes this barrier, thus granting local governments the power to regulate without a site-specific allowance by the COGCC.
- Increased Local Government Authority – SB 181 explicitly grants local governments the authority to directly regulate oil and gas operations within their boundaries. This extends to the siting of oil and gas locations, as well as the authority to inspect facilities and impose fines for environmental hazards.
- Reduce Industry Members on the COGCC – Currently, state law requires that three of the nine members on the COGCC be individuals with substantial experience in the oil and gas industry. Two of the three members are required to have a college degree in petroleum geology or petroleum engineering. In an effort to reduce industry influence on the COGCC, SB 181 cuts the required number of individuals with oil and gas experience to one, and removes the degree prequalification.
- Eliminate the COGCC’s Exclusive Authority Relating to Oil and Gas Regulation – Under current law, the COGCC has exclusive authority relating to the regulation of oil and gas. SB 181 removes this exclusivity, and specifies that the authority of the COGCC does not negate the authority of, among other entities, local governments to regulate oil and gas operations.
- Amendment to State Preemption Law – SB 181 amends state preemption law by stating that nothing in the Colorado Oil and Gas Conservation Act shall impair or negate the authority of a local government to regulate land use and the siting of oil and gas facilities. Where there is a conflict between state and local regulations, the regulation that is “rationally designed to be more protective of public health, safety, and welfare” controls. This allows local governments to promulgate more restrictive oil and gas regulations than under state law. However, more restrictive state regulations would still control over more lenient local government rules.

Supporters of SB 181 have referred to it as a common sense measure designed to make public health concerns more of a priority. Opponents of the bill, on the other hand, have decried it as destructive to both the state and local economies, voicing their concerns about what the shifted priorities of the bill would do to the oil and gas industry in the state.

The Oil and Gas, Real Estate, and Land Development Industries

Today, there are more than 53,000 active oil and gas wells in Colorado. The oil and gas industry is thriving in the state, and has brought with it tens of thousands of jobs. Estimates place the state and local taxes paid by the industry and its employees at

almost \$1 billion, a significant stream of revenue, particularly from a single industry. In Weld County, which leads the state in oil and gas production with nearly 13,000 wells, oil and gas operations are expected to generate upwards of \$490 million in property tax revenue (including \$200 million for schools) in 2019 alone.

It remains to be seen what SB 181 would do to these numbers, but it raises more questions than ever about the industry's future in the state. Since the introduction of SB 181, Adams County, one of three counties comprising an area in which 90% of the state's drilling permits issued in the past year have been located, unanimously passed a moratorium on the processing of new applications for oil and gas drilling permits. The moratorium can last for up to six months to allow the county government to "re-evaluate its oil and gas development regulations" in anticipation of SB 181's passage. Additional moratoria, heavy local regulation, and even drilling bans by local governments could mean big changes for oil and gas development in Colorado.

Likewise, SB 181 could have significant effects on the real estate and land development industries in the state. For example, the legislation could prove to be a boon for surface owners of large parcels of land, as additional drilling restrictions may lead to increased development potential, a spike in land values, and reduced pressure from mineral estate owners to restrict surface use. This is particularly relevant in oil heavy northern Colorado. At the same time, however, communities that have experienced a homebuilding surge as a result of a prospering oil and gas industry, could see a significant slowdown in this sector. With a decrease in oil and gas development comes a decrease in oil and gas jobs, which may in turn lead to reduced housing and retail demand in areas where the industry has spurred growth.

While some surface owners may see dividends following the passage of SB 181, mineral rights owners may see plunging property values in light of local regulatory clampdowns. Conversely, mineral interests in jurisdictions that continue to freely allow oil and gas development may then become more valuable. This scenario could lead to an increase in takings claims by aggrieved mineral owners against local governments, which may then be required to compensate mineral estate owners.

In addition to takings claims, SB 181 promises to bring with it a wave of litigation. As the bill introduces a new preemption framework for oil and gas regulation, courts will be forced to decide, on a regulation-by-regulation basis, whether it is the state or local regulation that is "rationally designed to be more protective of public health, safety, and welfare." Upending the state's current preemption precedent, SB 181's preemption standard may open the door to "legislation from the bench," as judges inevitably will take different approaches to answering this question.

Only time will tell what the effects of SB 181 truly might be. As always, we will be happy to consult with any client interested in the prospective impact of SB 181 on its business.

Otten Johnson attorneys in our [Real Estate](#), [Land Use](#), and [Litigation](#) practice groups have substantial experience with development and governmental agreements. For more information on this Otten Johnson Alert or for help evaluating your current situation, contact any of the attorneys in the Real Estate, Litigation, or Land Use practice groups. For a listing, [click here](#).

More Great Reads

Rocky Mountain Real Estate Blog

The latest real estate and land use news and updates. [Read More](#)

Rocky Mountain Sign Law Blog

Regulatory, best practices, and other First Amendment news. [Read More](#)

Our lawyers are pleased to present timely, topical issue alerts on the latest legal developments, trends and other subjects of interest to our clients and colleagues. Otten Johnson publishes Otten Johnson Alerts on a monthly basis. If you do not wish to receive future Otten Johnson Alerts, you may unsubscribe by clicking the "opt out" link below. This Otten Johnson Alert has been prepared for informational purposes only and does not constitute legal advice or the opinion of Otten Johnson. Receipt of this summary does not create an attorney-client relationship between you and Otten Johnson. You should not act or rely on any information in this article without seeking the advice of an attorney. Otten Johnson provides legal advice only after being engaged to do so by a client with respect to particular facts and circumstances.

Read our full disclaimer

950 Seventeenth Street, Suite 1600, Denver, CO 80202
Phone 303.825.8400 | Fax 303.825.6525 | ottenjohnson.com