



Dora
Department of Regulatory Agencies

Office of Policy, Research and Regulatory Reform

2012 Sunset Review: Colorado Coordination Council

October 15, 2012





Executive Director's Office

Barbara J. Kelley
Executive Director

John W. Hickenlooper
Governor

October 15, 2012

Members of the Colorado General Assembly
c/o the Office of Legislative Legal Services
State Capitol Building
Denver, Colorado 80203

Dear Members of the General Assembly:

The mission of the Department of Regulatory Agencies (DORA) is consumer protection. As a part of the Executive Director's Office within DORA, the Office of Policy, Research and Regulatory Reform seeks to fulfill its statutorily mandated responsibility to conduct sunset reviews with a focus on protecting the health, safety and welfare of all Coloradans.

DORA has completed the evaluation of the Colorado Coordination Council. I am pleased to submit this written report, which will be the basis for my office's oral testimony before the 2013 legislative committee of reference. The report is submitted pursuant to section 24-34-104(8)(a), of the Colorado Revised Statutes (C.R.S.), which states in part:

The department of regulatory agencies shall conduct an analysis of the performance of each division, board or agency or each function scheduled for termination under this section...

The department of regulatory agencies shall submit a report and supporting materials to the office of legislative legal services no later than October 15 of the year preceding the date established for termination....

The report discusses the question of whether there is a need for the process created under Part 3 of Article 33 of Title 24, C.R.S. The report also discusses the effectiveness of the Colorado Department of Natural Resources and staff in carrying out the intent of the statutes and makes recommendations for statutory changes in the event this program is continued by the General Assembly.

Sincerely,

Barbara J. Kelley
Executive Director





John W. Hickenlooper.
Governor

Barbara J. Kelley
Executive Director

2012 Sunset Review: Colorado Coordination Council

Summary

What Is the Colorado Coordination Council?

The Colorado Coordination Council (Council) is not a standing body. Rather it is a coordination process that is instituted at the request of a sponsor of a project that has as its purpose the extraction, use, conversion, transportation, or management of natural resources and that requires permits or approvals from federal, state or local governmental entities or that requires compliance with a jurisdictional requirement of the federal, state or local government.

Why was the Council Created?

The Council was created to provide a "one stop shop" that could coordinate the permitting processes for natural resources development projects.

Who Uses the Council?

Since its creation, the coordination process envisioned by the Council has never been utilized.

What Does It Cost?

Natural resources development project sponsors would pay the expenses of the Council for that sponsor's particular project.

Key Recommendations

Sunset the Council.

The goals of the Council were laudable – to create a “one stop shop” for the permitting of natural resources development projects. However, the Council, like the Colorado Joint Review Process that preceded it, has not been used. A considerable level of coordination exists outside of the formal framework of the Council. Therefore, the Council should be sunset because it has not been used and it is not necessary.

Major Contacts Made During This Review

Colorado Association of Commerce and Industry
Colorado Counties, Inc.
Colorado Department of Natural Resources
Colorado Department of Public Health and Environment
Colorado Mining Association
Colorado Municipal League
Colorado Stone, Sand and Gravel Association

What is a Sunset Review?

A sunset review is a periodic assessment of state boards, programs, and functions to determine whether or not they should be continued by the legislature. Sunset reviews focus on creating the least restrictive form of regulation consistent with protecting the public. In formulating recommendations, sunset reviews consider the public's right to consistent, high quality professional or occupational services and the ability of businesses to exist and thrive in a competitive market, free from unnecessary regulation.

Sunset Reviews are Prepared by:
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Background

Introduction

Enacted in 1976, Colorado's sunset law was the first of its kind in the United States. A sunset provision repeals all or part of a law after a specific date, unless the legislature affirmatively acts to extend it. During the sunset review process, the Department of Regulatory Agencies (DORA) conducts a thorough evaluation of such programs based upon specific statutory criteria¹ and solicits diverse input from a broad spectrum of stakeholders including consumers, government agencies, public advocacy groups, and professional associations.

Sunset reviews are based on the following statutory criteria:

- Whether regulation by the agency is necessary to protect the public health, safety and welfare; whether the conditions which led to the initial regulation have changed; and whether other conditions have arisen which would warrant more, less or the same degree of regulation;
- If regulation is necessary, whether the existing statutes and regulations establish the least restrictive form of regulation consistent with the public interest, considering other available regulatory mechanisms and whether agency rules enhance the public interest and are within the scope of legislative intent;
- Whether the agency operates in the public interest and whether its operation is impeded or enhanced by existing statutes, rules, procedures and practices and any other circumstances, including budgetary, resource and personnel matters;
- Whether an analysis of agency operations indicates that the agency performs its statutory duties efficiently and effectively;
- Whether the composition of the agency's board or commission adequately represents the public interest and whether the agency encourages public participation in its decisions rather than participation only by the people it regulates;
- The economic impact of regulation and, if national economic information is not available, whether the agency stimulates or restricts competition;
- Whether complaint, investigation and disciplinary procedures adequately protect the public and whether final dispositions of complaints are in the public interest or self-serving to the profession;
- Whether the scope of practice of the regulated occupation contributes to the optimum utilization of personnel and whether entry requirements encourage affirmative action;
- Whether administrative and statutory changes are necessary to improve agency operations to enhance the public interest.

¹ Criteria may be found at § 24-34-104, C.R.S.

Sunset Process

Regulatory programs scheduled for sunset review receive a comprehensive analysis. The review includes a thorough dialogue with agency officials, representatives of the regulated profession and other stakeholders. Anyone can submit input on any upcoming sunrise or sunset review via DORA's website at: www.askdora.colorado.gov.

The functions of the Executive Director of the Colorado Department of Natural Resources (Executive Director and DNR, respectively) as enumerated in Part 3 of Article 33 of Title 24, Colorado Revised Statutes (C.R.S.), shall terminate on July 1, 2013, unless continued by the General Assembly. During the year prior to this date, it is the duty of DORA to conduct an analysis and evaluation of the administration of the Colorado Coordination Council by the Executive Director pursuant to section 24-34-104, C.R.S.

The purpose of this review is to determine whether the currently prescribed Colorado Coordination Council (Council) should be continued for the protection of the public and to evaluate the performance of the Executive Director. During this review, the Executive Director must demonstrate that the program serves to protect the public health, safety or welfare, and that the program is the least restrictive form of government intervention consistent with protecting the public. DORA's findings and recommendations are submitted via this report to the Office of Legislative Legal Services.

Methodology

As part of this review, DORA staff interviewed staff at DNR and the Colorado Department of Public Health and Environment, interviewed representatives of trade and industry associations, and reviewed Colorado statutes.

Profile of the Colorado Coordination Council

The process of starting a natural resources development project, whether it be a mine, an oil well, or a water project, can be time consuming and laborious. Many regulatory hurdles must be overcome before production can begin. Many of those regulatory hurdles take the form of permits that must be obtained, often from a combination of local, state and federal authorities. In addition to any permits that may be required for the actual extraction of the resource, permits can also be required for, among other things, land use, air and water emissions, water usage, infrastructure improvement and transportation.

Thus, commencing a natural resources development project can be a daunting task. It is reasonable to seek some level of coordination among the various regulatory authorities.

The Council is more of a process than an actual, standing council. It was intended to coordinate the permitting process for natural resources development projects by creating a sort of “one stop shop.” Importantly, it is voluntary, on the part of the project sponsor. No one is required to utilize the Council.

The Council is designed such that a project sponsor seeking to utilize the coordination process can request the Executive Director to begin the process. As part of this request, the project sponsor must, among other things, provide the Executive Director with a list of local, state and federal agencies that the project sponsor reasonably expects to have to be included.

The Executive Director, in turn, seeks representatives from each of those local, state and federal agencies to serve on an *ad hoc* “council,” which is unique to that project. This council is then tasked with coordinating the permitting processes among the various local, state and federal agencies for the project sponsor.

All costs associated with the Council are borne by the project sponsor.

Legal Framework

History of Regulation

The General Assembly created the Colorado Joint Review Process (CJRP) in 1983 in an attempt to streamline the environmental permitting process for large energy and mining projects.

As a voluntary process, the CJRP allowed sponsors of natural resources extraction, conversion, transportation, management or water development projects to submit information about the project to the Colorado Department of Natural Resources (DNR). DNR staff would then request the various federal, state and local regulatory authorities to coordinate their various permitting processes.

However, a 1995 sunset review of the CJRP found it to be underutilized – nine projects began the process, but most never progressed past the initial review stage and none were seen through to completion. The General Assembly adopted the recommendation to sunset the CJRP during the 1996 session.

House Bill 03-1323 (HB 1323) resurrected the CJRP as the Colorado Coordination Council (Council). Proponents of HB 1323 testified that the CJRP had been a good idea; it just had not been utilized. Proponents offered that the Council offered a way to create a “one-stop shop” to increase efficiency by coordinating, among other things, public hearings, so that project sponsors could have one, joint hearing, rather than individual local, state and federal hearings.

Summary of Colorado Law

The Council is created in Part 3 of Article 33 of Title 24, Colorado Revised Statutes, (Act) and is administered by the Executive Director of the DNR.² The stated purpose of the Act is to create a state agency responsible for expeditiously assuring maximum public, governmental, and sponsor input with reduced costs and minimum delay.³

The Council is not a standing body. Rather, it is a voluntary coordination process that sponsors of certain projects may elect to utilize. These projects include those that have as their purpose the extraction, use, conversion, transportation, or management of natural resources and that require permits or approvals from federal, state or local governmental entities or that require compliance with a jurisdictional requirement of federal, state or local government.⁴

² § 24-33-302(1), C.R.S.

³ § 24-33-301(2), C.R.S.

⁴ § 24-33-303(1), C.R.S.

The direct and indirect costs of the Council's coordination efforts are borne by the project sponsor that requests utilization of the process.⁵

To utilize the Council's process, a project sponsor must perform at least the following activities:⁶

- Submit to the Council a project statement containing accurate information relating to the nature, location, size and duration of the project;
- Submit to the Council a list containing the names and addresses of all federal, state and local governmental entities that the sponsor reasonably expects to be involved in a process requiring public input with regard to the project; and
- Serve the project statement upon each federal, state and local governmental entity contained in the list filed with the Council.

Once the project sponsor has completed these tasks, the Council is required to:⁷

- Establish a list of all applicable requirements identified by the project sponsor that will be the subject of the agreement between the Council and the project sponsor;
- Establish a timetable for completion of the public input, permit compliance, and approval requirements in coordination with the governmental entities involved;
- Organize and manage meetings involving the project sponsor and all involved governmental entities; and
- Take any other action that will facilitate the timely approval or denial of permits, approvals, or licenses required of the project sponsor for the commencement of the project.

Additionally, the CJRP, as it existed prior to its repeal in 1996, is transferred to the Council.⁸ For the most part, the CJRP statute is substantially similar to that of the Council. However, by virtue of the CJRP, the Council is required to prepare a directory of federal, state and local regulations that are applicable to various types of natural resources development activities. This directory is to be updated annually and proceeds from the sale of the directory are to fund the publication of the directory.

⁵ § 24-33-303(2), C.R.S.

⁶ § 24-33-303(2), C.R.S.

⁷ § 24-33-303(3), C.R.S.

⁸ § 24-33-302(3), C.R.S.

Program Description and Administration

The Colorado Coordination Council (Council) is administered by the Executive Director of the Colorado Department of Natural Resources (DNR).

The Council is not a standing body. Rather it is a coordination process that is instituted at the request of a sponsor of a project that has as its purpose the extraction, use, conversion, transportation, or management of natural resources and that requires permits or approvals from federal, state or local governmental entities or that require compliance with a jurisdictional requirement of the federal, state or local government.

Since its creation in 2003, the Council has not been utilized. Therefore, DNR has no information or statistics regarding its benefits or shortcomings.

Additionally, the directory of federal, state and local regulations envisioned by the synthesis of the Council's current statute, and the now-repealed statute that governed the Colorado Joint Review Process, has never been published.

Analysis and Recommendations

Recommendation 1 – Sunset the Colorado Coordination Council.

The process envisioned by the Colorado Coordination Council (Council) has never been utilized. If the history of the Council's predecessor, the Colorado Joint Review Process (CJRP), is considered, the process envisioned by both programs has not seen a project through to completion in 21 years.

On its face, these data would seem to justify the sunset of the Council. However, given the laudable goals of the Council – to streamline the permitting process by attempting to create a “one stop shop” – it is reasonable to inquire as to why the process has not been used. If it has not been used because of a technical defect that, if corrected, would generate interest in the Council, then perhaps it should be reformed and retained. If it has not been used because it is not needed, then it should be repealed.

As part of the sunset review process, staff of the Department of Regulatory Agencies (DORA) listened to the legislative hearings surrounding House Bill 03-1323 (HB 1323) to determine the underlying justification for the creation of the Council, despite the repeal of the CJRP just a few years earlier.

All testimony offered on HB 1323 was in support of its passage. The bill was designed to create a “one stop shop” for permitting, where the Council would coordinate, among other things, public hearings so that project sponsors could have one, joint hearing on, for example, water, rather than one local, one state and one federal hearing. Additional testimony was offered suggesting that project sponsors would have to submit technical information only once. A point was made during testimony that the CJRP was repealed in 1996 because of non-utilization, not because it represented a bad idea.

Importantly, the Council was created with no particular natural resources development project in mind.

To determine why the process envisioned by the Council has never been utilized, DORA staff asked stakeholders to speculate as to why. Multiple reasons were offered.

First, very few outside, or even inside, the Colorado Department of Natural Resources (DNR) were aware of the Council's existence. Indeed, most stakeholders contacted as part of this sunset review had never heard of the Council, though some had vague recollections of the CJRP.

Those within DNR acknowledged that DNR conducted no outreach to inform the community of the Council's existence and, to the best of anyone's recollection, no one at DNR had ever suggested that a project sponsor utilize the Council.

If this were the sole reason offered for the lack of utilization of the Council, then perhaps greater outreach would justify continuation of the Council. However, additional explanations are apparent.

A considerable amount of coordination already occurs informally, at least at the state level. The various agencies within DNR coordinate with one another, as do those within the Colorado Department of Public Health and Environment. These two departments also coordinate their processes with one another, and, to the extent possible, with federal and local agencies.

Additionally, DNR routinely coordinates with federal agencies on environmental impact statements.

Thus, the Council is not needed because the formal coordination it was created to provide already occurs informally.

Therefore, the General Assembly should sunset the Council because it has not been used and it is not needed.