

1041 Regulations

*What Are They and How Do
Counties Implement Them?*

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The Statute

- Colorado General Assembly amended Colorado Land Use Act in 1974 to delegate authority over “areas and activities of state Interest” to local governments, with some exceptions for state involvement. *See C.R.S. 24-65.1-101, et seq.*
- The Act authorizes local governments to designate specified areas and activities of state interest, promulgate regulations, and issue permits for designated activities or development in designated areas.
- The designation process is legislative. *See Colorado Land Use Commission v. Board of County Com’rs of Larimer County*, 199 Colo. 7, 604 P.2d 32 (1979).

Basics of 1041

- The Act “delegates to the counties power to supervise land use with regard to areas and activities of ‘state interest’, i.e., which may have an impact on the people of the state beyond the immediate scope of the project.” *City County of Denver v. Bergland*, 517 F. Supp. 155 (D. Colo. 1981) (emphasis added), *aff’d in part, rev’d in part*, 695 F.2d 465.
- The Act provides that once an activity or area is designated as one of state interest, local governments may administer that activity or area subject to certain criteria, found at C.R.S. 24-65.1-202 and 204.
- Local government may adopt more stringent regulations than those criteria. C.R.S. 24-65.1-402(3). *See also City & County of Denver v. Grand & Eagle County*, 782 P.2d 753, 760 (Colo. 1989).
- The Act requires that “any person desiring to engage in the development in an area of state interest . . . shall file an application for a permit with the local government in which such development is to take place.” C.R.S. 24-65.1-501(1)(a).
- The local government may deny permit if proposed activity does not comply with locally adopted guidelines and regulations. C.R.S. 24-65.1-501(4).

Areas of State Interest

- Mineral resource areas
- Natural hazard areas
- Areas containing, or having a significant impact upon, historical, natural, or archaeological resources of statewide importance.
- Areas around key facilities in which development may have a material effect upon the key facility or the surrounding community.

Activities of State Interest



- Site selection and construction of major new domestic water and sewage treatment systems and major extension of existing domestic water and sewage treatment systems;
- Site selection and development of solid waste disposal sites and hazardous waste disposal sites (with exceptions). *See C.R.S. 25-15-200.3*
- Site selection of airports
- Site selection of rapid or mass transit terminals, stations, and fixed guideways
- Site selection of arterial highways and interchanges and collector highways
- Site selection and construction of major facilities of a public utility
- Site selection and development of new communities
- Efficient utilization of municipal and industrial water projects
- Conduct of nuclear detonations
- The use of geothermal resources for the commercial production of electricity.

Application of 1041 Regulations

- Applies to **Persons**. “[A]ny individual, limited liability company, partnership, corporation, association, company, or other public or corporate body, including the federal government, and includes any political subdivision, agency, instrumentality, or corporation of the state.” CRS 24-65.1-102(6).
- **Home rule municipality** is a “person” under 1041. *City & County of Denver v. Bd. of County Comm'rs of Grand County, Northwest Colorado Council of Governments, and Bd. of County Comm'rs of the County of Eagle*, 782 P.2d 753 (1989).
- **CDOT** is a “person” under 1041. *Department of Transportation v. City of Idaho Springs*, 192 P.3d 490 (2008).
- **Special Districts**. Special districts are subject to 1041 regulations. *See Bd. of County Comm'rs of County of Boulder v. Hygiene Fire Protection District*, 221 P.3d 1063 (Colo. 2009).



Adopting 1041 Regulations

- County prepares draft regulations and guidelines for the administration of the matters of state interest.
- At public meeting, BOCC makes finding that the county wishes desires to initiate designation of matters of state interest pursuant to C.R.S. 24-65.1-101 *et seq.*
- BOCC issues notice of the time and place of a public hearing for the designation of matters of state interest and adoption of regulations and guidelines for the administration thereof. C.R.S. 24-65.1-404(2)(a).

Adopting 1041 Regulations – Hearing Notice

- Notice must be published once at least 30 days and not more than 60 days before the public hearing in a newspaper of general circulation in the county.
- Notice should include:
 - place at which materials relating to the matters to be designated and any guidelines and regulations for the administration thereof may be examined by the public;
 - telephone number where inquiries about the proposed regulations may be answered;
 - description of the areas or activities proposed to be designated in sufficient detail to provide reasonable notice as to the property which would be included; and
 - legal description of the property affected as well as any general or popular names of the property.

Adopting 1041 Regulations – Public Hearing

- Act is silent with respect to procedures for conduct of public hearing.
- Public hearing should be conducted in the same manner as a public hearing for the adoption of other land use regulations.
- Statute provides minimum requirements for public hearing record.

Adopting and Enforcing 1041 Regulations – Designation Order

- At conclusion of hearing or within 30 days after its completion, local government may adopt, adopt with modifications, or reject the proposed designations and regulations for administration thereof.
- County must take its action by resolution.
- Each designation order should include, at a minimum:
 - a specification of the boundaries of the proposed area of state interest or the boundary of the area in which the activity of state interest has been designated. C.R.S. 24 65.1 401(2)(a);
 - reasons why particular area or activity is of state interest;
 - dangers that would result from uncontrolled development of the area or uncontrolled conduct of the activity; and
 - advantages of development of the area or conduct of the activity in a coordinated manner. C.R.S. 24-65.1-401(2)(b).

Moratorium

- “After a matter of state interest is designated pursuant to this person shall engage in development such area, and no such activity shall be conducted until the designation guidelines for such area or activity finally determined pursuant to this article.” Section 404(4).

1041 Regulations – Permitting

- Typically, HB 1041 regulations establish a Permit Authority to administer the program.
- Permit Authority (*e.g.*, the Board of County Commissioners) has power to reject the application if it is considered incomplete, and may not act on the application until it is complete.
- More than one area or activity of state interest may be combined in the same application.

1041 Regulations – Permit Hearing

- Within 30 days of receipt of a completed application for a permit, the Permit Authority must set and publish notice of the date, time and place for hearing on the application.
- The Permit Authority must provide procedural due process to the applicant and opposers.
 - hearing may best be compared to a rezoning or conditional use application.
 - quasi-judicial in nature. *City of Colorado Springs v. BOCC, Eagle County, supra; Snyder v. City of Lakewood*, 189 Colo. 421, 542 P.2d 371 (1975).

1041 Regulations – Action on Permit Application

- As with any land use application, the burden of proof is upon the applicant to show compliance with the regulations.
 - If there is not sufficient information upon which to make a decision, the Permit Authority should either deny the application or continue the hearing to give the applicant an opportunity to present additional information.
 - Such continuances are limited to 60 days.
- Permit Authority should state, in writing, the reasons for its decision.
- 1041 regulations typically impose an absolute outside time frame after the completion of the permit hearing for the Permit Authority's action to approve or deny.

Zoned Land Exemption

Section 107(1)(c)(II)

- Applies only to development that met certain statutory conditions as of May 17, 1974.
- Only applies when “[t]he development is to be on land...which has been zoned by the appropriate local government for the use contemplated by such development or activity...” C.R.S. 24-65.1-107(1)(c)(II) (emphasis added). It does not apply to uses generally contemplated in the zoning district.
- Development that is exempt under the zoned land exemption is not exempt from other county land use regulations. *Peter C. Droste v. Bd. of County Comm'rs of Pitkin*, 85 P.3d 585 (2003).
- Appellate cases do not define the limits of the zoned land exemption.

1041 on Federal Lands

- State and local environmental regulations that apply to private activities on federal lands are not preempted by FLPMA or federal mining laws. *California Coastal Commission v. Granite Rock*, 480 U.S. 572 (1987).
- Distinction between land use and environmental regulation? Think of “standards” instead of zoning.
- Colorado courts have rejected preemption claims.
 - Because it found no express preemption, the court analyzed preemption claims under the doctrine of implied preemption and held that Congress did not intend to occupy the field or impliedly preempt all local regulation of oil and gas operations. *Board of County Comm’rs v. BDS, Int’l*, 159 P.3d 773, 784-85 (Colo. App. 2006).

Other Legal Issues/Considerations

- Permit denial is not the same as prohibiting a use. Failure to satisfy any one criterion requires Permit Authority to deny permit. *City of Colorado Springs and City of Aurora v. Bd. of County Comm'rs of Eagle County*, 895 P.2d 1105 (1994).
- “Significant deterioration” or “significant degradation” are not impermissibly vague standards. *City of Colorado Springs*, 895 P.2d at 1114-115.
- Proper venue for claim involving validity of regulations is county where regulations were adopted. *City of Colorado Springs v. Bd. of County Comm'rs of Pueblo*, 147 P.3d 1 (2006).
- Designation of “new communities” as an activity of state interest does not give a county authority to regulate annexations under 1041. *Bd. of County Comm'rs of the County of Douglas v. Gartrell Investment Company, LLC*, 33 P.3d 1244 (2001) (finding that local regulations cannot redefine activities of state interest).

HB 1041 Regulations in Practice: Water Diversion Projects

- Grand County (1978) and Eagle County (1980) designated municipal water projects and new domestic water projects
- Challenges were brought by Denver, Colorado Springs, and Aurora
- The cases were decided in favor of the counties on preemption, water rights, public utility, election, and venue claims.
- For the first time, West Slope counties have a seat at the table on transmountain diversions.

HB 1041 Regulations in Practice: Solar Power

- Designation of activity – Major Facilities of a Public Utility
- Regulations define the scope of projects addressed (ex: 50MW generating capacity)
- Transmission lines at 115 KV
- Key elements include analysis of alternate transmission line routing.

HB1041 Regulations in Practice: Irrigated Land Dryup

- Designation of “development” in a Natural Area of Statewide Importance
- Area within the designation is land in the county historically irrigated
- “Development” defined:
 - Cessation of irrigation
 - Transfer of water separate from land, or
 - Use for non-irrigation purpose
- Permit required, conditions:
 - Revegetation plan
 - Conditions placed on water court transfer decree

HB 1041 Regulations in Practice: Stormwater Control

- Designation is “development” within a floodplain natural hazard area
- Which increases stormwater discharge above pre-existing conditions (additional impervious cover, etc.)
- Permit jurisdiction restricted to the police power jurisdiction of the adopting entity
- Impact felt at the jurisdictional boundary as basis for application of regulations
- Permit requires a drainage basis study and mitigation measures
- Options for a single (municipal) permit, or the County as a cooperating permit agency

HB 1041 Regulations in Practice: Arterial Collector Highways and Interchanges

- Designation is of the activity as defined in HB 1041
- Extends to CDOT owned or sponsored projects
- Alternative locations, sizes, configurations are key considerations for the permitting authority
- Exemptions permitted for county projects

Questions?