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Small Claims County Court District Court
 Probate Court Juvenile Court Water Court

Denver County, Colorado

Court Address:
Denver District Court
1437 Bannock Street, Room 256
Denver, CO 80202

Plaintiff(s): Xiuhtezcatl Martinez, Itzcuahtli Rosky-Martinez, Sonora Binkley, Aerielle Deering, Trinity Carter, Jamirah DuHamel, and Emma Bray, minors appearing by and through their legal guardians Tamara Roske, Bindi Brinkley, Eleni Deering, Jasmine Jones, Robin Ruston, and Diana Bray

v.

Defendant(s): Colorado Oil and Gas Conservation Commission

Attorney for the Plaintiffs:
Katherine Toan
1434 Spruce St., Ste. 223
Boulder, CO 80302

Phone No: 720-965-0854
Email: kate@coloradoenvironmentallaw.com
Atty. Reg. #: 45672

▲ COURT USE ONLY ▲

Case Number:

Div.: Ctrm:

COMPLAINT

PLAINTIFFS, through counsel, submit the following Complaint:

INTRODUCTION

1. Plaintiffs Xiuhtezcatl Martinez (age 14), Itzcuahtli Rosky-Martinez (age 11), by and through their legal guardian Tamara Roske, Sonora Binkley (age 10), by and through her legal guardian Bindi Brinkley, Aerielle Deering (age 16), by and through her legal guardian Eleni Deering, Trinity Carter (age 12), by and through her legal guardian Jasmine Jones, Jamirah DuHamel (age 13), by and through her legal guardian Robin Ruston, and Emma Bray (age 15), by and through her legal guardian Diana Bray (“Youth Plaintiffs”), bring this Complaint by and through Katherine Toan, their attorney, to seek judicial review of an order entered by the

Colorado Oil and Gas Conservation Commission (“Commission” or “Defendant”) denying Youth Plaintiffs’ Petition for the promulgation of a comprehensive rule to suspend the issuance of oil and gas drilling permits until such drilling can be shown to be done without adversely impacting the public health, safety, and welfare including Colorado’s environmental and wildlife resources.

2. Youth Plaintiffs seek review of the Commission’s May 29, 2014 decision in Cause #1, Order No. 1-187. *See* Exhibit A (“Order of the Commission,” hereinafter “Order”). The five-page Order denied Plaintiffs’ petition for rulemaking, filed November 15, 2013, requesting that Defendant promulgate a rule or rules “to protect the health and safety or Colorado’s residents and the integrity of Colorado’s atmospheric resource and climate system, water, soil, wildlife, other biological resources, upon which all Colorado citizens rely for their health, safety, sustenance, and security.” *See* Exhibit B (“Petition of Xiuhtezcatl Martinez, *et al.*,” hereinafter “Petition”).

3. Youth Plaintiffs seek judicial review of the Commission’s Order as a final agency action under the State APA, C.R.S. § 24-4-106, and the Oil and Gas Conservation Act (hereinafter “the Act”), C.R.S. § 34-60-111, because the Order reflects errors of law. The Plaintiffs seek relief in the form of declaratory judgments and ask the Court to remand for further agency action pursuant to C.R.C.P. Rule 57 and C.R.S. § 24-4-106(7). The Plaintiffs do not here seek judicial review of the Commission’s conclusion that the public trust doctrine has not been recognized in Colorado.

PARTIES

4. YOUTH PLAINTIFFS are minor children who have exercised their legal rights as citizens to petition the Commission for the issuance of a rule pursuant to C.R.S. § 24-4-103(7) and 2 CCR 404-1, 529(a-b). By this complaint, Youth Plaintiffs seek to exercise their right and interest under the State APA, C.R.S. § 24-4-106, for judicial review of agency action.

5. Youth Plaintiffs live and recreate in Colorado. Youth Plaintiffs work to reduce the harmful impacts of oil and gas drilling to protect human health, wildlife, and the environment. Oil and gas drilling in the state adversely affects recreational enjoyment of the lands and water and creates concern over public health impacts. Youth Plaintiffs are very concerned about the current and future adverse impacts of oil and gas drilling to human health, environment, and wildlife in Colorado.

6. The violations alleged in this Complaint have injured and continue to injure the interests of Youth Plaintiffs. This injury is traceable to the errors of law upon which Defendant based its denial of Youth Plaintiffs’ decision, a final agency action under the State APA. Granting the requested relief would redress these injuries by providing the judicial review to which Youth Plaintiffs are entitled. Further, granting the requested relief would correct the errors of law in the Order denying Youth Plaintiffs’ Petition, provide clarification of both the Commission’s rulemaking authority and the scope of Youth Plaintiffs’ legal rights under the Oil

and Gas Conservation Act and the Commission's Regulations, and compel the Commission to execute its statutory obligations under the Oil and Gas Conservation Act and the Administrative Procedure Act. The relief requested would not mandate rulemaking by the Commission; it would merely require the Commission to meet its statutory obligations in addressing Youth Plaintiffs' Petition, exercise the discretion bestowed upon the agency by statute, and support any discretionary decisionmaking with findings sufficient to support judicial review of those decisions.

7. DEFENDANT COLORADO OIL AND GAS CONSERVATION COMMISSION is the Colorado regulatory agency with jurisdiction and authority to implement the Colorado Oil and Gas Conservation Act, C.R.S. § 34-60-101, *et seq.* The Act empowers the Commission to make and enforce rules, regulations, and orders and "to do whatever may reasonably be necessary to carry out the provisions of" the Act. C.R.S. § 34-60-105. The Commission also has specific authority to regulate oil and gas operations to prevent and mitigate significant adverse environmental impacts to the extent necessary to protect public health, safety, and welfare, including protection of the environment and wildlife resources. C.R.S. § 34-60-106. The Commission has also been granted permitting authority over oil and gas drilling operations. C.R.S. § 34-60-106.

JURISDICTION AND VENUE

8. This Court has jurisdiction under C.R.S. § 24-4-106 (State Administrative Procedure Act (hereinafter "State APA")), C.R.S. § 34-60-111 (judicial review provision of the Colorado Oil and Gas Conservation Act), and as a Court of general jurisdiction under the Colorado Constitution.

9. The Commission has instructed that its Order be deemed final agency action for purposes of judicial review, and thus is subject to this Court's review. C.R.S. § 24-4-106 ("[A]ny person adversely affected or aggrieved by any agency action may commence an action for judicial review in the district court within thirty-five days after such agency action becomes effective . . ."); § 34-60-111 (judicial review provision of Oil and Gas Conservation Act). *See also* Order, Exhibit A at 4 ("ORDERED, that under the State [APA] the Commission considers this to be final agency action for purposes of judicial review . . .").

10. Venue is proper pursuant to C.R.C.P. Rule 98(c) and State APA § 24-4-106(4) because the residence and main place of operation of the defendant state agency is located in the city and county of Denver, Colorado.

FACTUAL BACKGROUND

11. On November 15, 2013, Youth Plaintiffs filed a rulemaking petition with the Commission requesting the promulgation of a comprehensive rule to suspend the issuance of oil and gas drilling permits until such drilling can be done without adversely impacting the public

health, safety, and welfare including Colorado's environmental and wildlife resources. *See* Petition, Exhibit B at 1, 3–4.

12. In compliance with Commission Rule 529, Youth Plaintiffs' Petition included the proposed rule, a proposed statement of the basis and purpose for the rule, and a general statement of the reasons for the requested rule. Youth Plaintiffs presented evidence, testimony, and argument in support of the proposed rulemaking on April 28, 2014. The Commission denied the Youth Plaintiffs' Petition on May 29, 2014.

13. Specifically, Youth Plaintiffs proposed that the Commission promulgate a rule that would (1) evaluate the impacts of oil and gas drilling on the state's environment, natural resources, and human health, safety, and welfare according to the best available science before issuing any permits for oil or gas drilling or exploration; (2) adopt a climate recovery plan by March 15, 2014, based on the best available science that fulfills the Commission's duty to protect the state's environment, natural resources, and public health; (3) publish annual reports, to be verified by an independent third-party, on statewide greenhouse emissions from the oil and gas industry on the Commission's website for public review; and (4) adopt any policies or regulations necessary to implement the proposed actions. *See* Petition, Exhibit B at 3–4.

14. Youth Plaintiffs' 54-page Petition cited Defendant's legal authority under the Oil and Gas Conservation Act, C.R.S. § 34-60-105(1), which states: "The [C]ommission has jurisdiction over all persons and property, public and private, necessary to enforce the provisions of this article, and has the power to make and enforce rules, regulations, and orders pursuant to this article, and to do whatever may reasonably be necessary to carry out the provisions of this article." The provisions of the Act, under C.R.S. § 34-60-102, include the following: "It is declared to be in the public interest to foster the responsible, balanced development, production, and utilization of the natural resources oil and gas in the state of Colorado in a manner consistent with the protection of public health, safety, and welfare, including protection of the environment and wildlife resources. . . ." *See* Petition, Exhibit B at 49–50.

15. Youth Plaintiffs' Petition also cited to the Commission's permitting obligation under the Act: "[t]hat no operations for the drilling of a well for oil and gas shall be commenced without first giving to the commission notice of intention to drill and without first obtaining a permit from the commission, under such rules and regulations as may be prescribed by the commission." C.R.S. § 34-60-106(f). *See* Petition, Exhibit B at 50.

16. Youth Plaintiffs' Petition provided scientific evidence to demonstrate the extent of the threat to public health, safety, and welfare, including environmental and wildlife resources, posed by modern oil and gas extraction methods. *See* Petition, Exhibit B at 7–40.

17. The Commission denied Youth Plaintiffs' Petition, asserting that "[t]he relief sought in the Petition is beyond the Commission's authority." *See* Order, Exhibit A at 2. The Commission denied that it had the statutory authority to promulgate a rule that would suspend the issuance of new oil and gas drilling permits unless or until the drilling could be shown to be

achievable without cumulatively adversely impacting the health and safety of the public or the environment.

18. The Commission based their decision in part on several additional acts of legal interpretation, finding: that it did not have the authority to promulgate a rule that would allow for the consultation of an independent third party; that it and other state agencies are currently addressing many of the concerns raised in the Petition; that most, if not all, of the relief sought in the Petition related to air quality was within the jurisdiction of the Colorado Department of Public Health and the Environment (hereinafter “CDPHE”), and not the COGCC; and that other agency priorities “must take precedence” over the proposed rulemaking. *See* Order, Exhibit A at 3–4.

19. The Commission incorporated portions of a memorandum (*see* Memo, Exhibit C) by Assistant Attorney General into its Order by reference, and noted that the Memo “was among the ‘most important pieces of information’ the Commission received concerning the Petition and was the primary basis for the Commission’s denial of the Petition.” *See* Order, Exhibit A at 2.

20. The incorporated sections of the Memo asserted in relevant part that “[s]ome of the Proposed Rule is beyond the Commission’s statutory authority.” Memo, Exhibit C at 4 (emphasis added).

21. The Commission’s denial of Youth Plaintiffs’ Petition included findings that the Commission and other agencies are currently addressing “many of the concerns in the Petition.” Order, Exhibit A at 3. In support, the Order cited the statement of Commissioner Wolk, CDPHE’s Chief Medical Officer, as follows: “I believe the intent and content of the petition speaks quite a bit to me and CDPHE with regard to some of the things you’re concerned about, maybe all the things you’re concerned about.” *Id.* The Order also cited the statement of Commissioner King: “I firmly believe that we are dealing with climate change right now.” *Id.* In support of these statements, the Commission described the actions being taken by other agencies on the issue of climate change including the CDPHE, the Colorado Energy Office, and the Colorado Water Conservation Board. *Id.* The Commission also acknowledged the oil and gas industry’s current VOC and methane/ethane emissions in noting recent revisions to the regulations of the Air Quality Control Commission. *Id.* The Commission “pointed out that the Commission itself is taking ‘evolutionary steps’ in addressing many of the Petitioners’ concerns.” *Id.* at 4.

22. The Commission stated that it considers its order to be a final agency action for purposes of judicial review. *See* Order, Exhibit A at 4.

LEGAL BACKGROUND

23. Colorado has empowered the Oil and Gas Conservation Commission with the authority to regulate oil and gas drilling at the state level. C.R.S. § 34-60-101, *et seq.*

24. The Oil and Gas Conservation Act declares it to be in the public interest to “[f]oster the responsible, balanced development, production, and utilization of the natural resources of oil and gas in the state of Colorado in a manner consistent with protection of public health, safety, and welfare, including protection of the environment and wildlife resources; [and to] [p]rotect the public and private interests against waste in the production and utilization of oil and gas.” C.R.S. § 34-60-102(1)(a). To this end, the Act aims “to permit each oil and gas pool in Colorado to produce up to its maximum efficient rate of production, subject to the prevention of waste, consistent with the protection of public health, safety, and welfare, including protection of the environment and wildlife resources.” C.R.S. § 34-60-102(1)(b).

25. The Act grants the Commission “jurisdiction over all persons and property, public and private, necessary to enforce the provisions of this article,” and empowers the Commission with authority “to make and enforce rules, regulations, and orders pursuant to this article, and to do whatever may reasonably be necessary to carry out the provisions of this article. C.R.S. § 34-60-105.

26. The Commission has the authority, pursuant to the Conservation Act, to regulate the drilling, producing, and plugging of wells, as well as all other operations necessary for the production of oil or gas. C.R.S. § 34-60-106(2). “Significantly, the Conservation Act states that the grant of any specific power or authority to the COGCC shall not be construed to be in derogation of any other general powers and authority granted.” *Chase v. Colorado Oil & Gas Conservation Comm’n*, 284 P.3d 161, 166 (Colo. App. 2012), quoting C.R.S. § 34-60-106(4).

27. The Commission also has the authority to require “[t]hat no operations for the drilling of a well for oil and gas shall be commenced without first giving to the commission notice of intention to drill and without first obtaining a permit from the commission, under such rules and regulations as may be prescribed by the commission....” C.R.S. § 34-60-106(1). This permitting authority includes a specific provision allowing the regulation of oil and gas operations “so as to prevent and mitigate significant adverse environmental impacts on any air, water, soil, or biological resource resulting from oil and gas operations to the [extent] necessary to protect public health, safety, and welfare, including protection of the environment and wildlife resources, taking into consideration cost-effectiveness and technical feasibility.” C.R.S. § 34-60-106(2).

28. The Commission has asserted its power to deny permits on the basis of imminent threat to public health, safety, welfare, the environment or material threats to wildlife, under Commission Rule 303.j.

29. Under the State APA, any citizen may petition a state agency such as the Commission for the issuance of a rule. C.R.S. § 24-4-103(7); Commission Rule 529.a. (“The Commission may initiate rulemaking on its motion or in response to an application filed by any person.”).

30. The Commission possesses substantial discretion to initiate the proposed rulemaking. *See* Exhibit C (“Memorandum from Office of the Attorney General,” hereinafter “Memo,” at 1, 3) (“The Commission has substantial discretion to initiate the desired rulemaking, or not.”). The Conservation Act broadly empowers the Commission “to make and enforce rules, regulations, and orders” and “to do whatever *may reasonably be necessary*” to carry out the provisions of the Conservation Act. *Chase v. Colorado Oil & Gas Conservation Comm’n*, 284 P.3d 161, 166 (Colo. App. 2012), quoting C.R.S. § 34-60-105(1) (2011) (emphasis added).

31. In Colorado, the State APA is similar to the Federal APA, and the courts have therefore found federal cases instructive on review of administrative law issues. *See, i.e., Citizens for Free Enterprise v. Dept. of Rev.*, 649 P.2d 1054, 1063 (Colo. 1982); *see also* Memo, Exhibit C at 2–3 (Attorney General citing the same).

32. In *Massachusetts v. Env’tl Protection Agency* (hereinafter “*Mass. v. EPA*”), 549 U.S. 497 (2007), the Supreme Court of the United States addressed several questions similar to those before this Court:

- a. Where an agency has been statutorily empowered to promulgate industry regulations to protect the public health, safety, and welfare, may that agency decline to exercise such rulemaking authority by simply interpreting its legislative mandate in a more limited manner?
- b. May an agency decline rulemaking action based on jurisdictional overlap with another agency?
- c. May an agency defer rulemaking action based on limited agency resources?

In *Mass. v. EPA*, the U.S. Environmental Protection Agency defended its denial of a rulemaking petition on several grounds, including: the agency did not have the statutory authority to regulate greenhouse gasses; the agency could not regulate emissions from vehicles because a different agency had jurisdiction over vehicle mileage standards; that even if the agency had statutory authority, other actions by government bodies already sought to address climate change; and that even if the agency had authority to promulgate the requested rules, it would “be unwise to do so at this time.” *Id.* at 530, 532–33.

33. The *Mass. v. EPA* Court held first that the Agency, as part of its mandate to protect the public health and welfare by regulating “any air pollutant,” had rulemaking authority to regulate greenhouse gas emissions unless it determined that these emissions did not contribute to climate change, or by offering a “reasonable explanation why it cannot or will not exercise its discretion to determine whether they do.” *Id.* at 533. The Court noted that the EPA had never before disavowed its regulatory authority, and in fact had previously “affirmed that it *had* such authority.” *Id.* at 533 (emphasis in original).

Secondly, the Court held that the EPA could not “shirk its duty to protect the public ‘health’ and ‘welfare’” simply because another agency was given authority to establish standards for fuel

efficiency. *Id.* at 532. “The two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency.” *Id.*

Thirdly, the Court held that the EPA—despite broad agency discretion to marshal limited agency resources—could avoid taking regulatory action *only* if it determined that greenhouse gases (the EPA’s regulatory target) did *not* contribute to climate change (danger to the public health or welfare) *or* if it provided some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do. *Id.* at 527, 534. Famously, the Court reminded the EPA that “the word judgment is not a roving license to ignore statutory text.” *Id.* at 533.

34. The Court in *Mass. v. EPA* achieved these conclusions while applying an “extremely limited” and “highly deferential” standard of review. *Id.* at 527–28 (citing *National Customs Brokers & Forwarders Assn. of America, Inc. v. United States*, 883 F.2d 93, 96 (C.A.D.C. 1989)).

PLAINTIFFS’ FIRST CLAIM FOR RELIEF
DECLARATORY JUDGMENT: THE COMMISSION HAS AUTHORITY TO
PROMULGATE THE PROPOSED RULE

35. Youth Plaintiffs incorporate the allegations in all preceding paragraphs of this Complaint as if set forth in full herein.

36. The Commission erred as a matter of law in concluding that it lacks the authority to promulgate a rule that would suspend the issuance of oil and gas drilling permits until it could be established that such drilling could take place without cumulative adverse impacts to the public health, safety, and welfare, including the environment and wildlife resources.

37. The Commission relied primarily on a Memo from Assistant Attorney General Jake Matter to deny the rulemaking. Order, Exhibit A at 2 (“The April 11, 2014 Memo was among the ‘most important pieces of information’ the Commission received [. . .] and was the primary basis for the Commission’s denial of the Petition”).

38. The incorporated sections of the Memo asserted in relevant part that “[s]ome the Proposed Rule is beyond the Commission’s statutory authority.” Memo, Exhibit C at 4 (emphasis added). However, this analysis is not binding on the Court, which is delightful as the Assistant Attorney General’s position on the “balance” required by the COGCC is a clear misreading of the statutory text.

- a. The Memo reads the Act as requiring a balance between petroleum development and protecting the public health, safety, and welfare. This interpretation completely reads out the words “in a manner consistent with the protection of [. . .].” It is contrary to the Colorado canons of statutory construction to omit words in this way. C.R.S. § 2-4-101 *et seq.* Instead, it is clear that “the responsible, balanced development, production, and utilization” of petroleum

resources must be accomplished through rules and policies “in a manner consistent with protection of public health, safety, and welfare, including protection of the environment and wildlife resources.” The manner of development must be consistent with protection of public health.

- b. The Memo recites a “minimize adverse impacts” standard, which applies to wildlife resources, as if it applied to the protection of human health, safety and welfare. However, C.R.S. § 34-60-106 (11)(a)(II) clearly states that the Commission must establish “rules, in consultation with the department of public health and environment, **to protect the health, safety, and welfare** of the general public in the conduct of oil and gas operations” (emphasis added). There is no qualifying language to suggest that this mandate is anything less than one that unequivocally protects the public health, safety, and welfare. While C.R.S. § 34-60-106 (2)(d) mandates that the COGCC “prevent and mitigate significant adverse environmental impacts [. . .] *taking into consideration cost-effectiveness and technical feasibility*[.]” (emphasis added) these are clearly two different standards, and even the latter reflects a more stringent standard than the one disingenuously proffered by the Assistant Attorney General.
- c. Regardless of the Commission’s use of “balance” in the 2008 rulemaking process, a statement of basis and purpose—even the Commission Rules themselves—are not statutory text. The Proposed Rule cannot possibly upset the “balance crafted by the General Assembly under the Act,” because no such “balance” was ever attempted by the General Assembly. This “balance” in the rulemaking process is entirely a Commission construct, and furthermore one which seems to rely on a misreading or entire omission of several sections of statutory text.

39. The Assistant Attorney General’s opinion relies entirely on an erroneous reading of the statute and confusion between Commission Rules and statutory text, and therefore misconstrues the grant of statutory authority as being excessively limited in its power to protect the public health, safety, and welfare.

40. Additionally, the Assistant Attorney General’s opinion concludes that a rule which requires independent, third-party verification is *ipso facto* an improper delegation of the Commission’s authority.

Mr. Matter rests his argument entirely on the case of *Big Sandy Sch. Dist. v. Carroll*, 433 P.2d 325 (Colo. 1967), while ignoring the fact that it was overruled on the same grounds by *Norton v. Sch. Dist. No. 1*, 807 P.2d 1160 (Colo.App. 1990). In *Norton*, the Colorado Court of Appeals stated that “since *Big Sandy* was decided, the former strictness with which the supreme court treated the non-delegation principle, [. . .] has been relaxed.” (citing, *inter alia*, *Fellows v. Latronica*, 151 Colo. 300, 377 P.2d 547 (1962)). The Court furthermore distinguished between the delegation of the authority to hire teachers (whose employment is protected by statute and

procedural requirements) and unprotected non-teaching personnel, concluding that “the *Big Sandy* principle of non-delegation should not be extended to [the latter].” 807 P.2d at 1162.

Such third-party verification does not delegate legislative powers, or even regulatory duties, and has nothing to do with teachers, employment, or due process concerns. The Memo cites no good law to support its conclusion.

41. Upon reviewing an agency’s construction of the statute which it administers, a court is confronted with two questions: first, whether legislature has directly spoken to precise question at issue, in which case the court must give effect to legislature’s unambiguously expressed intent; or, if the legislature has not directly addressed the precise question at issue, whether the agency’s action is based on a permissible construction of the statute. *Wine and Spirits Wholesalers of Colorado, Inc. v. Colorado Dept. of Revenue, Liquor Enforcement Div.*, 919 P.2d 894 (Colo. App. 1996); *see also Shaw v. 17 West Mill St., LLC*, 2013 CO 37, ¶ 13 (a court must look to the “plain meaning” of the statutory language to see if the intent of the legislature is “clear”). The Commission’s construction of the Act is an error of law because the legislature has directly spoken to the agency’s authority to regulate the development of oil and gas in Colorado. Even if the court concludes that the statute is ambiguous, however, the agency’s conclusions are not based on a permissible construction of the statute.

42. Here, the Oil and Gas Conservation Act unambiguously bestows authority on the Commission to regulate oil and gas operations through the promulgation of rules and the granting or denial of permits. *See* C.R.S. § 34-60-101 to 129. The Act requires the Commission to “promulgate rules, in consultation with the department of public health and environment, to protect the health, safety, and welfare of the general public in the conduct of oil and gas operations.” C.R.S. § 34-60-106 (11)(a)(II). Although another subsection of 106 discusses cost-effectiveness and feasibility, §§ (11)(a)(II) places no qualifiers on the Commission’s responsibility to ensure that its rules, in fact, protect the public and the environment.

43. Even where the statute’s language is ambiguous, the administering agency’s interpretation of the statute is only entitled to deference where the interpretation is a reasonable one. *Grynberg v. Colorado Oil & Gas Conservation Comm’n*, 7 P.3d 1060, 1063 (Colo. App. 1999).

44. The Commission’s interpretation of the Act is not reasonable. *Chase*, 284 P.3d at 167. The Commission’s conclusion that it had no authority to promulgate the proposed rule constitutes an error of law within the meaning of the State APA. *See* C.R.S. § 24-4-106(7).

45. The Commission’s interpretation is contrary to the legislative intent and purpose of the Act, and does not correctly apply relevant case law. In 1994, the legislature enlarged the Commission’s authority under the Act to provide for the protection of the public health, safety, and welfare including environmental impacts. *Chase*, 284 P.3d at 166; C.R.S. § 34-60-102. It is a long-standing principle of statutory construction that a statute be interpreted in a manner that gives effect to legislative intent or purpose. *Bd. of County Com’rs v. Bowen/Edwards*

Associates, Inc., 830 P.2d 1045, 1059 (1992); *Colorado State Bd. of Land Com'rs v. Colorado Mined Land Reclamation Bd.*, 809 P.2d 974, 983 (Colo. 1991); *Woodsmall v. Regional Transp. Dist.*, 800 P.2d 63, 67 (Colo. 1990); *Griffin v. S.W. Devanney & Co., Inc.*, 775 P.2d 555, 559 (Colo. 1989). Where the General Assembly amends a statute, an intent to change the law is generally presumed. *Grynberg*, 7 P.3d at 1063. Here, the General Assembly amended the statute to broaden the power of the COGCC to regulate oil and gas to ensure that any development of these resources must be consistent with the protection of public health and the environment. The Colorado Supreme Court has given effect to this regulatory intent and expressly recognized “that the purposes of the Act are to encourage the production of oil and gas in a manner that protects public health and safety and prevents waste.” *Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913, 925 (Colo. 1997) (emphasis added). The Commission’s conclusion—that it lacks statutory authority to promulgate a regulation that would deny permits for hydraulic fracturing until the health and safety of the public can be assured—is not a reasonable one in the light of this deliberate statutory amendment.

46. Further, the Commission’s interpretation of its jurisdiction is inconsistent with its prior regulatory activity. Consistent with the Commission’s authority to protect the environment and the public’s health, safety, and welfare, the Commission has previously adopted and applies various rules and permit conditions, including safety setbacks from dwellings for wells and production equipment; blowout prevention equipment requirements; well and equipment safety specification and design standards; requirements for security fencing in high density areas; and special operations safety procedures. *Chase v. Colorado Oil & Gas Conservation Comm’n*, 284 P.3d 161, 166 (Colo. App. 2012). As noted in its Order denying Youth Plaintiffs’ Petition, the Commission has also exercised the regulatory authority it now claims not to possess in the implementation of other oil and gas regulations such as cement standards, mechanical integrity testing, and bradenhead testing. See Order, Exhibit A at 4. The Commissioner also has asserted the authority, under COGCC Rule 303.j, to “withhold approval of any [oil and gas permits] for any proposed well or Oil and Gas Location when . . . the Director has reasonable cause to believe the proposed [development] . . . presents an imminent threat to public health, safety and welfare, including the environment, or a material threat to wildlife resources.”

47. The United States Supreme Court had “little trouble concluding” that the EPA had the authority to regulate greenhouse gas emissions from new motor vehicles in *Mass. v. EPA*, 549 U.S. at 528. The Court in *Mass. v. EPA* looked to the plain language of the Clean Air Act to reach its conclusion. In relevant part, the act provides that the EPA “shall by regulation prescribe . . . standards applicable to the emission of any air pollutant . . . which in [the Administrator’s] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.” *Id.* In passing amendments to the Oil and Gas Conservation Act, the legislature invoked similar language: “By July 16, 2008, the commission shall: . . . (II) Promulgate rules, in consultation with the department of public health and environment, to protect the health, safety, and welfare of the general public in the conduct of oil and gas operations.” C.R.S. § 34-60-106.

48. For the foregoing reasons, the Commission's interpretation of the Act and its conclusion that it lacked the statutory authority to promulgate the proposed rule constitutes an error of law.

49. Pursuant to the State APA, Plaintiffs ask this Court to declare that the Commission possesses the authority to promulgate the requested rule and remand the case for further proceedings, and afford other such relief as may be appropriate. *See* C.R.S. § 24-4-106(7); C.R.C.P. Rule 57.

PLAINTIFFS' SECOND CLAIM FOR RELIEF
DECLARATORY JUDGMENT: THE COMMISSION HAS AN OBLIGATION TO
PROTECT PUBLIC HEALTH, OR EXPLAIN WHY IT CHOOSES NOT TO
DETERMINE WHETHER DRILLING THREATENS PUBLIC HEALTH

50. Youth Plaintiffs incorporate the allegations in all preceding paragraphs of this Complaint as if set forth in full herein.

51. The Commission erred as a matter of law when it based its decision to deny the rulemaking petition on the grounds that other Colorado state agencies are addressing the health, safety, welfare, environmental, and wildlife concerns arising from oil and gas development. Order, Exhibit A at 3. The Commission erred as a matter of law when it asserted that regulatory overlap with the CDPHE's mandate to protect air quality deprived it of the jurisdiction to regulate oil and gas development. The Commission erred as a matter of law when it chose to defer agency action based on limited agency resources, without establishing factual determinations of the extent of harm to the public health, safety, or welfare or providing a reasonable explanation of why it chose to forego such factual determination.

52. As the Commission itself notes in the Order, the Commission has a non-delegable duty to regulate oil and gas development in a manner that protects human health, safety, welfare, the environment, and our wildlife resources. Order, Exhibit A at 3. The role of the Colorado Department of Health and Environment is as a "consultant" in assisting the COGCC with its own rulemaking. The COGCC cannot defer its mandate to regulate oil and gas development in a manner consistent with protecting human health to the CDPHE. The CDPHE has its own mandate to protect the state's air quality; this does not negate the responsibility of the COGCC to regulate oil and gas development in a manner that protects public health, safety, and welfare, as well as the environment and wildlife.

53. The Commission rules either protect human health and safety, or they do not. The "evolutionary" "steps in the right direction" are legally insufficient to fulfill the Commission's non-delegable legislative mandate. Petitioners submitted a lengthy factual record in their Petition, detailing extensive and growing evidence of the risks posed by oil and gas development. Petition, Exhibit B at 7-40. There is no mechanism in the legislative mandate of the COGCC to forestall protecting human health and the environment, even while making

incremental changes in state rules, while it continues to issue many thousands of permits to drill every year.

54. If the Commission has determined that oil and gas drilling threaten the health, safety, or welfare of the public including the environment, then it cannot continue to permit the extraction of oil and gas consistent within the plain language of the Act. Like the EPA failing to evaluate the dangers of greenhouse gasses, if the COGCC has not taken steps to determine whether oil and gas development poses health, safety, or welfare risks, or risks to the environment and wildlife resources, what those risks are, or what the magnitude of those risks are, the Commission's Order must sufficiently explain *why* it cannot or will not exercise its discretion to determine whether oil and gas drilling threaten the public health. Petitioners submitted extensive evidence, including numerous scientific studies, establishing the risks of oil and gas development.

55. The Commission's Order fails to provide a reasonable explanation as to why it cannot or will not exercise its discretion to determine whether oil and gas drilling threatens the public health, safety, and welfare. The Order does not describe an exercise of discretion at all, but instead reflects conclusions of law. *See* Order, Exhibit A at 2 (“[T]he Commission received legal advice from counsel for the Commission The Memo concluded that some of the Proposed Rule was beyond the Commission's jurisdiction [The Memo] was the primary basis for the Commission's denial of the Petition.”).

56. The Order in fact embodies an agency judgment that oil and gas drilling *does* pose threats to the public health and the environment as outlined in Youth Plaintiffs' Petition. The Order explicitly acknowledges the concerns of the Plaintiffs, but provides explanations as to why—despite the concerns to public health—the Commission declines to exercise its rulemaking authority (which it also claims not to have). Defendant asserted first that it does not have statutory authority to promulgate the requested rule, and second that other agency priorities “*must* take precedence” over the rulemaking. *See* Order, Exhibit A at 4 (emphasis added). Just as in *Mass. v. EPA*, these conclusions are not a permissible interpretation of the agency's statutory obligations.

57. Defendant's claim that the CDPHE has jurisdiction over some of the relief sought by the Petition does not alter the obligation placed on the Commission by statute. The court in *Mass. v. EPA* rejected a similar argument made by the agency. The EPA argued that it could not regulate new vehicle emissions because it would be required to tighten mileage standards—a job purportedly assigned to the Department of Transportation. The Court dismissed the argument: “The two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency.” *Mass. v. EPA*, 549 US at 532. Here, even though the Commission's obligations may overlap with those of other agencies, it still must administer its statutory obligations.

58. The Commission has also suggested that the efforts of other state agencies to address the concerns raised by Youth Plaintiffs provide a sufficient reason for the agency to

decline to exercise its regulatory authority. Again, in *Mass. v. EPA*, the agency made a similar argument, citing the various efforts to promote interagency collaboration to better understand climate change as a basis to refrain from regulating emissions. The Court reconciled these efforts with the statutory obligations placed on the EPA, observing, “[c]ollaboration and research do not conflict with any thoughtful regulatory effort; they complement it.” *Id.* at 530. Here, the conclusion must be the same; efforts to address climate change at the state level does not alter the pre-existing mandate to develop oil and gas resources consistent with the protection of the public health, safety, and welfare.

59. Finally, just as the Commission has concluded that other agency priority “must take precedence” over the concerns raised by Youth Plaintiffs in the proposed rulemaking, the EPA in *Mass. v. EPA* argued that even if it had statutory authority to regulate greenhouse gas emissions, “it would be unwise to do so at this time.” *Id.* at 532–33. The Court determined that once the agency made a finding of endangerment, it could only exercise its discretion within defined limits. Here, the agency’s discretion has similar limits.

60. Because the Commission has acknowledged that it is aware of threats to the public health, safety, and welfare, including the environment and wildlife resources, from oil and gas drilling, the agency has an obligation to exercise its regulatory authority to ensure that further oil and gas development occur consistent with the protection of the public health, safety, and welfare from those threats.

61. In the alternative, if the Commission has not determined whether oil and gas drilling threatens the public health, safety, and welfare, the Commission must provide an adequate explanation as to why, *in its discretion*, it has decided not to make such a determination.

62. Plaintiffs ask this Court to declare that the Commission has an obligation either to act to protect the public health, safety, and welfare where it has determined that oil and gas development threaten same, or, in the alternative, to provide adequate explanation in its denial of Youth Plaintiffs’ Petition of why it has chosen to exercise its discretion not to determine whether oil and gas development threatens the public health, safety, and welfare, including the environment and wildlife resources. *See* C.R.S. § 24-4-106(7); C.R.C.P. Rule 57.

63. Consistent with the above, Plaintiffs ask this Court to remand the case for further proceedings, and afford other such relief as may be appropriate.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

WHEREFORE, Youth Plaintiffs respectfully pray that this Court: (1) grant declaratory relief clarifying the scope of the Commission’s rulemaking authority, and affirm the statutory obligation of the Commission to promulgate rules that ensure the public health, safety, and

welfare is protected without qualification (2) reverse or modify the Commission's decision, (3) remand this case to the Commission for further proceedings consistent with the Court's opinion, if appropriate, and (4) grant all other relief in law or equity to which Youth Plaintiffs may be entitled and as the Court deems appropriate or necessary.

Respectfully submitted,



Katherine Toan
Atty. Reg #: 45672
Colorado Environmental Law, Ltd.
1434 Spruce St.
Suite 223
Boulder, CO 80302

Plaintiff's counsel

Dated: July 3, 2014

CERTIFICATE OF SERVICE

I HEREBY certify that on this 3st day of July, 2014, a true and correct copy of the foregoing COMPLAINT was served on the following:

Via personal service:

Matt Lepore, Director
Colorado Oil and Gas Conservation Commission
1120 Lincoln Street, Suite 801
Denver, Colorado 80203
matt.lepore@state.co.us
DNR_COGCC.rulemaking@state.co.us

Jake Matter, Assistant Attorney General
Colorado Attorney General's Office
1300 Broadway, 10th Floor
Denver, Colorado 80203
jake.matter@state.co.us
attorney.general@state.co.us

I HEREBY certify that on this 3st day of July, 2014, that notice of this filing was provided to the parties of record in the original administrative rulemaking process, via email to the following:

Garry Kaufman, Deputy Director
Air Pollution Control Division
Colorado Department of Public Health and Environment

Mike Van Dyke, Ph.D., CIH
Section Chief, Environmental Epidemiology, Occupational Health, and Toxicology
Colorado Department of Public Health and Environment

Richard Kaufman, Counsel
American Petroleum Institute
rkaufman@rcalaw.com

Tisha Schuller, Director
Colorado Oil and Gas Association
tisha.schuller@coga.org

James Eklund, Director,
Colorado Water Conservation Board
james.eklund@state.co.us

Colorado Petroleum Association

Shane Davis
fractivist@gmail.com

Lawrence Scrima
lscrima@gmail.com

Sonia-Skakich Scrima
joejederman@msn.com

Frack-Free Colorado
frackfreecoloradoteam@gmail.com

Earth Network
libby.comeaux@gmail.com

Our Children's Trust
nate@ourchildrenstrust.org

National Association of Royalty Owners, Rocky Mountain
NARO@NARO-us.org

Denise Kennedy, Counsel
Noble Energy
dkennedy@hollandhart.com



Katherine Toan, #45672