DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202 XIUHTEZCATL MARTINEZ, et. al., Plaintiffs v. COLORADO OIL AND GAS CONSERVATION COMMISSION, Defendant and PETROLEUM INSTITUTE AND THE COLORADO PETROLEUM ASSOCIATION, Intervenors.	DATE FILED: February 19, 2016 10:51 AM CASE NUMBER: 2014CV32637 **▲COURT USE ONLY▲** Case Number: 14CV32637 Courtroom: 215

ORDER ON PLAINTIFFS' APPEAL

THIS APPEAL comes before the Court upon consideration of Plaintiffs Xiuhtezcatl Martinez, Itzcuahtli Roske-Martinez, Sonoroa Brinkley, Aerielle Deering, Trinity Carter, and Emma Bray's (collectively, "Plaintiffs") Appeal pursuant to the Administrative Procedure Act, C.R.S. § 24-4-101 *et. seq.* ("APA"), and the Colorado Oil and Gas Conservation Act, C.R.S. § 34-60-101 *et seq.* ("OGCA") filed on April 7, 2015. Defendant Colorado Oil and Gas Conservation Commission ("Defendant") filed an Answer Brief on May 12, 2015. Intervenors Petroleum Institute and The Colorado Petroleum Association (collectively, "Intervenors") filed an Answer Brief on May 12, 2015. Amicus Curiae Kids Against Fracking and numerous other groups and individuals filed a brief on April 10, 2015.[1] Plaintiffs filed a Reply Brief on June 3, 2015. The Court, having reviewed the briefs, court file, appellate record and applicable authority, FINDS and ORDERS as follows:

[1] The Court has considered the amicus curiae brief only to the extent that it relies on and cites to the administrative record and case law. *Hancock v. State Dept. of Rev.*, 758 P.2d 1372, 1376 (Colo. 1988).

STATEMENT OF FACTS

On November 15, 2013, Plaintiffs filed a Petition for Rulemaking ("the Petition") pursuant to Colorado Oil and Gas Conservation Commission ("COGCC") Rule 529(b). In addition, Plaintiffs submitted a Proposed Rule requesting that the COGCC:

> not issue any permits for the drilling of a well for oil and gas unless the best available science demonstrates, and an independent, third party organization confirms, that drilling can occur in a manner that does not cumulatively, with other actions, impair Colorado's atmosphere, water, and land resources, does not adversely impact human health and does not contribute to climate change.

R. at 896.

As grounds for Plaintiff's Proposed Rule suspending hydraulic fracturing permits, the Petition states that science unequivocally shows that: 1) "hydraulic fracturing is adversely impacting human health and impairining [sic] Colorado's atmosphere, water, soil, and wildlife resources"; and 2) "[c]limate change is already occurring in the state of Colorado and is projected to significantly impact the state in the future." R. at 856, 883. In addition, Plaintiffs assert that "[t]he Public Trust Doctrine demands that Colorado act to preserve the atmosphere and provide a livable future for present and future generations of Colorado residents." R. at 889.

Pursuant to COGCC Rule 510, Defendant solicited and received written stakeholder comments concerning Plaintiffs' Petition. On April 28, 2014, Defendant held a hearing where numerous parties provided oral testimony both for and against the relief sought in the Petition. In addition, Jake Matter, Assistant Attorney General ("AAG"), provided a memorandum to Defendant describing the legal framework applicable to their consideration of the Petition. R. at 8-13. Defendant's members deliberated and denied the Petition by unanimous vote on May 29, 2014. In the Order Denying the Petition ("the Order"), Defendant concluded the following: 1) the COGCC and other state agencies currently are addressing many of the concerns raised in the Petition; 2) most if not all of the relief related to air quality sought in the Petition is within the Colorado Department of Public Health and Environment's ("CDPHE") jurisdiction and not COGCC's jurisdiction; and 3) there are other COGCC priorities that must take precedence over the proposed rulemaking at this time. R. at 5.

In its Opening Brief, Plaintiffs challenge Defendant's Order as arbitrary and capricious, an abuse of discretion, and otherwise contrary to law. Pl. Opening Br. at 3. Plaintiffs request the Court vacate the Order and remand the Petition for reconsideration by the Defendant. Plaintiffs further request oral argument on this matter.

STANDARD OF REVIEW

§24-4-106(7) of the Colorado APA contains the standard of review generally applicable to any agency action or inaction.

> If the court finds no error, it shall affirm the agency action. If it finds that the agency action is arbitrary or capricious, a denial of statutory right, contrary to constitutional right, power, privilege, or immunity, in excess of statutory jurisdiction, authority, purposes, or limitations, not in accord with the procedures or procedural limitations of this article or as otherwise required by law, an abuse or clearly unwarranted exercise of discretion, based upon findings of fact that are clearly erroneous on the whole record, unsupported by substantial evidence when the record is considered as a whole, or otherwise contrary to law, then the court shall hold unlawful and set aside the agency action and shall restrain the enforcement of the order or rule under review, compel any agency action to be taken which has been unlawfully withheld or unduly delayed, remand the case for further proceedings, and afford such other relief as may be appropriate. In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party. In all cases under review, the court shall determine all questions of law and interpret the statutory and constitutional provisions involved and shall apply such interpretation to the facts duly found or established.

C.R.S. §24-4-106(7).

Judicial review of agency action under the APA is narrow and deferential, and the court must uphold the agency's action if there is a rational basis for the decision. *Rags Over the Arkansas River, Inc. v. Bureau of Land Mgmt.*, 77 F. Supp. 3d 1038, 1045 (D. Colo. 2015) (citations omitted). Agencies are afforded "broad discretion to choose how best to marshal [their] limited resources and personnel to carry out its delegated responsibilities." *Massachusetts v. E.P.A.*, 549 U.S. 497, 527-28 (2007). An agency has discretion whether to initiate a rulemaking in response to a petition. C.R.S. §24-4-103(7). In denials of petitions for

rulemaking, the affected party has an "undoubted procedural right to challenge the agency's decision" through judicial review. *Massachusetts,* 549 U.S. at 527. But "such review is 'extremely limited' and 'highly deferential.'" *Id.*

An administrative agency's decision is reviewed under an abuse of discretion standard. *Davison v. Indus. Claim Appeals Office of State*, 84 P.3d 1023, 1029 (Colo. 2004), as modified on denial of reh'g (Feb. 9, 2004) (citations omitted). Though a court must defer to the agency's determinations of fact, it reviews its conclusions of law *de novo*. *Id.* (quoting *Colo. Dept. of Labor and Employment v. Esser*, 30 P.3d 189, 193 (Colo.2001).) Considerable weight is given to an agency's interpretation of its own enabling statute, but courts set aside actions or interpretations that are clearly erroneous, arbitrary, or otherwise not in accordance with the law. *Id.*

ANALYSIS

I. Was Denial of the Petition Contrary to Legislative Intent?

A. Introduction

In asserting that no judicial deference is owed to Defendant's denial of Plaintiffs' Petition, Plaintiffs direct the Court to the two-part test articulated by the United States Supreme Court in *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Under the first part of the test, a court must employ the tools of statutory construction to determine whether the legislature has spoken to the issue in question; if the legislature's intent is clear, that concludes the court's review. *Id.* at 842. An agency, and the court on review, may only interpret an ambiguous portion of a statute when the legislative intent is absent from both the express language of the statute and the legislative history. *Id.*

Plaintiffs argue that the legislative intent of C.R.S. § 34-60-101(1)(a)(i) is clear, and that Defendant misinterpreted the plain and unambiguous language of the statute. The specific provision in question 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." C.R.S. § 34-60-101(1)(a)(i) (emphasis added). According to Plaintiffs, Defendant erroneously interprets the above provision as

requiring the COGCC to strike a balance between the development of oil and gas resources and protecting the public health. Pl. Opening Br. at 14. By interpreting the statute in this way, Plaintiffs maintain that the words "in a manner consistent with" become superfluous verbiage. Pl. Opening Br. at 15. Plaintiffs assert that Colorado courts disfavor interpretations of statutes that render language superfluous, and that courts have interpreted the phrase "in a manner consistent with" as a limitation on any allowable balancing test. *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253-254 (1992); *See e.g., Droste v. Board of County Com'rs of county of Pitkin*, 159 P.3d 601 (Colo. 2007); *Catholic Health Initiatives Colorado v. City of Pueblo*, 207 P.3d 812 (Colo. 2009).

Plaintiffs further contend that the legislature's intent is evident from both a contextual analysis of the statute's language and from its legislative history. Plaintiffs contrast the language from § 34-60-101(1)(a)(i) (quoted above) with § 34-60-102(1)(a)(iv), which declares that oil and gas operations must be planned and managed "in a manner that balances development with wildlife conservation." Pl. Opening Br. at 17. According to Plaintiffs, if the legislature had intended the public health, safety, and welfare to be balanced against development in the same manner as with wildlife, it would have chosen the same language. Pl. Opening Br. at 17. Because there is no mention of a balancing test in the disputed provision, Plaintiffs assert that the legislature's purpose was to mandate that public health, safety, and welfare be protected above all other concerns. Pl. Opening Br. at 17. In addition, Plaintiffs argue that the legislative history of the OGCA shows the legislature intended to increase Defendant's responsibilities to protect the public health while simultaneously decreasing the importance of promoting oil and gas development. Pl. Opening Br. at 20.

In its Answer Brief, Defendant characterizes Plaintiffs' construction of § 34-60-101(1)(a)(i) as "strained," and "resting on the public trust doctrine," which is contrary to Colorado law. Def. Answer Br. at 18. Defendant argues that Plaintiffs seek a declaratory order finding the COGCC has an unqualified obligation to ensure public health, safety, welfare and the environment. Def. Answer Br. at 19. Contrary to Plaintiffs' claims about the meaning of terms like "balanced development" and "in a manner consistent with," Defendant asserts that the legislature intended these terms to have their "familiar and generally accepted meaning" in order

to confer broad discretion on the COGCC to implement the Act. Def. Answer Br. at 17; *See, e.g.*, *Colorado Dep't of Revenue v. Hibbs*, 122 P.3d 999, 1004 (Colo. 2005) (it is the duty of the courts to effectuate the General Assembly's intent and, in order to do so, give statutory words and phrases their familiar and generally accepted meaning). According to Defendant, the legislature's intent was for the COGCC to balance many factors in carrying out their mandates under the OGCA. Def. Answer Br. at 19. For that reason, an absolute, unqualified ban on fracking, like the Plaintiffs propose, exceeds the COGCC's limited statutory authority. Def. Answer Br. at 19. Defendant concludes that Plaintiffs' Petition was properly denied because the COGCC "rightfully determined" that the revolutionary change sought by Plaintiffs could only come from the legislature. R. at 5.

The Court now turns to the test articulated in *Chevron* to evaluate these competing arguments.

B. The First Prong of *Chevron*

In analyzing C.R.S. § 34-60-101(1)(a)(i) under the first prong of *Chevron,* the Court agrees that the statute requires a balance between the development of oil and gas resources and protecting public health, the environment, and wildlife. The statutory mandate that Defendant establish rules and policies that foster the "balanced development" of oil and gas resources is clear and must be interpreted according to its plain and ordinary meaning. *Davison,* 84 P.3d at 1029 (citations omitted).

Contrary to Plaintiffs' assertions, there is nothing to suggest the legislature intended the phrase "in a manner consistent with" to be "a mandatory condition that must be satisfied before the actions described before it can occur." Pl. Reply Br. at 9. No Colorado courts have interpreted the statute in this way, such a reading is contrary to the ordinary terms used in the statute, and the legislature easily could have inserted mandatory language if that is what its intent was. None of the cases cited by Plaintiffs indicate anything to the contrary. Pl. Reply Br. at 9.

In codifying C.R.S. § 34-60-101(1)(a)(i), the legislature did not intend for the COGCC to prioritize protecting the public health and environment over any other considerations. If the Court were to follow Plaintiffs' logic, the word "balanced" is rendered superfluous in the statute because "development, production, and utilization of the natural resources of oil and gas" are

wholly subordinate to, and not balanced with the criteria following the phrase "in a manner consistent with." All operative portions of the enacted language must be given effect, which renders Plaintiffs' interpretation of C.R.S. § 34-60-101(1)(a)(i) impermissible.

While Plaintiffs focus on the contrasting language between the provision in question and C.R.S. § 34-60-102(1)(a)(iv), they ignore other sections of the OGCA that direct Defendant to: 1) "ensure oil and gas pools produce up to the maximum efficient rate of production," § 34-60-102(1)(b); 2) "encourage the full development of the state's natural resources," § 24-33-103; or 3) "safeguard the coequal and correlative rights of owners and producers of oil and gas" § 34-60-102. These provisions evidence the legislature's intent to expand the development of oil and gas resources, albeit in a responsible manner, and not to subordinate all other considerations to protection of the public health. Similarly, while recent amendments to the OGCA suggest an increased focus on protecting environmental and wildlife resources, analyzing the OGCA's legislative history does not reveal a legislative intent to make public health the primary or sole factor in Defendant's decisions to issue oil and gas permits. R. at 100-102. In fact, the statement of basis and purpose included in the 2008 rulemaking explains "these rules will ensure the protection of the public health…*while also* fostering the responsible, balanced development, production, and utilization of oil and gas resources." R. at 12 (emphasis added).

Thus, under *Chevron's* first prong, an analysis of C.R.S. § 34-60-101(1)(a)(i) compels the conclusion that the statutory language is clear, and it requires Defendant to strike a balance between the regulation of oil and gas operations and protecting public health, the environment, and wildlife resources. The Court's interpretation of the statute mirrors that of the Defendant, and the Court must "give considerable weight to an agency's interpretation of its own enabling statute." *Colo. Dept. of Labor,* 30 P.3d at 193. For the above reasons, the Court determines there is no basis to reverse Defendant's decision to deny the Petition as contrary to legislative intent.

C. Second Prong of *Chevron*

Although Plaintiffs assert that an analysis of § 34-60-101(1)(a)(i) under the second prong of *Chevron* is unnecessary because the provision is clear and unambiguous, Plaintiffs nevertheless argue that such an analysis reveals that Defendant's interpretation of the law is an

impermissible construction. Specifically, in denying the Petition, Plaintiffs contend that Defendant construed § 34-60-101(1)(a)(i) in such a way that it conflicts with the Colorado Constitution and other laws. Pl. Opening Br. at 21. According to Plaintiffs, by refusing to issue a rule imposing a moratorium on fracking, Defendant infringed on the constitutional guarantee of the right to a "healthful and pleasant natural environment." Pl. Opening Br. at 22. In addition, Plaintiffs argue that the manner in which Defendant interprets the OGCA renders meaningless any statutory responsibility Defendant has to protect the public health and to "respect and carry out" the law. Pl. Opening Br. at 25.

An analysis under *Chevron's* second prong is appropriate only if the statutory language or the legislative history fails to provide clear legislative intent. *Chevron*, 467 U.S. at 843. In this case, the wording of § 34-60-101(1)(a)(i) is unambiguous, and it mandates that Defendant balance multiple factors when regulating oil and gas operations in Colorado; such balancing is not inconsistent with the Colorado Constitution. For that reason, the Court declines to address Plaintiffs' contention that Defendant's interpretation of the statute is an impermissible construction.

II. The Basis for Defendant's Decision to Deny Plaintiffs' Petition

Plaintiffs' final attack on Defendant's Order denying the Petition is that the decision was arbitrary and capricious because it was based primarily on legal advice containing "several errors of legal interpretation and reasoning." Pl. Opening Br. at 2. Among these alleged errors was the AAG's use of Plaintiffs' Proposed Rule to justify denial of the Petition. Pl. Opening Br. at 31. According to Plaintiffs, they were statutorily required to submit the Proposed Rule with the Petition, and it was not intended to have independent legal significance. Pl. Opening Br. at 31. For that reason, Plaintiffs argue that the AAG's advice to Defendant was incorrect because it implies that the Proposed Rule would bind the Commission if the Petition were granted. Pl. Opening Br. at 31. Plaintiffs contend that Defendant is mandated to consider all evidence when voting on a petition, and therefore it was arbitrary and capricious or an abuse of discretion to deny Plaintiffs' Petition based on either the AAG's "improper legal conclusions" or due to the contents of the proposed rule alone. Pl. Opening Br. at 3.

Defendant counters that Plaintiffs' Petition was denied only after hearing evidence, testimony, and argument from the public and its sister agencies, and not based solely on the recommendations in the AAG's memo. Def. Answer Br. at 8. Examples of the other evidence Defendant utilized to make its decision include written input, submitted pursuant to Rule 510, from two different divisions of the CDPHE, the Colorado Water Conservation Board ("CWCB"), the American Petroleum Institute, the Colorado Petroleum Association ("CPA"), Noble Energy, the National Association of Royalty Owners ("NARO"), the concerned citizens group of Arapahoe County, the Loretto Earth Network, Our Children's Trust, and others. R. at 15-96.

Among the written input was CDPHE's assessment that Colorado already has "the most rigorous oil and gas air quality programs in the country" including new regulatory requirements adopted by the Colorado Air Quality Control Commission ("AQCC") that will reduce methane emissions by 113,000 tons per year. R. at 16. The Disease Control and Environment Epidemiology Division (DCEED) of the CDPHE wrote "[CDPHE] does not believe that existing studies on the potential public health impacts from oil and gas development provide the strong, consistent base of scientific evidence to support the statement that 'science unequivocally shows that hydraulic fracturing is adversely impacting human health.'" R. at 19. Finally, the Air Pollution Control Division ("APCD") of the CDPHE submitted the following: 1) "the COGCC does not have the authority to undertake the expansive regulatory changes requested by Petitioners and COGCC should defer to the jurisdiction and expertise of the APCD which already has undertaken a comprehensive rulemaking that will result in immediate and substantive reductions in exactly the emission that Petitioners seek to regulate"; and 2) "[the APCD] already is inventorying greenhouse gases and recently completed a rulemaking that will result in substantial reductions in greenhouse gases over the next three years." Def. Answer Br. at 10.

In addition to utilizing the written input to guide its decision, Defendant conducted a hearing on Plaintiffs' Petition on April 28, 2014. Groups that made presentations before the COGCC included CDPHE, CWCB, CPA, Earth Guardians, the Colorado Oil and Gas Association, and 15 other individuals who asked to address the Commission. R. at 1052. Defendant heard testimony like the following from the CDPHE: "over the last 10 years, Colorado has been very aggressive in finding ways to reduce air emissions from the oil and gas

sector . . . we've made really a lot of great steps and have created an industry that probably is amongst the most, if not the most clean producing industry in the country." R. at 1105. The representative from the DCEED testified that "[d]espite broad public concern, no comprehensive population based studies of the public health effects of unconventional gas exist." R. at 22. In later testimony, the COGA representative pointed out that: 1) "numerous studies show that hydraulic fracturing reduces overall Green House Gas ("GHG") emissions by making natural gas more readily available and less expensive then coal"; 2) "[o]ver 90% of Colorado's oil and gas wells in our state are hydraulically fracked . . . [a] moratorium or ban on permitting will nearly halt all oil and gas development"; and 3) "[if there is a ban on fracking], in 5 years the state's domestic product could be decreased by billions of dollars and Colorado citizens could suffer up to 68,000 job losses." R. at 1123. It appears from the record that only after considering the inputs from stakeholders on both sides of the fracking issue did Defendant's members unanimously vote to deny Plaintiffs' Petition.

In its narrow and deferential review of Defendant's actions, the Court does not find that Defendant's decision to deny Plaintiffs' Petition lacked a rational basis. *See Rags Over the Arkansas River, Inc.*, 77 F. Supp. 3d at 1045 (judicial review of agency action under the APA is narrow and deferential, and the court must uphold the agency's action if there is a rational basis for the decision). Instead of acting arbitrarily and capriciously by relying "primarily" on the AG's advice, as Plaintiffs allege, Defendant adhered to COGCC Rule 510 by soliciting and receiving both oral and written input from numerous stakeholders. Comments from the CDPHE's Air Pollution Control Division, the CDPHE's Disease Control and Environmental Epidemiology Division, the Colorado Water Conservation Board, the APCD, and the AQC all support Defendant's Order denying the Petition. By following the required procedures for public comment, then using the substantial quantity of evidence collected to guide its deliberations, Defendant used reasonable diligence and care to arrive at their decision. Therefore, the Court declines to vacate Defendant's Order denying Plaintiffs' Petition or remand the Petition back to Defendant for reconsideration.

CONCLUSION

The Court finds that oral argument would not materially assist it in making its decision.

For the reasons discussed above, the Colorado Oil and Gas Commission's Order denying Plaintiffs' Petition is AFFIRMED**.**

ENTERED February 19, 2016.

BY THE COURT:

J. Eric Elliff
District Court Judge