

BEFORE THE OIL AND GAS CONSERVATION COMMISSION
OF THE STATE OF COLORADO

IN THE MATTER OF THE PETITION FOR) CAUSE NO. 1
RULEMAKING FILED WITH THE COLOARDO)
OIL AND GAS CONSERVATION COMMISSION) ORDER NO. 1-187
BY XIUHTEZCATL MARTINEZ ET. AL.)

ORDER OF THE COMMISSION

This matter came before the Commission pursuant to the “Petition of Xiuhtezcatl Martinez, Itzcuahtli Rosky-Martinez, Charlotte Buren-Hanley, Sonora Binkley, Aerielle Deering, Trinity Carter, Jamirah Duhamel, and Emma Bray to the Colorado Oil and Gas Conservation Commission and Colorado Department of Natural Resources for promulgation of a rule to suspend the issuance of permits that allow hydraulic fracturing until it can be done without adversely impacting human health and safety and without impairing Colorado’s atmospheric resource and climate system, water, soil, wildlife, [or] other biological resources.” (“Petition” and “Petitioners”). Being fully advised on the premises, the Commission hereby **DENIES** the Petition.

I. Procedural History

On November 15, 2013, the Petitioners filed the Petition. On and before April 28, 2014, the Commission received oral and written evidence, testimony and argument on the merits of the Petition from numerous interested persons. On April 28, 2014, the Commission voted to deny the Petition on a 7-0 vote.

II. Petitioners’ Proposed Rule

Under Commission Rule 529, a petition for rulemaking must contain 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.

The Petitioners’ “Proposed Rule” requests that the Commission “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, wildlife, and land resources, does not adversely impact human health and does not contribute to climate change.” Petition, p. 47.

III. Analysis

Under the Administrative Procedure Act, § 24-4-103(7), C.R.S., an agency has discretion whether to initiate a rulemaking in response to a petition for rulemaking. An agency has “broad discretion to choose how best to marshal its limited resources and

personnel to carry out its delegated responsibilities.” *Mass. v. Environmental Protection Agency*, 549 U.S. 497, 527-528 (2007).

The Colorado Oil and Gas Conservation Act charges the Commission with creating rules and policies that “[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.” § 34-60-102(1)(a)(I), C.R.S.

A. The relief sought in the Petition is beyond the Commission’s authority.

By memorandum dated April 11, 2014, the Commission received legal advice on the Petition from counsel for the Commission, Assistant Attorney General Jake Matter (“April 11, 2014 Memo”). The April 11, 2014 Memo concluded that some of the Proposed Rule was beyond the Commission’s jurisdiction and stated:

The Proposed Rule, if adopted, would require the Commission to prevent new drilling from occurring until it is proven that such operations, cumulatively, would have no adverse impacts. This memo concludes that such a rule is beyond the Commission’s limited statutory authority under the Oil and Gas Conservation Act, §§ 34-60-101-128 (‘Act’). This memo also concludes that the Proposed Rule, if adopted, would cause the Commission to delegate some of its statutory responsibilities to an unidentified ‘third-party organization’ in contravention of the Act.

This memo also examines the Petitioners’ legal argument that the desired rulemaking is necessary for the Commission to fulfill its ‘affirmative duty’ under the public trust doctrine. However, Colorado courts have expressly rejected the public trust doctrine.¹

The April 11, 2014 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.² Sections IV (Some of the Proposed Rule is beyond the Commission’s statutory authority) and V (The public trust doctrine is inapplicable) of the April 11, 2014 Memo are incorporated herein by reference.

Specifically, the Commission finds and concludes that:

- The Proposed Rule, if adopted, would have required the Commission to readjust

¹ April 11, 2014 Memo, Executive Summary, p. 1.

² April 28, 2014 Hearing Audio, Afternoon Session (“April 28 Audio”), Statement of Commissioner King, at 2:35. Prior to voting, the Commission expressly waived the attorney client communication and attorney work product privileges applicable to the legal advice it received from the Colorado Attorney General’s Office concerning the Petition. The Commission then asked counsel to advise the public in attendance of such concerns and opinions.

the balance crafted by the General Assembly under the Act, and is therefore beyond the Commission's limited grant of statutory authority. More specifically, the Proposed Rule hinges on conditioning new oil and gas drilling on a finding of no cumulative adverse impacts, which is beyond the Commission's limited statutory authority.

- The Commission's statutory duty to "[p]romulgate 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," § 34-60-106(11)(a)(II), C.R.S., is a non-delegable duty the General Assembly has assigned to the Commission and review by a third party organization as contemplated by the Proposed Rule is contrary to the Act; and
- The Colorado courts have expressly rejected the public trust doctrine. Therefore, the public trust doctrine does not provide a basis for the Commission to initiate the proposed rulemaking.

B. The Commission, in cooperation with the Colorado Department of Health and Environment, is currently addressing many of the concerns in the Petition.

The Commission also finds that the Commission and the Colorado Department of Public Health and the Environment (CDPHE) are currently addressing many of the Petitioners' concerns through more gradual changes in regulation within their relative jurisdictions.

Commissioner Wolk, who is CDPHE's Chief Medical Officer, stated that "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."³ Commissioner Wolk also noted that CDPHE is currently addressing many of the Petitioners' concerns.⁴

Commissioner King, who is the Executive Director of the Colorado Department of Natural Resources, stated that "I firmly believe that we are dealing with climate change right now."⁵ On May 28, 2013, House Bill 13-1293 created positions within the CDPHE, the Colorado Energy Office (CEO), and the Colorado Water Conservation Board (CWCB) charged with the development of a climate action plan, climate preparedness studies, and annual reports to the Legislature on climate change issues, statewide emissions, and reduction proposals. In addition, on February 23, 2014, the Air Quality Control Commission adopted revisions to its Regulation Numbers 3, 6, and 7, which are projected to significantly reduce the oil and gas industry's current VOC and methane/ethane emissions.

Commissioner King also pointed out that the Commission itself is taking "evolutionary

³ April 28 Audio, Statement of Commissioner Wolk, at 2:43.

⁴ *Id.* at 2:44.

⁵ April 28 Audio, Statement of Commissioner King, at 3:01.

steps” in addressing many of the Petitioners’ concerns, although it may not be the “revolutionary” change the Petitioners were seeking.⁶ Similarly, Chairman Compton observed that “the COGCC has taken some giant steps in the right direction and it may be evolutionary but it is some pretty fast evolution.”⁷ Commissioner Craig noted that new rules need time to have an effect and pointed out examples of these evolutionary steps in oil and gas regulation; including cement standards, mechanical integrity testing, and bradenhead testing.⁸

The Commission finds and concludes that:

- It and other state agencies are currently addressing many of the concerns raised in the Petition.
- Most, if not all, of the relief sought in the Petition related to air quality is within CDPHE’s jurisdiction, and not COGCC’s jurisdiction.
- There are other Commission priorities that must take precedence over the proposed rulemaking at this time.

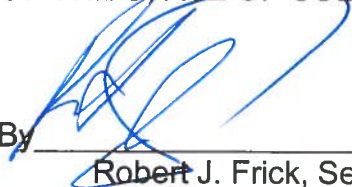
ORDER

NOW, THEREFORE, IT IS ORDERED, that the Petition is hereby **DENIED**.

IT IS FURTHER ORDERED, that under the State Administrative Procedure Act the Commission considers this order to be final agency action for purposes of judicial review within 30 days after the date this order is mailed by the Commission.

ENTERED this 29th day of May, 2014.

OIL AND GAS CONSERVATION COMMISSION
OF THE STATE OF COLORADO

By  _____
Robert J. Frick, Secretary

⁶ *Id.* at 3:01.

⁷ April 28 Audio, Statement of Chairmen Compton, at 3:06.

⁸ April 28 Audio, Statement of Commissioner Craig, at 2:49.

CERTIFICATE OF SERVICE

On May 29, 2014, a true and correct copy of the foregoing Order of the Commission was mailed by first-class mail to the following:

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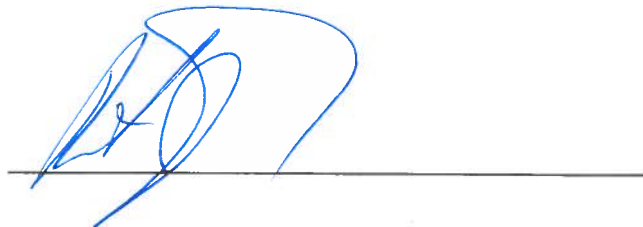
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A handwritten signature in blue ink is written over a horizontal line. The signature is stylized and appears to be the name 'Emma Bray'.