COLORADO RISING

P.O. Box 370
Eastlake, CO 80614-0370
Phone: (303) 895-7044
Email: jas@salazarlaw.net

May 13, 2019

Via Electronic Mail: kyle.davenport@coag.gov
Jeffrey Robbins, Director
Colorado Oil and Gas Conservation Commission
c/o Kyle Davenport, Assistant Attorney General
1300 Broadway, 10th Floor
Denver, CO 80203

Re: Stay of Permits and Hearings

Dear Mr. Robbins:

Please allow this letter to express our deep appreciation for your efforts related to establishing Objective Criteria in the final determination of permit applications. As you noted in your April 19, 2019 Amended SB 19-181 Draft Required Director Objective Criteria:

> *The Director may "delay the final determination regarding a permit application" if the Director determines, "pursuant to objective criteria… that the permit requires additional analysis to ensure the protection of public health, safety, welfare or the environment or requires additional local government or state agency consultation." This authority remains in place until the Commission completes rulemaking implementing or amending the following provisions:*
>
> - *Protection and minimization of adverse impacts to public health, safety and welfare, the environment, and wildlife resources and the environment resulting from oil and gas operations;*
> - *Alternative location analysis process for oil and gas locations or facilities;*
> - *Cumulative impacts of oil and gas development; and*
> - *Flowline and inactive, temporarily abandoned, and shut-in wells.*

A few days after close of the comment period on the Objective Criteria, notification was made that the COGCC will hold a "Stakeholder Meeting" related to the 500 Series Rulemaking on May 15, 2019. As stated in the email, the Commission will address amending "the evidentiary requirements for pooling and drilling and spacing unit applications." Surely, you must be aware that hearing officers are still moving forward with spacing and pooling applications despite the fact that the 500 Series has not been amended to comply with SB 19-181? Processing these applications before the proper rulemaking has been completed is premature and an abuse of these officers' authority.

For example, in Docket No. 190600458, individuals in the Broomfield area were advised by the COGCC about a pooling application filed by Extraction Oil & Gas, Inc. They were notified that the deadline to file a protest or intervention is May 17, 2019, and the hearing will be held on June 17-18, 2019. As we know from prior cases, the current pooling hearing process does not conform with SB 19-181. This statement is not without support.

As you may recall, during COGCC review of the Broomfield Wildgrass matter in 2019, the COGCC Commissioners were bewildered by the fact that a federal judge ordered them to address public health, safety, and welfare, the environment, and economics during the pooling hearing. Apparently, the Commissioners believed these issues were not appropriate to address during pooling hearings.

SB 19-181 changed all of that, with its clear legislative declaration that the Commission is directed to regulate the development and production of oil and gas in a manner that protects public health, safety, and welfare. Now, however, without a modification of the 500 Series of rules related to pooling to conform to SB 19-181, Broomfield protestants are left to guess how to proceed in front of the hearing officer and during the hearing in front of COGCC Commissioners. Their rights, duties, and obligations are not clearly spelled out with recent changes in the law. Protestants are left without statutory or administrative guidance involving their rights to discovery and other evidentiary matters.

With respect to spacing, Extraction filed for a spacing application in the Commerce City area. In Docket Nos. 190300473, 190300474, 190300475, and 190300476 residents protesting the application have been advised that this matter will be heard on June 17-18, 2019. SB 19-181 substantially impacts spacing decisions. Nonetheless, in an unsigned Joint Proposed Case Management Order the hearing officer denied protestants the right to discovery adding that, "It is within the sole discretion of the Hearing Officer in deciding for the allowance of discovery." Such notification is incongruent with SB 19-181. For example, it can be justified that not only should protestants be allowed to discover information related to "public health, safety, and welfare, the environment, and wildlife resources" and to ensure their protection "against adverse environmental impacts on any air water, soil, or biological resource" from the project, but also that oil and gas operators bear the burden of demonstrating the project's cumulative impact. § 34-60-106(2.5)(a); § 34-60-106(11)(c)(II).

<u>Accordingly, until the 500 Series is complete, the COGCC is obligated to halt all hearings on applications and to halt all pre-hearing matters</u>. With SB 19-181 in effect, the current rules and processes fail to provide people of ordinary intelligence a reasonable opportunity to understand what conduct the rules prohibit or allow, and there is a very real possibility of arbitrary and discriminatory enforcement. *Faustin v. City and Cnty. of Denver*, 423 F.3d 1192, 1201-02 (10th Cir. 2005), citing *Hill v. Colorado*, 530 U.S. 703, 732 (2002) ("If arbitrary and

discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them."). Further, proceeding without required updates to rules concerning pooling and spacing, among other affected areas of the new law, would be a violation of the due process rights of affected citizens of the State.

Moreover, halting the hearing process for a short period of time to allow for the completion of the 500 Series rules reduces the chance that the COGCC will be engaging in *ultra vires* acts. *City of Arlington v. FCC*, 133 S.Ct. 1863, 1864-65 (2013) ("[t]he question is always, simply, whether the agency has stayed within the bounds of its statutory authority…"); see generally *Martinez v. Dep't of Personnel and Admin.*, 159 P.3d 631, 633 (Colo.App. 2006) (unless "expressly or impliedly by statute, administrative rules and regulations are without force and effect if they add to, change, modify, or conflict with an existing statute.").

Mr. Robbins, please seriously consider this request to respect the administrative process concerning rulemaking. Halting the hearing process for a short period of time does not unreasonably harm oil and gas operators. Operating blindly, however, will most certainly result in irreparable harm to protestants.

As a note, we are authorized to advise you that the following groups on the attached page have signed on to this letter in support.

We are available and happy to speak with you concerning this letter at your earliest convenience. Joe Salazar can be reached at (303) 895-7044 and Jeremy Nichols can be reached at (303) 437-7663. Thank you for your time and attention in this matter.

Sincerely,

Joseph A. Salazar, Executive Director
Colorado Rising for Communities

Jeremy Nichols, Climate and Energy Program Director
WildEarth Guardians

SUPPORTING ORGANIZATIONS

Front Range Residents for Environment, Safety, and Health (FRRESH)
North Range Concerned Citizens
Adams County Communities for Drilling Accountability NOW (ACCDAN)
Broomfield Clean Air & Water (BCAW)
Broomfield Moms Active Community