

# Exhibit C\*

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**To:** Commissioners of the Colorado Oil and Gas Conservation Commission  
**CC:** Director Matthew Lepore  
**From:** Jake Matter, Assistant Attorney General (720-508-6289)<sup>1</sup>  
**Date:** April 11, 2014  
**Re:** Petition for Rulemaking from Martinez, *et al.*

#### EXECUTIVE SUMMARY

On November 15, 2013, eight citizens filed a petition for rulemaking with the Colorado Oil and Gas Conservation Commission ("Petitioners" and "Petition"). This memo describes the legal framework applicable to the Commission's consideration of the Petition.

The Commission has substantial discretion to initiate the desired rulemaking, or not. If the Commission initiates the desired rulemaking, the processes and procedures supplied by the State Administrative Procedures Act ("State APA") and Commission Rules would control, just like any other rulemaking. If the Commission does not initiate the desired rulemaking, it must issue a written order explaining its decision in sufficient detail to enable judicial review. Such a decision would be subject to judicial review under a "highly deferential" standard.

The Petitioners' proposed rule is attached as Appendix I to the Petition ("Proposed Rule"). 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.

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<sup>1</sup> The opinions expressed herein are those of the author and not necessarily those of the Attorney General.

## DISCUSSION

### I. Overview of the Petition and Proposed Rule

The Petition explains that Petitioners seek “the 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 biologic resources.” Petition, p. 1 (emphasis added).

The Proposed Rule provides, among other things, that the “Commission shall 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 (containing Proposed Rule) (emphasis added).

As grounds, the Petition states:

“The science unequivocally shows that hydraulic fracturing is adversely impacting human health and impairing Colorado’s atmosphere, water, soil, and wildlife resources.”

“The science unequivocally shows that anthropogenic climate change is occurring and is threatening the stability of the global climate.”

“Climate change is already occurring in the State of Colorado and is projected to significantly impact the state in the future.”

“The Public Trust Doctrine demands that Colorado act to preserve the atmosphere and provide a livable future for present and future generations of Colorado residents.”

Petition, pp. 7, 12, 34 & 40.

The Petition cites numerous sources, including Colborn, Theo, *et al.* “Natural Gas Operations from a Public Health Perspective.” *Int’l J. of Human and Ecological Risk Assessment* (Sept. 2011); and McKenzie, Lisa, *et al.*, “Human Health Risk Assessment of Air Emissions from Development of Unconventional Natural Gas Resources.” *Sci. Total Environ.* (2012).

### II. The Petitioners have standing to petition the Commission to initiate a rulemaking.

Under the State APA, any citizen may petition a state agency such as the Commission for the issuance of a rule. § 24-4-103(7), C.R.S. The same is true under the Commission Rules. *See* Commission Rule 529.a. (“The Commission may initiate rulemaking on its motion or in response to an application filed by any person.”). The same is also true under the Federal Administrative Procedures Act (“Federal APA”). *See* U.S.C. 553(e) (“Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.”). Given the similarities between the State APA and Federal APA, court decisions construing the Federal APA are persuasive with respect to the interpretation of the State APA. *Citizens for Free*

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*Enterprise v. Dept. of Rev.*, 649 P.2d 1054, 1063 (Colo. 1982) (federal cases are instructive in regards to administrative law issues given the similarity between the Federal and State APAs).

**III. The Commission has substantial discretion to initiate the desired rulemaking, or not.**

Administrative decisions are presumptively valid and reviewing courts resolve all reasonable doubts as to the correctness of such decisions in favor of the agency. This presumption applies to both the Commission's decision to initiate a rulemaking, or not, and any substantive rules that may result from initiating the rulemaking.<sup>2</sup>

The State APA contains the standard of review generally applicable to any agency action or inaction and provides:

If the court [upon judicial review] 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.

§ 24-4-106(7), C.R.S. (State APA); *see also*, 5 U.S.C. § 706 (Federal APA's scope of review).

The United States Supreme Court has recently refined the foregoing standard of review for cases challenging the propriety of an agency's decision to not initiate a rulemaking in response to a citizen petition and stated:

There are key differences between a denial of a petition for rulemaking and an agency's decision not to initiate an enforcement action. **In contrast to non-enforcement decisions, agency refusals to initiate rulemaking are less frequent, more apt to involve legal as opposed to factual analysis, and subject to special formalities, including a public explanation. They moreover arise out of denials of petitions for rulemaking which (at least in the circumstances here) the**

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<sup>2</sup> It is important to note that granting a rulemaking petition initiates a rulemaking process; it does not guarantee the promulgation of a final substantive rule.

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affected party had an undoubted procedural right to file in the first instance. Refusals to promulgate rules are thus susceptible to judicial review, though such review is extremely limited and highly deferential.

*Mass. v. Environmental Protection Agency*, 549 U.S. 497, 527-528 (2007) (emphasis added).

“[A]n agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities.” *Id.* at 527. Declining to initiate a rulemaking is a proper exercise of agency discretion where the following illustrative criteria form the basis for the decision:

- The agency lacks jurisdiction;
- The proposed rulemaking would conflict with agency priorities or is untimely;
- The proposed rulemaking implicates matters which are the subject of ongoing investigation and study by the agency;
- The proposed rule would conflict with other existing rules and policies;
- The proposed rule does not comply with state law; or
- The proposed rule lacks scientific or technical support.

If the Commission does deny the Petition, it must provide a written order explaining its decision in sufficient detail to enable judicial review.

IV. Some of the Proposed Rule is beyond the Commission's statutory authority.

A. The Commission's legislative mandate to "balance" oil and gas development

Paragraph 2(c) of the Petitioners' Proposed Rule would require the Commission to prevent new oil and gas drilling until it is proven that such drilling, "cumulatively, with other actions," would have no adverse impacts. To the extent the Proposed Rule hinges on conditioning new oil and gas drilling on a finding of no cumulative adverse impacts, the Proposed Rule is beyond the Commission's limited statutory authority. The Proposed Rule states:

The Commission shall 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 (containing Proposed Rule); Proposed Rule, ¶ 2(c) (emphasis added). The "other actions" referred to above appears to pertain to "each and every substantial source of greenhouse

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gas emissions from Colorado's oil and gas industry, including, extraction, processing, transportation, distribution, combustion, and other emissions sources." See *id.*, ¶ 4(a).

The 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. (emphasis added). The Act also charges the Commission with minimizing and mitigating adverse impacts on wildlife resources arising out of oil and gas operations, but does not condition development on a finding of no adverse impacts. § 34-60-103(5.5) C.R.S. (defining "Minimize adverse impacts" as used in § 34-60-128(2), C.R.S., which requires the Commission to administer the Act "so as to minimize adverse impacts to wildlife resources affected by oil and gas operations.").

The "balance" required under the Act was central to the Commission's 2008 rulemaking. As the statement of basis and purpose associated with the 2008 rulemaking explains:

The Commission believes that the resulting final rules responsibly address the recent increase in oil and gas development, implement the 2007 legislation, and update the prior rules where appropriate. It also believes that these rules will ensure the protection of the public health, safety and welfare, including the environment and wildlife resources, while also fostering the responsible, balanced development, production, and utilization of oil and gas resources. C.R.S. § 34-60-102(1)(b). These rules will, among other things:

- Provide additional protection for public health and the environment through several new measures. ...
- Minimize adverse impacts on wildlife resources by requiring operators to work with CDOW regarding site-specific mitigation for sensitive wildlife habitat ... and to avoid the most critical habitat areas where technically and economically feasible. ...
- Provide for consultation with the CDPHE and CDOW. ...
- Provide for enhanced transparency. ...
- Avoid a one-size-fits-all approach by tailoring numerous rules to the individual circumstances of the location or region. ...

Statement of Basis, Specific Statutory Authority, and Purpose, New Rules and Amendments to Current Rules of the Colorado Oil and Gas Conservation Commission (adopted December 11, 2008), 2 CCR 404-1, pp. 5-6 and available at <http://cogcc.state.co.us/>.

The Proposed Rule, if adopted, would require the Commission to readjust the balance crafted by the General Assembly under the Act, and is therefore beyond the Commission's limited grant of statutory authority.

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**B. The Commission cannot delegate its responsibility to administer the Act to a "third-party organization."**

Paragraph 2(c) of the Proposed Rule requires the Commission's determination – "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" – to be subject to review by an unidentified "third-party organization."

Subjecting the Commission's decision making to review by a third-party organization is unsupported by the text of the Act and, moreover, is an improper delegation of the agency's authority.

In *Big Sandy Sch. Dist. v. Carroll*, 433 P.2d 325 (Colo. 1967), the Colorado Supreme Court discussed a school board's ability to delegate its statutory power and duty to hire a principal and fix the principal's wage to the school superintendent. The Supreme Court held that such a delegation was improper because such a decision involved judgment and discretion, and was not a merely ministerial task. Moreover, the school board had an express statutory duty to do so, which was critical to the court's analysis.

The reasoning in *Big Sandy* applies with equal weight to the issue of whether the Commission's decisions can be subject to review by any person or entity other than the judiciary. 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 is contrary to the Act.

**V. The public trust doctrine is inapplicable.**

Petitioners rely on the public trust doctrine and assert that the Commission, as a trustee, must maintain the atmosphere as a trust asset on behalf of members of the general public as beneficiaries. Petition, pp. 40-45. However, Colorado courts have expressly rejected the public trust doctrine. What is more, the courts have rejected the doctrine in litigation involving at least one of the Petitioners. See *Martinez v. Colorado*, Denver Dist. Ct. No. 11CV4377, Order on Motions to Dismiss, at 4 (Colo. November 7, 2011) (stating that "the Public Trust Doctrine has never been recognized by the Colorado courts" and explaining that while many Colorado statutes provide protection for wildlife, lands, and waters, "they do not generally provide a cause of action for citizens who feel the state is not doing enough to protect the environment.").