

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO Court Address: 1437 Bannock Street Denver, Colorado 80202</p> <hr/> <p>Plaintiffs: Xiuhtezcatl Martinez, <i>et al.</i></p> <p>v.</p> <p>Defendant: Colorado Oil and Gas Conservation Commission.</p>	<p>DATE FILED: December 24, 2014 10:25 AM CASE NUMBER: 2014CV32637</p> <hr/> <p>Case No.: 2014-CV-32637</p> <p>Courtroom: 215</p>
<p>ORDER DENYING MOTION TO DISMISS</p>	

This matter is before the Court on the Defendant’s motion to dismiss this action under C.R.C.P. 12(b)(5). The Court received argument on this motion on November 14, 2014. The Court has also reviewed the briefing on this motion, the exhibits submitted in support of this briefing, the complaint and its exhibits, the entire file and is otherwise advised as to the grounds for the motion. After considering all of this information, and the applicable authorities discussed below, the Court denies the motion to dismiss and orders the parties to prepare the record for review in accordance with the judicial review provision of the Colorado Administrative Procedures Act, Colo. Rev. Stat. § 24-4-106 (“APA”).

Factual Background

Plaintiffs filed a request with Defendant Colorado Oil and Gas Conservation Commission (“COGCC”) requesting that it initiate rulemaking regarding the use of hydraulic fracturing (“fracking”) in oil and gas exploration and development in Colorado. *See* Compl., ex. B. In their request for rulemaking Plaintiffs urge COGCC to cease issuing drilling permits until it can be shown that fracking is “consistent with the protection of public health, safety and welfare, including protection of the environment and wildlife resources.” (Quoting legislative declaration from COGCC’s enacting legislation, Colo. Rev. Stat. § 34-60-102(1)(a)(I)).

Their petition for rulemaking is 46 pages and contains 127 numbered paragraphs. *See* Compl., ex. B. It contains detailed scientific information, most of which is devoted to describing the impacts that fracking has on human health, the environment and wildlife. *See id.*, pp. 7 – 40. The petition also advocates for adoption of the public trust doctrine as part of COGCC’s rulemaking. *See id.*, ¶¶ 115 – 122, at pp. 40 – 41. The proposed rule submitted with the petition provides that no drilling permits can be issued until an independent third party organization confirms that fracking can be done “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.” *Id.*, appendix I: Proposed Rule.

The statement of basis and purpose submitted with the proposed rules relies on the public trust doctrine as authority for the rulemaking. *Id.*, appendix II, Proposed Statement of Basis and Purpose. It also makes reference to various provisions of COGCC's enacting legislation as authority for this proposed rulemaking. *Id.* In particular it quotes from the legislative declaration of COGCC's enacting legislation which provides that the Commission may enact 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.

Colo. Rev. Stat. § 34-60-102(1)(a)(I).

They also find authority in Colo. Rev. Stat. § 34-60-106(2)(d) for these rules. This provision of COGCC's enacting legislation provides that:

[t]he commission has the authority to regulate: ... 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.

COGCC denied the petition relying in large part on a memo from the Attorney General's Office. *See* Compl., ex. C, April 11, 2014 memo. This memo concludes that COGCC lacks jurisdiction to adopt the proposed rule as it is written. *Id.* It concludes that that there is no statutory basis to withhold drilling permits pending the various health, environmental and wildlife reviews proposed by Plaintiffs. *Id.* It also concludes that that the proposed rule provides for an unauthorized delegation of COGCC's power to a third party. It also points out that the petition and proposed rule place heavy reliance on the public trust doctrine, which is not recognized in Colorado. *Id.* COGCC largely followed this memo to deny the petition for rulemaking.

COGCC relies on these same grounds to argue that this action may not be maintained as a matter of law. In their complaint seeking judicial review, Plaintiffs disavow any reliance on the public trust doctrine for COGCC's authority to enact the proposed rules. *See* Compl. ¶ 3. In this action, Plaintiffs couch COGCC's authority to adopt these rules in its enacting legislation, portions of which are referenced above. *See, e.g.*, Colo. Rev. Stat. § 34-60-102(1)(a)(I); § 34-60-106(2)(d). They also argue that the third party certification suggested in the proposed rule is just that: a suggestion. At argument on this motion, Plaintiffs maintained that the rulemaking could proceed even if COGCC did not ultimately adopt the third party certification as proposed.

Plaintiffs assert that they have adequately alleged a theory under which COGCC has jurisdiction to undertake this rulemaking. They urge the Court to deny the motion to dismiss and move forward with judicial review of COGCC's decision in accordance with the APA.

The Court agrees that this action cannot be dismissed when Plaintiffs' complaint is reviewed under the standards governing a motion to dismiss. Rule 12(b)(5) sets a low bar for alleging a claim. At this stage the Court must accept all of Plaintiffs' allegations as true and view them in a light most favorable to Plaintiffs. When viewed in this light, Plaintiffs have advanced a theory under which they may be entitled to some relief. Plaintiffs, therefore, have alleged a claim for judicial review under the APA.

Motion to Dismiss Standards

Motions to dismiss under C.R.C.P. 12(b)(5) are disfavored and may be granted only if it appears beyond doubt that a plaintiff can prove no set of facts in support of a claim which would entitle him or her to relief. *Rosenthal v. Dean Witter Reynolds, Inc.*, 908 P.2d 1095, 1098 (Colo. 1995). All averments of material fact stated in the complaint are accepted as true and are viewed in a light most favorable to a plaintiff. *Id.* The Court may consider only the allegations made in the complaint and must not go beyond the confines of the pleadings. *Id.* However, the Court may consider materials that are referenced in a complaint. *Boulder v. Pub. Serv. Co. of Colo.*, 996 P.2d 198, 203 (Colo. App. 1999).

The complaint should not be dismissed if there is any theory of law under which a plaintiff is entitled to some relief. *Rosenthal*, 908 P.2d at 1098. On the other hand, a motion to dismiss is properly granted when a complaint's factual allegations cannot support a claim as a matter of law. *Id.*, at 1099.

Application of Motion to Dismiss Standards

COGCC sets forth no grounds for dismissal of this action as a matter of law under these standards. Its arguments for dismissal go to the merits of COGCC's reasons for denying the rulemaking petition. These arguments may be considered when reviewing COGCC's decision under the APA. At this stage, though, the complaint sets forth allegations which must be accepted as true. They assert a theory under which COGCC's denial may be reviewed under the APA. This is a low burden, but is all that is required for Plaintiffs' claims to proceed at this stage.

COGCC primarily argues that it correctly denied the petition because Plaintiffs relied so heavily on the public trust doctrine, which is not recognized in Colorado. There can be no doubt that the petition for rulemaking rested heavily on the public trust doctrine. Now in seeking judicial review, the complaint refers to COGCC's enacting legislation as authority for the proposed rule. This statutory basis is also referenced in the statement of basis and purpose proposed by Plaintiffs. Plaintiffs state a theory under which COGCC's enacting legislation supports their proposed rules. *See* Pl.'s Opposition to Motion to Dismiss, at pp. 9 – 18. Under

these circumstances Plaintiffs' heavy reliance on the public trust doctrine is not fatal to its claim for judicial review. They have set forth a theory under which COGCC's enacting legislation supports the proposed rule. At this stage the Court must accept these allegations as true and draw any favorable inferences in Plaintiffs' favor. Under this standard, they have met the minimum legal standards for alleging an APA claim for judicial review.

Plaintiffs' reliance on COGCC's enacting legislation also distinguishes this action from an earlier case that where Plaintiffs relied on the public trust doctrine to bring environmental protection claims. *See Martinez v. Colorado*, 2011 WL 11552495 (Denver Dist. Ct., Nov. 7, 2011) (dismissing Plaintiffs' declaratory claims asserted against the State to enact more protective environmental laws). The Court dismissed their claims because the public trust doctrine has not been recognized in Colorado. Here, however, Plaintiffs have advanced a theory under which the proposed rule may be adopted under COGCC's enacting legislation. Accordingly, this earlier action is different from the authority advanced in this case.

COGCC argues that suspending the issuance of drilling permits while the health and environmental reviews are completed is directly contrary to the balancing of interests that it must achieve under its enacting legislation. Because this proposal is contrary to its statutory obligations, COGCC argues that this action must be dismissed.

Plaintiffs advance an interpretation of COGCC's enacting legislation which allows these permits to be withheld during these reviews. *See Pl.'s Opposition to Motion to Dismiss*, at pp. 9 – 18. Again, these allegations are accepted as true at this stage, and all inferences must be drawn in Plaintiffs' favor. Under this standard, Plaintiffs set forth a theory under which COGCC may adopt its proposed rule. Therefore, dismissal is not appropriate when evaluated under Rule 12(b)(5) standards.

Finally, COGCC argues that the proposed health and environmental reviews and certification by the independent third party is an unauthorized delegation of its regulatory authority. COGCC argues that because it cannot delegate its authority in this manner it could not adopt Plaintiffs' proposed rule. Again, Plaintiffs set forth a theory under which the third party certification is consistent with its authority. Plaintiffs suggest that the third party can be used as a consultant, but that COGCC still retains all of its regulatory and enforcement power after receiving the third party's certification. *See Pl.'s Opposition to Motion to Dismiss*, at p. 19. The Court must accept these allegations as true and draw all favorable inferences in favor of Plaintiffs. Under this standard Plaintiffs state a claim for judicial review under the APA.

Plaintiffs have met the threshold requirements under Rule 12(b)(5) to state a claim for judicial review. Nothing in this Order is intended to reflect an opinion on the merits of Plaintiffs' claim or COGCC's denial of the petition for rulemaking. These are matters for the Court's consideration after the record is assembled and briefing is completed in accordance with the APA.

Accordingly, IT IS ORDERED that Defendant's motion to dismiss is DENIED.

SO ORDERED this 24th day of December, 2014.

BY THE COURT:



Andrew P. McCallin
District Court Judge