DISTRICT COURT, DENVER COUNTY, COLORADO 1437 Bannock St. Denver, Colorado 80202	DATE FILED: March 12, 2020 2:37 PM FILING ID: 5E57C9B9A05EC CASE NUMBER: 2020CV30997
Plaintiffs: THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF GARFIELD; THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF CHEYENNE ; THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LOGAN; THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF MESA; THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF MOFFAT; THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF PHILLIPS; THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF SEDGWICK; THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF RIO BLANCO; AND THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF YUMA v. **Defendants:** AIR QUALITY CONTROL COMMISSION, COLORADO DEPARTMENT OF PUBLIC HEALTH AND THE ENVIRONMENT, and AIR POLLUTION CONTROL DIVISION	▲ COURT USE ONLY ▲
John R. Jacus, #14139 Benjamin B. Strawn, #44631 Shalyn R. Kettering, #49875 Hayden Weaver, #51315 Kate Sanford, #52073	Case No.

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COMPLAINT

1. The Boards of County Commissioners for Garfield County (represented by John R. Jacus, Benjamin B. Strawn, Shalyn R. Kettering, Hayden Weaver, and Kate Sanford), Cheyenne County (represented by Kelly Zorn Lowery), Logan County (represented by Alan Samber), Mesa County (represented by Patrick Coleman), Moffat County (represented by Rebecca Tyree), Phillips County (represented by Russell J. Sprague), Rio Blanco County (represented by Todd M. Starr), Sedgwick County (represented by Kelly Zorn Lowrey), and Yuma County(represented by Kenn Fellman and Brandon Dittman) ("Plaintiffs") support common-sense, cost-effective regulations to attain health-based air quality standards for all Coloradoans.

2. Certain rules adopted by the Colorado Air Quality Control Commission in its December 2019 Rulemaking to implement Senate Bill 19-181 reflect a different – and unlawful – approach to regulating air quality.

3. Rather than regulating for all Coloradoans, as the Air Pollution Prevention Control Act requires, the Air Quality Control Commission took a one-size-fits-all approach that

assumed its new regulations would impose roughly equal costs on all Coloradoans. That assumption was false. The diversity of Colorado's economy – and, in particular, the heavy reliance many western and rural counties place on oil and gas activity – means those counties will bear a disproportionate share of the costs of the Commission's increased regulation.

4. The Commission also assumed its regulations would benefit all Coloradoans. Yet there is little benefit to the increased regulations challenged herein for Colorado's western and rural counties, as those areas already meet or exceed the federal health-based standards. There also is no meaningful benefit for the rest of the state as air quality data shows that increased regulation on Colorado's western and rural counties will not meaningfully decrease pollution in the Denver Metro and North Front Range area that is out of compliance with federal air quality standards.

5. In short, some of the Commission's new regulations – which might be appropriate for the Denver Metro and North Front Range area – are not appropriate for Colorado's western and rural counties. State law and the Commission's own regulations required it to account for that fact by conducting appropriate cost-benefit, economic impact, and regulatory analyses – and also to prioritize local government concerns about the outsized costs and illusory benefits of its new regulations challenged herein – yet the Commission failed to do so.

6. Indeed, the Commission even accepted a revised alternate proposal from an environmental advocacy group that was introduced too late. Because the revised alternate proposal was submitted late, the parties to the Rulemaking did not have a reasonable opportunity to analyze and respond to it. The revised alternate proposal also lacked the required economic

impact analysis. Despite this, and despite its own enforcement division's rejection of the revised alternate proposal, the Commission incorporated it into its final regulations.

7. Plaintiffs therefore bring this lawsuit to challenge those aspects of the Air Quality Control Commission's December 2019 rulemaking that defy common sense, do not meet statutory requirements, and threaten western and rural counties' economies without providing material air quality benefits.

8. Specifically, Plaintiffs seek an order invalidating the following four revised provisions of Colorado Air Quality Control Commission Regulation Number 7 (the "Challenged Revisions"):

- The reduction from 4 tons per year to 2 tons per year of Volatile Organic Compounds ("VOCs") as the regulatory threshold for emissions controls on storage tanks outside of the ozone nonattainment area;
- Increasing from annual or one-time only to semi-annual the frequency for leak detection and repair inspections required for facilities with storage tanks emitting from 2 to 12 tons per year of VOCs outside of the ozone nonattainment area;
- New requirements to control emissions during the unloading of hydrocarbon liquids from facilities into trucks, as applied to facilities with a hydrocarbon liquid throughput equal to or greater than 5,000 barrels per year;
- Imposing an entirely new set of regulations for increased frequency of leak detection and repair activities at facilities in proximity to "Occupied Areas," a term not previously used or defined in air-quality regulations, and for which there is no supporting data in the record.

PARTIES, JURISDICTION, AND VENUE

The Parties

9. Garfield County, Colorado is a body corporate and politic pursuant to C.R.S. § 30-1-101(1). The Board of County Commissioners of Garfield County is authorized to file suit on behalf of Garfield County pursuant to C.R.S. § 30-11-105.

10. Cheyenne County, Colorado is a body corporate and politic pursuant to C.R.S. § 30-1-101(1). The Board of County Commissioners of Cheyenne County is authorized to file suit on behalf of Cheyenne County pursuant to C.R.S. § 30-11-105.

11. Logan County, Colorado is a body corporate and politic pursuant to C.R.S. § 30-1-101(1). The Board of County Commissioners of Logan County is authorized to file suit on behalf of Logan County pursuant to C.R.S. § 30-11-105.

12. Mesa County, Colorado is a body corporate and politic pursuant to C.R.S. § 30-1-101(1). The Board of County Commissioners of Mesa County is authorized to file suit on behalf of Mesa County pursuant to C.R.S. § 30-11-105.

13. Moffat County, Colorado is a body corporate and politic pursuant to C.R.S. § 30-1-101(1). The Board of County Commissioners of Moffat County is authorized to file suit on behalf of Moffat County pursuant to C.R.S. § 30-11-105.

14. Phillips County, Colorado is a body corporate and politic pursuant to C.R.S. § 30-1-101(1). The Board of County Commissioners of Phillips County is authorized to file suit on behalf of Phillips County pursuant to C.R.S. § 30-11-105.

15. Rio Blanco County, Colorado is a body corporate and politic pursuant to C.R.S. § 30-1-101(1). The Board of County Commissioners of Rio Blanco County is authorized to file suit on behalf of Rio Blanco County pursuant to C.R.S. § 30-11-105.

16. Sedgwick County, Colorado is a body corporate and politic pursuant to C.R.S. § 30-1-101(1). The Board of County Commissioners of Moffat County is authorized to file suit on behalf of Moffat County pursuant to C.R.S. § 30-11-105.

17. Yuma County, Colorado is a body corporate and politic pursuant to C.R.S. § 30-1-101(1). The Board of County Commissioners of Yuma County is authorized to file suit on behalf of Yuma County pursuant to C.R.S. § 30-11-105.

18. Defendant Colorado Department of Public Health and Environment ("CDPHE") is an "agency" of the State of Colorado as defined by C.R.S. § 24-4-102(3) and is the Colorado regulatory department with jurisdiction and authority to implement the Colorado Air Pollution Prevention and Control Act ("APPCA"), C.R.S. § 25-7-101, *et seq*. The CDPHE also has jurisdiction and authority to implement, maintain, and enforce national air quality standards within Colorado, which are set by the U.S. Environmental Protection Agency ("EPA") as directed by the federal Clean Air Act ("CAA"). 42 U.S.C. § 7401(a); C.R.S. § 25-7-102(1).

19. Defendant Colorado Air Quality Control Commission ("Commission") is a subdivision of CDPHE and is also an "agency" of the State of Colorado as defined by C.R.S. § 24-4-102(3) and created pursuant to C.R.S. § 25-7-104. The Commission promulgates rules and regulations to implement the APPCA, as well as to implement the State's plan to meet national air quality standards under the CAA, pursuant to C.R.S. § 25-7-105.

20. Defendant Air Pollution Control Division ("Division") is a subdivision of the Division of Administration of CDPHE that is tasked with air quality control and compliance under the APPCA. C.R.S. §§ 25-7-103(2), (9); 25-7-115. The Division's actions and omissions as detailed herein constitute conduct for which the Commission and CDPHE are liable.

Jurisdiction and Venue

21. The APPCA, the Colorado Administrative Procedure Act ("APA"), the Colorado Uniform Declaratory Judgments Law, and C.R.C.P. 57 give this Court jurisdiction over the claims made herein.

22. The APPCA states that "[a]ny final order or determination by the division or the commission shall be subject to judicial review in accordance with the provisions of this article and the provisions of article 4 of title 24, C.R.S." C.RS. § 25-7-120(1).

23. The APA – i.e., "article 4 of title 24, C.R.S." – states that "any person adversely affected or aggrieved by any agency action may commence an action for judicial review in the district court within thirty-five days after such agency action becomes effective; . . . A proceeding for such review may be brought against the agency by its official title, individuals who comprise the agency, or any person representing the agency or acting on its behalf in the matter sought to be reviewed." C.R.S. § 24-4-106(4).

24. The Colorado Uniform Declaratory Judgments Law, § 13-51-101, *et seq.*, provides that any person "whose rights, status, or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights . . . thereunder."

25. The Commission's revisions to Regulation Number 7, 5 CCR 1001-5, effective on February 14, 2020, constitute final agency actions and determinations for which judicial review is available under C.R.S. §§ 24-4-106 and 25-7-120.

26. The Challenged Revisions present questions of statutory construction insofar as Defendants construed the APPCA to violate Plaintiffs' rights thereunder as further detailed herein.

27. The Plaintiff counties are "person[s]" as defined by C.R.S. § 24-4-102(12) that have been or will be "adversely affected or aggrieved" by the Challenged Revisions to Regulation Number 7. The Challenged Revisions threaten Plaintiffs' economic well-being by, among other things, significantly and disproportionately increasing the costs of regulatory compliance for oil and gas operators in Colorado's western and rural counties, without commensurate or material benefits to their air quality, thereby reducing Plaintiffs' tax revenue streams and economic prosperity.

28. Defendants' Challenged Revisions – as well as the inadequate procedures followed by Defendants in the Rulemaking – further harmed Plaintiffs by suborning Plaintiffs' interests and its governmental powers to the interests of other stakeholders, all in violation of the APPCA, the APA, and the Commission's Procedural Rules governing Rulemaking.

29. The General Assembly empowered counties to regulate land use within their jurisdictions. This authority includes, but is not limited to, the authority to protect the environment, to regulate land use based on impacts to the community, and to regulate certain oil and gas development activities. *See* C.R.S. § 29-20-101, *et. seq.* (Local Government Land Use Control Enabling Act).

30. The General Assembly also conferred significant power upon counties under C.R.S. §§ 30-11-101 and 107. These powers include the power to set the counties' budgets and manage the counties' economic affairs.

31. The General Assembly has also statutorily limited the Commission's authority over air pollution controls in multiple ways, all in deference to county economic and land use prerogatives. The APPCA requires that the Commission "give priority to and take expeditious action upon consideration of the following: (a) A request by a unit of local government to investigate and resolve air quality problems associated with a source; (b) A request by a unit of local government for inclusion of a locally developed air pollution control measure in a state implementation plan; (c) A request by a unit of local government that the commission consider local concerns respecting environmental and economic effects in the context of a proceeding where the state is targeting a source for imposition of additional air pollution controls." C.R.S. § 25-7-105(16). In so doing, the General Assembly granted counties a unique standing to represent the interests of their constituents.

32. Venue is proper in this Court pursuant to C.R.C.P. 98(c) because Defendants are residents in the City and County of Denver pursuant to C.R.S. § 24-4-106(4).

GENERAL ALLEGATIONS

The Clean Air Act and Nonattainment

33. The CAA establishes a framework for protecting the nation's air quality while giving each state the responsibility of regulating air quality within its borders. 42 U.S.C. § 7407(a).

34. Pursuant to the CAA, the EPA establishes National Ambient Air Quality Standards ("NAAQS") to protect public health and welfare with an adequate margin of safety. 42 U.S.C. §§ 7407, 4709. States are responsible for establishing procedures to attain these standards through a state implementation plan ("SIP"). 42 U.S.C. § 7407(a)(1).

35. Regions that violate the NAAQS (nonattainment areas) must meet special compliance schedules based on the severity of an area's air pollution. Nonattainment areas are categorized based on pollutant concentration recorded by air quality monitoring devices. In nonattainment areas, the Colorado SIP requires major sources emitting pollution at or above a specified tons per year ("tpy") threshold to implement emission control technologies.

36. The nine-county Denver and Metro and North Front Range area ("DMNFR") is an ozone nonattainment area. The DMNFR includes all of Adams, Arapahoe, Boulder, Broomfield, Denver, Douglas, and Jefferson Counties, as well as most of Larimer and Weld Counties. On August 15, 2019, the EPA proposed to reclassify DMNFR from "moderate" to "serious" nonattainment for the 2008 8-hour ozone NAAQS of 75 parts per billion ("ppb") and set an attainment date of July 20, 2021. Separately, EPA has also designated the DMNFR as "marginal" nonattainment for the 2015 ozone NAAQS of 70 ppb, with an attainment date of August 3, 2021. Serious nonattainment designation lowers the emissions threshold for facilities that are subject to control requirements under the Colorado SIP, necessarily subjecting the DMNFR to more stringent regulatory burdens under the CAA.

37. All counties outside the DMNFR, including Plaintiffs', are in attainment with the NAAQS. Because they meet the federal health-based NAAQS, facilities in these counties are not subject to controls in the Colorado SIP required to make progress toward attaining the NAAQS.

38. Garfield County, in particular, has invested heavily in its own air quality monitoring network over the past decade. It maintains a network of air quality monitors in five separate locations throughout the county. Data from the monitors clearly indicate that air quality in Garfield County does not violate the NAAQS, and has improved from 2008 through 2016, despite periods of increasing and peak production of natural gas.

39. The CDPHE administers Colorado's SIP through rules promulgated by the Commission and administered by the Division. *See* C.R.S. § 25-7-105. The Commission develops rules and regulations regarding the construction, operation, and permitting of stationary sources of air emissions, and the Division implements and enforces these rules and regulations. *See id.*

The Colorado Air Pollution Prevention and Control Act

40. The APPCA grants the Commission "maximum flexibility in developing an effective air quality control program" and authority to "promulgate such combination of regulations as may be necessary or desirable to carry out that program." C.R.S. § 25-7-106(1). These regulations include emission control regulations applicable to the entire state. C.R.S. § 25-7-106(6). The Commission also can – and does – adopt regulations applicable only to the nonattainment areas when appropriate.

41. The APPCA's stated objective is "to require the development of an air quality control program in which the benefits of the air pollution control measures utilized bear a reasonable relationship to the economic, environmental, and energy impacts and other costs of such measures." C.R.S. § 25-7-102.

42. To carry out its objective while respecting the powers held by local governments – like the Plaintiff counties – the APPCA also requires the Commission to "give priority to and take expeditious action upon consideration of . . . [a] request by a unit of local government that the commission consider local concerns respecting environmental and economic effects in the context of a proceeding where the state is targeting a source for imposition of additional air pollution controls." C.R.S. § 25-7-105(16)(c).

43. Before any rule is proposed, the APPCA requires that the proponent conduct an initial economic impact analysis ("EIA"). C.R.S. § 25-7-110.5(4)(a).

44. Proponents of a rule must also submit a final EIA at least ten days before the date of a rulemaking hearing. *Id.* The EIAs must rely on "reasonably available data." *Id.*

45. The APPCA's EIA requirements apply to alternate proposed rules as well as rules proposed by the Division itself.

46. The failure to provide an EIA "of any alternative proposed rule will preclude such proposed rule or alternate proposed rule from being considered by the Commission." *Id.*

47. The Commission's Procedural Rules further provide that "the Hearing Officer will not accept an alternate proposal by a party after the prehearing conference." 5 CO ADC 1001-1:V(8). The parties, however, "are encouraged to develop consensus positions, and *to narrow the issues in contention* based upon discussions during or after the prehearing conference and prior to a final Commission action in the proceeding, *provided the Commission and the parties have a reasonable opportunity, to evaluate such alternative proposal.*" *Id.* (emphasis added).

48. The regulations further provide that an "alternate proposed rule text must be accompanied by a Final Economic Impact Analysis." 5 CO ADC 1001-1:V(8)(b).

Colorado's Administrative Procedure Act

49. The Colorado APA's legislative declaration states that "any agency action taken without evaluation of its economic impact may have unintended effects" and, therefore, "it is the continuing responsibility of agencies to analyze the economic impact of agency actions and reevaluate the economic impact of continuing agency actions to determine whether the actions promote the public interest." C.R.S. § 24-4-101.5.

50. The APA declares that within five days after publication of a notice of proposed rulemaking in the Colorado register, any person may request that the agency submitting a proposed rule prepare a cost-benefit analysis. If the executive director determines that a cost-benefit analysis is required, the agency shall complete a cost-benefit analysis at least ten days before the hearing on the rule. The cost-benefit analysis must include, among other things, the direct and indirect costs to business and other entities required to comply with the rule or amendment and "[a]ny adverse effects on the economy." C.R.S. § 24-4-103(2.5)(a).

51. The APA further declares that upon the request of any party, at least fifteen days prior to the hearing, the agency must issue a regulatory analysis of a proposed rule. The regulatory analysis must include, among other things, a description of the classes of persons who will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and a determination of whether there are less costly methods or less intrusive methods for achieving the proposed rule. C.R.S. § 24-4-103(2.5)(a).

Senate Bill 19-181

52. On April 16, 2019, Colorado's General Assembly adopted Senate Bill 19-181 ("SB 181") which required the Commission to "adopt rules to minimize emissions of methane and other hydrocarbons, volatile organic compounds, and oxides of nitrogen" from the "natural gas supply chain." C.R.S. § 25-7-109.

53. SB 181 also required the Commission to review its rules for oil and natural gas well production facilities and consider, among other things, more stringent provisions related to leak detection and repair ("LDAR") inspections. C.R.S. § 25-7-109(b)(I)(A).

54. SB 181 did not change any of the statutory procedural requirements for promulgating regulations under the APPCA or the APA.

55. The Rulemaking for Regulations 3 and 7 (the "Rulemaking") was the first of several Commission rulemakings that are intended to implement SB 181.

The Rulemaking

56. On September 19, 2019, the Division formally proposed changes to Regulations 3 and 7 and requested that the Commission hold hearings on the proposed changes to address SB 181 as well as other issues related to ozone, streamlining and updating the regulations, and making necessary formatting corrections. Memorandum of Notice, Regulation Number 7, September 19, 2019.

57. The changes were designed to implement the statutory mandates in SB 181 as well as certain findings of the Statewide Hydrocarbon Emissions Reduction ("SHER") team and the Pneumatic Controller Task Force ("PCTF"), which are stakeholder groups created by the Commission in a November 2017 rulemaking.

58. Parties to the Rulemaking generally consisted of the Division, which was the proponent of the proposed rules, a coalition of western and rural local governments (the "WRLG Coalition"), local governments located primarily in the DMNFR nonattainment area, various oil and gas industry groups including the DJ Basin Operator Group and Joint Industry Working Group, various environmental non-profit groups, and a group called Local Community Organizations ("LCO"), which represented communities claiming to be impacted by oil and gas development.

59. Plaintiffs were (and continue to be) members of the WRLG Coalition that appeared as a party at the Rulemaking.

60. On September 19, 2019, the Division submitted an initial EIA of its proposed regulations pursuant to the APPCA.

61. On October 15, 2019, multiple parties to the Rulemaking, including the WRLG Coalition, filed requests for a Regulatory Analysis and Cost-Benefit Analysis of the Division's proposed regulations with the Division and the Commission pursuant to the APA. C.R.S. § 24-4-103(4.5)(a); C.R.S. § 24-4-103(2.5); 5 Code Colo. Reg. §1001-1:1.5.5(12). The Division submitted the Regulatory Analysis on December 5, 2019 and the Cost-Benefit Analysis on November 29, 2019.

62. Parties filed prehearing statements on November 5, 2019.

63. The Division filed a final EIA on November 5, 2019.

64. A prehearing conference was held on November 13, 2019.

65. Parties filed rebuttals to prehearing statements on November 25, 2019.

66. The Rulemaking hearing took place on December 17 through December 19, 2019. Prior to the hearing, the Commission heard public comment in Rifle on December 10, 2019, Durango on December 11, 2019, and Loveland on December 16, 2019.

The Division's Proposed Rules

67. The Division's proposed rules underwent several iterations but eventually included:

a. A statewide requirement for storage tank controls for tanks emitting 2 tons per year ("tpy") of Volatile Organic Compounds ("VOCs"), lowered from the 6 tpy threshold established in 2014. This rule would require operators with tanks storing hydrocarbon liquids and produced water that emit 2 tpy or more to install and operate air pollution control equipment to flare (i.e., combust) the emissions. The WRLG Coalition supported such additional controls for tanks emitting between 4 and 6 tpy of VOCs, but opposed these controls for tanks emitting 2 to 4 tpy of VOCs outside the nonattainment area. According to the Division's final EIA the estimated annualized cost over a 15-year period of installing and maintaining a flare and associated equipment for all tanks emitting between 2 and 6 tpy of VOCs is $6,487.70. Final Economic Impact Analysis, Regulation Number 7 at 5.

b. A statewide requirement for semi-annual LDAR inspections for facilities with storage tanks emitting 2 to 12 tpy of VOCs. This rule revises 2014 regulations requiring one-time or annual inspection of tanks and components emitting between 2 to 12 tpy. According to the Division's final EIA, the estimated annualized cost of this requirement over a 5-year period is $193,629. *Id.* at 15.

c. A statewide requirement for emission controls during tank loadout operations for those storage tanks with annual hydrocarbon liquid loadout equal to or greater than 5,000 barrels per year, on a 12-month rolling basis. This control requirement, which is entirely new to Regulation Number 7, includes equipment that collects vapors and returns them to the system. The Division estimated that the average annualized cost of this requirement would likely range from $6,200 to $14,550 depending on the type of equipment installed. *Id.* at 33.

68. In its filings and at the Rulemaking hearing, the WRLG supported most of the Division's proposed revisions, including cost-effective regulations designed to reduce methane and ozone-forming VOCs.

69. The WRLG opposed the few rule changes specifically described in paragraph 67 and presented evidence that each of the Challenged Revisions was individually not cost-effective and, in the aggregate, threatened significant economic harm in rural communities that are already in attainment with federal health-based air-quality standards.

70. During the Rulemaking hearing, the WRLG presented the expert testimony of Dr. Timothy J. Considine, PhD, an economist, to address the inadequate methodology used by the Division in its initial and final EIA. Specifically, Dr. Considine explained that the Division assumed that all facilities will face the same unit costs when implementing the new regulations, which is problematic in light of the fact that those facilities actually are diverse in terms of the number of tanks and those tanks' capacities, and in effect, the increased costs of the new regulations will vary.

71. As to LDAR inspections, Dr. Considine demonstrated the inaccuracy of the Division's claim that "more inspections means that more leaks are found and repaired." Dr.

Considine presented evidence that the Division's EIA did not account for diminishing marginal rates of newly discovered leaks, i.e., that fewer leaks will be discovered over time and thereby the new regulations will achieve fewer benefits than the Division assumed.

72. Dr. Considine also presented evidence of the disproportionate impact the new regulations will have on western and rural counties in Colorado. There are large numbers of oil and gas facilities in western and rural Colorado with 2 to 3 wells. Dr. Considine opined that these smaller facilities would likely be unable to pay for the higher costs of complying with the proposed rules given their lower production and marginal operating profits. As a result, Dr. Considine testified that there would be an increased likelihood that many such smaller wells in western and rural Colorado would shut in (i.e., stop producing) and be permanently reclaimed rather than incur the high costs of multiple new control requirements.

73. Dr. Considine's data indicated that such a significant increase in well shut-ins would harm western and rural counties, municipalities and special districts that have significant oil and gas production, and which rely on industry taxes and other revenues to support essential public programs and services. Dr. Considine reported that job losses would range from an estimated 55 to 280 full time positions and labor income losses would range from $1.5 to $7.6 million. Local governments would lose from $757,000 to $3.8 million in tax revenues.

74. The WRLG also presented the expert testimony of Dr. James Wilkinson, PhD, an atmospheric scientist who testified about the minimal air quality benefits anticipated from the challenged revisions.

75. Dr. Wilkinson used routine measurements of VOCs in Garfield County to show that average concentrations of VOCs are decreasing and that ozone concentrations remain below

ozone NAAQS with little risk of slipping out of attainment. Existing regulations and improving technologies, among other factors, are contributing to an on-going reduction in VOC emissions in Garfield County.

76. Dr. Wilkinson also presented evidence that oil and gas emissions from western and eastern Colorado had only a nominal contribution to modelled ozone at monitors in the DMNFR, and the proposed rules would only reduce ozone in the DMNFR by a small fraction of that nominal (0.3ppb) contribution.

77. The Division's counsel admitted during cross examination that the Division did not estimate or analyze the cumulative costs of the proposed regulations on lower producing facilities outside the nonattainment area and that the Division did not analyze whether the cumulative costs could cause those wells to shut-in.

78. Other parties to the Rulemaking presented evidence and expert testimony demonstrating similar flaws in the Division's analyses relied upon by the Commission. For instance, the Joint Industry Working Group demonstrated that the Division overstated the emissions benefits of the proposed frequency for LDAR monitoring and understated the cost per ton of emissions avoided. This was based on, among other things, evidence that emissions in attainment areas like Garfield County are lower because wells produce dry gas with little VOC content, have fewer tanks, fewer components, a lower initial component leak frequency, and fewer ongoing leaks. Other industry groups presented the Commission with data from an expert economist demonstrating, among other things, methodological and empirical flaws in the Division's EIA which led to an understatement of costs of installing and maintaining control equipment, improper assumptions about the continued realization of fixed emissions reductions

from year to year, and the likelihood that the proposed revisions' compliance costs individually and in the aggregate, would force operators to shut-in wells.

The Local Community Organization's Alternate Proposed Rule

79. The LCO was comprised of three nonprofit groups, Grand Valley Citizens Alliance, League of Oil and Gas Impacted Coloradoans, and Western Colorado Alliance. Each group has a general stated purpose of protecting neighborhoods, homes and citizens from the potential adverse effects of oil and gas development in Colorado.

80. On November 5, 2019, the LCO submitted an alternate proposal to increase the LDAR inspection frequencies for tanks and oil and gas production facilities that are within 1,000 feet of "Building Units." Tanks and facilities subject to the rule would require quarterly LDAR inspections if they have emissions between 2 and 12 tpy and monthly LDAR inspections if they have emissions greater than 12 tpy.

81. LCO defined "Building Unit" as "a residential building unit, and every five thousand (5,000) square feet of a building floor area in commercial facilities or every fifteen thousand (15,000) square feet of building floor area in warehouses that are operating and normally occupied during working hours."

82. LCO's stated purpose for the alternate proposed rule was "to achieve the co-benefit of providing greater public health and safety protections."

83. As required by the APPCA, LCO submitted an initial EIA along with its alternate proposed rules. LCO's EIA was based on its definition of "building unit" which LCO used to approximate the number of oil and gas facilities that would be impacted by its alternate proposed rule. Specifically, LCO calculated the number of Building Units impacted by the alternate

proposed rule based on address point data from the Colorado Information Marketplace for 33 of Colorado's 64 counties. LCO then created buffer zones around the address points of the Building Units to determine how many facilities were located within 1,000 feet from the address points, as well as other distances. The estimated economic impact of the alternate proposed rule therefore relies on this method of calculating the distance of oil and gas facilities from Building Units.

84. On November 9, 2019, LCO submitted a final EIA. LCO did not make any changes to the methodology it used to calculate how many facilities would be impacted by the alternate proposed rule.

85. On December 12, 2019, five days before the rulemaking hearing, after the deadline for parties to submit alternate rules, the LCO filed a substantially different "revised alternate rule." The LCO failed to provide an updated EIA with the December 12, 2019 alternate proposal, despite the fact that it significantly increased the types of facilities that would be subject to increased LDAR inspections under its revised alternate proposal.

86. Specifically, LCO replaced "Building Unit" with the term "Occupied Areas." Occupied Areas is defined much more broadly than Building Units: "(1) a building or structure designed for use as a place of residency by a person, a family, or families. The term includes manufactured, mobile, and modular homes, except to the extent that any such manufactured, mobile, or modular home is intended for temporary occupancy or for business purposes; (2) indoor or outdoor spaces associated with a school that students use commonly as part of their curriculum or extracurricular activities; (3) five thousand (5,000) or more square feet of building floor area in commercial facilities that are operating and normally occupied during working

hours; and (4) an outdoor venue or recreation area, such as a playground, permanent sports field, amphitheater, or other similar place of outdoor public assembly."

87. Even after submitting its revisions on December 12, LCO repeatedly indicated – incorrectly – that the alternate proposed rule only applied to facilities within 1,000 feet of "homes." Matt Sura, LCO's representative stated in his presentation to the Commission, "[i]n moving to our alternate proposal, our alternate proposal is simple. If there is going to be oil and gas development within 1,000 feet of a home, we expect that there's going to be increase[d] monitoring on those locations, and that if they do find a leak that they're going to, they're going to fix that leak more quickly." He later stated, "[y]ou understand that there's a problem of air pollution near homes, and you have a clear solution that has shown to be cost effective."

88. Based on the LCO testimony, the Commission appears to have misunderstood the breadth of the alternate rule that it eventually adopted. Mr. Sura was asked by Commissioner Gerber "[a]nd, and so, is – that's the alternate proposal is any well pad or well site within I hear – did I hear 1,000 feet of an occupied dwelling that that would, that would be required for continuous monitoring to prevent such a, a case from happening?" Mr. Sura responded, "that's correct."

89. The Division did not support the LCO proposal. The Division reported that it, "believe[d] that a more appropriate time to consider the frequencies proposed by the LCO, particularly for the smaller sites, would be with the continuous monitoring rulemaking anticipated for 2020" and that operators should "work with LCO in advance of next year's Regulation Number 7 Rulemaking." The Division reiterated at the Rulemaking, "the Division does not support at this time the LCO Proposal . . . I think we're concerned about some of the

issues you've already heard a lot of testimony about; how it would work, and I think especially how it would impact the Commission's current repair schedule."

90. In the limited time available to review the LCO alternate proposal, and even without the benefit of an EIA applicable to the revised alternate proposal, numerous parties demonstrated the proposal's inconsistency with the APPCA and objected to its late introduction.

91. For instance, the WRLG demonstrated that the LCO's EIA was inaccurate in its calculations of the asserted benefits of increased LDAR. As Dr. Considine explained, "they do not account for diminishing marginal rates of newly discovered leaks. As a result, they over-estimate avoided emissions and under-estimate the marginal costs of avoided emissions."

92. Similarly, the DJ Basin Operator Group showed how the LCO failed to acknowledge and estimate the increased costs associated with monitoring future development of "occupied areas" within 1,000 feet of an oil and gas facility. The proposal would require operators to constantly monitor new, ongoing, and potential construction of additional Building Units and Outside Activity Areas surrounding at least hundreds of facilities statewide. An ongoing monitoring effort would require intermittent and repeated field surveys which would be difficult to manage and expensive – costs that were not included in the LCO's economic impact analysis. The LCO and the Commission also ignored the vagueness inherent in the LCO alternate proposal; for instance, neither addressed whether the 1,000-foot radius for the regulated area is measured from the center of the occupied area or a fence line.

Rules Adopted by the Commission

93. After approximately one-and-a-half hours of deliberation, the Commission adopted all of the Division's numerous proposed revisions to Regulations 3 and 7, including those opposed by WRLG and other parties.

94. During deliberations on the storage tank threshold, two Commissioners indicated concern regarding the economic impact of that provision of challenged revisions on western and rural counties and operators of lower producing wells, but those concerns were dismissed by the other Commissioners without substantive analysis or apparent consideration of the evidence presented by WRLG and other parties.

95. During deliberations, several Commissioners rejected the arguments of WRLG regarding storage tank thresholds solely based on concerns expressed during public comment sessions, a general desire to improve air quality statewide, concerns regarding climate change, and the notion that the financial concerns of operators in western and rural Colorado depend on gas prices established internationally more than any other factor, a proposition for which no expert testimony was offered or received, and not at all on the costs of compliance associated with the challenged provisions.

96. Among other things, the Commission adopted the 5,000 barrel per year throughput threshold for requiring operators to install equipment to control the loadout of liquid hydrocarbons from facilities to trucks. Although one Commissioner questioned the cost-effectiveness of this threshold based on economic data presented by industry parties, this concern was dismissed without substantive analysis. Instead, the Commissioners referred to the regulations that other states have promulgated as well as general health concerns.

97. The Commission also adopted the Division's proposal to increase LDAR inspections to semi-annual for storage tanks emitting 2 to 12 tpy of VOCs without addressing any of the parties' arguments related to the increased costs and ineffectiveness of increased inspection frequencies to semi-annual, rather than annual. The Commission's deliberations on this proposed rule focused almost exclusively on the LCO's alternate proposal to increase inspections based on proximity to occupied areas.

98. Additionally, the Commission adopted part of LCO's revised alternate proposal, to increase LDAR inspection frequency for facilities within 1,000 feet of an "occupied area" to quarterly for facilities emitting between 2 and 12 tpy and monthly for facilities emitting more than 12 tpy.

99. The Commission did not address the deficiencies in the LCO's EIA or the definitional or implementation concerns arising from the revised alternate proposed rule, as expressed by various parties to the Rulemaking.

100. During deliberations, the Commissioners demonstrated confusion regarding the term "occupied areas" as defined in the LCO's revised alternate rule. Prior to a vote on the revised alternate rule, Commissioner Grobe stated "I think what we're proposing is we're going with the Division, but the Local County Government's on frequency of LDAR around residential or the definition of a, of a – basically, a home, school." Commissioner Schendler stated, "I support the Local Community Organization proposal, proximity proposal, because the, the issue that seems to come up more than anything in the state is facilities near playgrounds and near houses."

101. The Commission did not address the meaning of the word "outside area" or what kinds of buildings or areas would be subject to the revised alternate proposed rule, despite the confusion that this term generated among parties to the Rulemaking and the complete absence of data regarding facilities near any occupied areas other than building units or homes.

102. The adopted rules were published in the Colorado Register on January 25, 2020 and made effective February 14, 2020.

FIRST CLAIM FOR RELIEF

(Colorado Air Pollution Prevention and Control Act, Colorado Administrative Procedure Act, Air Quality Control Commission Procedural Rules)

103. The Plaintiffs reallege and incorporate herein all the preceding allegations in this Complaint.

104. The Colorado APA requires courts to hold unlawful and set aside agency actions found to be, among other things, arbitrary and capricious; a denial of a statutory right; an abuse of discretion; unsupported by substantial evidence when the record is considered as a whole; or otherwise contrary to law.

105. The APA, the APPCA, and the Commission's Procedural Rules require agencies to conduct robust economic analyses of their actions.

106. The Colorado APA provides that agency action taken without evaluation of its economic impact may have unintended effects, and therefore, it is the continuing responsibility of agencies to analyze the economic impact of agency actions to determine whether the actions promote the public interest.

107. The APPCA provides that the failure to provide an EIA of any alternate proposed rule will preclude such proposed rule or alternate proposed rule from being considered by the Commission.

108. The Commission's Procedural Rules state that "alternate proposed rule text must be accompanied by a final Economic Impact Analysis."

109. LCO filed an alternate proposal and an EIA on November 5, 2019.

110. On December 12, 2019, LCO filed a substantially revised alternate proposal that significantly increased the types of facilities that would be subject to increased LDAR inspections. The LCO's December 12, 2019 alternate proposal was not accompanied by an EIA.

111. The revised alternate proposal included definitional and other revisions that were so substantial as to render the EIA associated with the LCO's initial proposal no longer applicable. There was thus no EIA evaluating the LCO's revised alternate proposal.

112. The Commission violated the APA, the APPCA, and its own Procedural Rules when it adopted the LCO's December 12, 2019 alternate proposal without considering the economic impact of the alternate proposal.

SECOND CLAIM FOR RELIEF
(Air Quality Control Commission Procedural Rules)

113. The Plaintiffs reallege and incorporate herein all the preceding allegations in this Complaint.

114. The Colorado APA requires courts to hold unlawful and set aside agency actions found to be, among other things, arbitrary and capricious; a denial of a statutory right; an abuse of discretion; unsupported by substantial evidence when the record is considered as a whole; or otherwise contrary to law.

115. The Commission's Procedural Rules state that the Hearing Officer "will not accept an alternative proposal by a party after the prehearing conference. However, the parties are encouraged to develop consensus positions and to narrow the issues in contention prior to a final Commission action, but only if the other parties have a reasonable opportunity, to evaluate such alternative proposals."

116. On December 12, 2019, five days before the Rulemaking hearing and a month after the prehearing conference, the LCO filed a substantially revised alternate proposal.

117. The LCO's revisions to its alternate proposal were so substantial that other parties in the Rulemaking were not given a reasonable opportunity to evaluate and respond to the LCO's December 12, 2019 alternate proposal.

118. The Commission violated its own regulations when it adopted the LCO's revised alternate proposal without providing the other parties a reasonable opportunity to evaluate and respond to the LCO's revised alternate proposal.

THIRD CLAIM FOR RELIEF
(Colorado Air Pollution Prevention and Control Act)

119. The Plaintiffs reallege and incorporate herein all the preceding allegations in this Complaint.

120. The Colorado APA requires courts to hold unlawful and set aside agency actions found to be, among other things, arbitrary and capricious; an abuse of discretion; unsupported by substantial evidence when the record is considered as a whole; or otherwise contrary to law.

121. The APPCA requires the Commission to give priority to and take expeditious action upon consideration of a request by a unit of local government that the Commission consider local concerns respecting environmental and economic effects.

122. Throughout the Rulemaking, the WRLG continually requested that the Commission consider the fact that western and rural counties would bear disproportionately heavier economic burdens from the new regulations, and also would receive disproportionately less air quality benefit.

123. The Division did not evaluate such impacts; disregarded testimony on them; and offered no economic testimony to the contrary.

124. The administrative record – including the Commissioners' deliberations – establish that the Commission adopted new rules that did not "bear a reasonable relationship to the economic, environmental, and energy impacts," as required by the APPCA.

125. The Commission violated the APPCA by failing to prioritize and consider western and rural local concerns respecting the environmental and economic effects of the new regulations, and by failing to ensure the Challenged Revisions bore a reasonable relationship to economic, environmental, and energy impacts.

FOURTH CLAIM FOR RELIEF
(Declaratory Judgment, C.R.S. § 113-51-101 et seq. and C.R.C.P. 57)

126. The Plaintiffs reallege and incorporate herein all the preceding allegations in this Complaint.

127. The APPCA requires the Commission to give priority to and take expeditious action upon consideration of a request by a unit of local government that the Commission consider local government concerns respecting environmental and economic effects.

128. As members of the WRLG Coalition, Plaintiffs were a party to the Rulemaking and continually requested that the Commission consider local concerns respecting economic

effects of the proposed rules. Plaintiffs are therefore interested persons with respect to the Commission's Rulemaking.

129. There is an actual controversy between Plaintiffs and Defendants because the Challenged Revisions adopted by the Commission disproportionately and unnecessarily impact Plaintiffs' economies.

130. The Commission's denials of Plaintiffs' statutory rights present questions of law and statutory construction appropriate for resolution through a declaratory judgment.

131. A declaratory judgment by this Court will terminate and afford relief from the uncertainty and insecurity regarding whether the Commission must give any priority to local governments' economic concerns regarding proposed regulations.

132. Plaintiffs seek a declaration that the Commission failed to prioritize and consider western and rural local government concerns respecting the environmental and economic effects of the Challenged Revisions, that it failed to ensure the Challenged Revisions bore a reasonable relationship to economic, environmental, and energy impacts, and that the Challenged Revisions are therefore invalid.

FIFTH CLAIM FOR RELIEF
(Colorado Administrative Procedure Act)

133. Plaintiffs reallege and incorporate herein all the preceding allegations in this Complaint.

134. The Colorado APA requires courts to hold unlawful and set aside agency actions found to be, among other things, arbitrary and capricious; an abuse of discretion; unsupported by substantial evidence when the record is considered as a whole; or otherwise contrary to law.

135. Because there was no EIA or other cost-benefit analysis considering the LCO's revised alternate proposal – i.e., no analysis of how many facilities would be subject to the proposal, nor any analysis of the costs or benefits of the proposal – and because such analysis was effectively impossible given the vagueness of the definitions contained in the LCO revised alternate proposal, the administrative record lacks substantial support for the LCO's revised alternate proposal.

136. The Commission's adoption of the LCO's revised alternate proposal therefore was arbitrary and capricious, an abuse of discretion, unsupported by substantial evidence, and contrary to law.

SIXTH CLAIM FOR RELIEF
(Colorado Administrative Procedure Act)

137. Plaintiffs reallege and incorporate herein all the preceding allegations in this Complaint.

138. The Colorado APA requires courts to hold unlawful and set aside agency actions found to be, among other things, arbitrary and capricious; an abuse of discretion; unsupported by substantial evidence when the record is considered as a whole; or otherwise contrary to law.

139. The Final EIAs failed to adequately consider the cumulative costs of complying with the proposed controls in rural areas and the economic impact the proposed controls would ultimately have on western and rural local governments, as required by the APPCA.

140. The Division's cost-benefit analysis failed to adequately consider the proposed rules' direct and indirect costs to local governments and the adverse effects on rural economies, as required by the APA.

141. The Division's regulatory analysis failed to adequately describe the probable quantitative impact of the proposed rules on western and rural local governments and failed to adequately determine whether there are any less costly methods or less intrusive methods for achieving the purpose of the proposed rules.

142. Plaintiffs and their coalition partners, as well as other parties to the Rulemaking, presented credible evidence that the Division's analyses failed to account for the disproportionately heavy burden and disproportionately small air quality benefits of the new regulations for western and rural local governments.

143. The Commission's reliance on the inadequate and statutorily flawed EIAs, cost-benefit analysis, and regulatory analysis as well as the Commission's failure to adequately consider credible and independent economic analyses renders the Commission's decision arbitrary and capricious, an abuse of discretion, unsupported by substantial evidence in the record, and contrary to law.

WHEREFORE, Plaintiffs pray for the following relief:

a. An order vacating the Challenged Revisions;

b. A judgment declaring that the Commission denied Plaintiffs a statutory right and that the Challenged Revisions therefore are invalid;

c. An order remanding this matter to the Commission for further proceedings to be conducted consistent with a Court ruling and all applicable law and regulations; and

d. Such other relief as this Court may deem just and proper.

Dated: March 12, 2020.

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