DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street Denver, CO 80202	DATE FILED: April 24, 2023 4:31 PM CASE NUMBER: 2018CV32513
Plaintiffs: WILDGRASS OIL & GAS COMMITTEE; JANICE CHARLES; DAVID MCNICHOLAS; and HEATHER MCNICHOLAS **v.** **Defendants:** COLORADO OIL & GAS CONSERVATION COMMISSION and EXTRACTION OIL & GAS, INC.	**Δ COURT USE ONLY Δ** Case No.: 2018CV32513 Division: 209

ORDER RE: RULE 106 MOTION

This matter is before the Court on a Complaint filed by Plaintiffs Wildgrass Oil & Gas Committee ("Wildgrass"), Janice Charles, David McNicholas, and Heather McNicholas (collectively referred to as "Petitioners") seeking judicial review of Colorado Oil & Gas Conservation Commission's (the "Commission") decision to grant permits for oil and gas operations around the City and County of Broomfield ("Broomfield"). After reviewing the pleadings, the record, the parties' oral arguments, and the applicable law, the Court finds and orders as follows:

I. BACKGROUND

1. In 2017 Extraction Oil & Gas, LLC ("Extraction") filed at least eight spacing applications with COGCC – the first step in establishing an oil and gas project. These applications were given Commission Docket Numbers 170900596, 170900598, 170900601, 170900602, 170900603, 170900605, 170900749, and 170900752.

2. The Wildgrass Homeowners Association and its subcommittee the Wildgrass Oil & Gas Committee, through counsel, filed protests in several of these spacing applications.

3. Broomfield also filed protests to many of these applications.

4. Although the protests by Wildgrass and Broomfield were brought separately, many of the same concerns were shared by the protesters, namely the potential size of the project, the potential for health and safety impacts, and the nuisance impacts that might occur.

5. Concurrently with the filing of these spacing applications, Broomfield and Extraction were finalizing the negotiations for a contractual Operator Agreement ("OA") governing the terms of Extraction's allowable operations in Broomfield.

6. The OA governs every aspect of Extraction's operations in Broomfield and requires Extraction to employ a long list of Best Management Practices ("BMPs") at all wells and locations.

7. The OA expressly requires all BMPs to be included on all permit applications.

8. In prehearing procedures, Extraction and Broomfield negotiated an agreement to include the following language in the Draft Report of the Commission:

> The wells will be drilled from surface locations within the unit or at legal location(s) on adjacent lands and subject to the October 24, 2017 Amended and Restated Oil and Gas Operator Agreement between Applicant and the City and County of Broomfield.

9. The Commission held hearings on October 30 and 31st of 2017, including Docket Numbers 170900598, 171000749, 170700471, 170900535, 170900596, 170900602, 170900603, 170900601, 170900605, 171000752.

10. On October 31, 2017, for procedural reasons pertaining to Extraction providing inadequate notice to Wildgrass, the Commission held over portions of Dockets 170900598 and 171000749 until the December meeting solely regarding the Lowell South Drilling and Spacing Unit.

11. On October 31, 2017, during Commissioner deliberations, Commissioner Randall proposed altering the stipulated language quoted in Paragraph 8 above.

12. The language Commissioner Randall proposed struck the words “subject to” and inserted the words “Extraction Oil & Gas, LLP’s, Applications for Permits to Drill, Form 2, and Oil and Gas Location Assessments, Form 2A, will comport with [the OA].”

13. The Commission adopted Commissioner Randall's proposed change to the stipulated language (the "Comport Obligation") and the language as finally incorporated into the spacing order reads:

> Any applications for Permits to Drill (Form 2) or Oil and Gas Location Assessments (Form 2A) filed by Extraction Oil & Gas, Inc. in the unit on surface lands within the City and County of Broomfield will comport with the October 24, 2017 Amended and Restated Oil and Gas Operator Agreement between Applicant and the City and County of Broomfield.

14. On October 31, 2017, a vote of the Commission determined to include the Comport Obligation "in all applicable Orders."

15. On October 30th and 31st, 2017, the Commission approved Order 407-2209, Order 407-2216, Order 407-2220, 407-2221, Order 407-2222, Order 407-2245. These Orders contained the "Comport Obligation" language.

16. On December 11, 2017, the Commission approved Order 407-2256 and Order 407-2274. These Orders also contained the "Comport Obligation" language.

17. The well Locations at issue in this case are the pads within these "Comport Obligation" spacing units, including the Livingston Pad, the Interchange A & B Pad, the Northwest A Pad, the Northwest B Pad, and the United Pad.

18. Extraction submitted its Form 2A applications for the Interchange A & B pad and the Livingston pad on January 16, 2018.

19. Extraction's Form 2A application for an Oil and Gas Location Assessment for the Interchange A & B pad contains 53 of the total 57 OA BMPs, some of which

mirror the OA BMPs only in part because of Extraction rewording and omitting some provisions from the OA BMPs.

20. The approved Form 2A for the Interchange Location contains only 23 of the 57 OA BMPs in some form.

21. Extraction's Form 2A application for an Oil and Gas Location Assessment for the Livingston pad contains 56 of the total 57 OA BMPs, some of which mirror the OA BMPs only in part because of Extraction rewording and omitting some provisions from the OA BMPs.

22. However, Extraction still submitted all the OA BMPs in their original form as an attachment to the Livingston Form 2A application.

23. In an email sent on May 25, 2018, Extraction asked the Commission to incorporate all the BMPs from the OA by reference into the Livingston Form 2A.

24. Despite this request, the Commission once again omitted several OA BMPs from their approved Form 2A, resulting in an approved Form 2A for the Livingston Location containing only 22 of the 57 OA BMPs in some form.

25. Extraction submitted its Form 2A application for the Northwest A pad on February 26, 2018.

26. Extraction submitted its Form 2A applications for the Northwest B pad and the United pad on April 13, 2018.

27. Extraction's Form 2A submissions for the Northwest A, Northwest B, and United Pads included 18 of the 57 OA BMPs apiece, some of which mirror the OA BMPs only in part because of Extraction rewording and omitting some provisions from the OA BMPs.

28. However, Extraction continued to submit all the OA BMPs in their original form as an attachment to the United Form 2A application.

29. The final approved Form 2A Oil and Gas Location Assessments for each of these sites contained 22 of the 57 OA BMPs each because of the Commission incorporating some of the OA BMPs which were missing from the applications back into the approved permits.

30. Following the permit approvals for the Livingston Location, Petitioners filed a Complaint in this Court on July 6, 2018, seeking judicial review pursuant to C.R.S. § 24-4-106.

31. On August 30, 2018, Defendant Colorado Oil & Gas Conservation Commission filed a Motion to Dismiss the Complaint.

32. On October 12, 2018, Petitioners filed a Motion for Leave to Amend the Complaint, which sought to add claims seeking judicial review of the permits approving the Interchange A & B, Northwest A, Northwest B, and United Locations.

33. On December 12, 2018, Extraction filed a Motion to Intervene which was granted by this Court on December 17, 2018.

34. On May 13, 2019, this Court granted Defendants' Motion to Dismiss and denied Petitioners' Motion to Amend the Complaint.

35. Petitioners appealed these decisions, and the Court of Appeals upheld this Court's dismissal of Petitioners' Declaratory Judgment and Promissory Estoppel claims but reversed the dismissal of the Administrative Procedure Act claim finding that Petitioners did have standing to pursue this claim.

36. On August 1, 2021, after this matter was remanded from the Court of Appeals, this Court granted Petitioners' Motion for Leave to Amend the Complaint adding claim seeking judicial review of the permits approving the Interchange A & B, Northwest A, Northwest B, and United Locations.

II. STANDARD OF REVIEW

A. Standing

Subject matter jurisdiction involves "the court's authority to deal with the class of cases in which it renders judgment." *In re Water Rights of Columbine Ass'n*, 993 P.2d 483, 488 (Colo. 2000). In determining whether a court has subject matter jurisdiction, the Court must refer to the nature of the claim (the facts alleged) and the relief sought. *Id.*; *Currier v. Sutherland*, 215 P.3d 1155, 1160 (Colo. App. 2008). The general subject matter jurisdiction of a district court may be limited by an express constraint created by the legislature. *Currier*, 215 P.3d at 1160. C.R.S. § 24-4-106(4) provides 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 plaintiff bears the burden of proving a court has subject matter jurisdiction when such jurisdiction is challenged, but a court must accept as true all allegations set forth in the complaint in determining whether a Plaintiff has alleged sufficient injury to confer standing. *Marks v. Gessler*, 350 P.3d 883, 899 (Colo. App. 2013); *City of Boulder v. Pub. Serv. Co. of Colorado*, 996 P.2d 198, 203 (Colo. App. 1999). If the plaintiff cannot establish the trial court has subject matter jurisdiction or the court has no power to hear the case, the court must dismiss the action. *See* C.R.C.P. 12(h)(3).

Standing is a prerequisite to establishing subject matter jurisdiction that can be raised at any time during the proceedings and must be determined prior to a determination on the merits. *Hickenlooper v. Freedom from Religion Found., Inc.*, 338 P.3d 1002, 1006 (Colo. 2014). As such, a reviewing court will consider not just the allegations in the complaint, but "any other evidence submitted on the issue of standing." *Bd. of Cty. Comm'rs, La Plata Cty. v. Bowen/Edwards Assoc., Inc.*, 830 P.2d 1045, 1053 (Colo. 1992). To have standing, a plaintiff must have suffered an injury in fact to a legally protected interest. *Wimberly v. Ettenberg*, 570 P.2d 535, 539 (Colo. 1977). An injury in fact can be an intangible injury, but injuries that indirectly affect a plaintiff or are incidental to a defendant's conduct are not sufficient to confer standing. *Cloverleaf Kennel Club, Inc. v. Colorado Racing Comm'n*, 620 P.2d 1051, 1054, 1058 (Colo. 1980).

An injury in fact can arise from the invasion of rights created by statute. *Id.* (establishing that "injury in fact conferring standing may not only be intangible but may exist solely by virtue of statutes creating legal rights the invasion of which creates standing" (internal citations and quotations omitted)). Additionally, Colorado courts have recognized that plaintiffs can establish standing by demonstrating risk of environmental injuries to places a plaintiff actively uses. *Grand Valley Citizens' All. v. Colorado Oil & Gas Conservation Comm'n*, 298 P.3d 961, 964 (Colo. App. 2010) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv. (TOC), Inc.*, 528 U.S. 167, 183 (2000) and *Rocky Mountain Animal Def. v. Colorado Div. of Wildlife*, 100 P.3d 508, 513 (Colo. App. 2004)).

B. Judicial Review Under the Administrative Procedure Act

Under the State Administrative Procedure Act, "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." C.R.S. § 24-4-106(4). Upon review, the agency's decision will be upheld unless the court finds that it is:

> (I) Arbitrary or capricious; (II) A denial of statutory right; (III) Contrary to constitutional right, power, privilege, or immunity; (IV) In excess of statutory jurisdiction, authority, purposes, or limitations; (V) Not in accord with the procedures or procedural limitations of this article 4 or as otherwise required by law; (VI) An abuse or clearly unwarranted exercise of discretion; (VII) Based upon findings of fact that are clearly erroneous on the whole record; (VIII) Unsupported by substantial evidence when the record is considered as a whole; or (IX) Otherwise contrary to law, including failing to comply with section 24-4-104(3)(a) or 24-4-105(4)(b).
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> C.R.S. § 24-4-106(7)(b).

In all cases, "the court shall determine all questions of law and interpret the statutory and constitutional provisions involved and shall apply the interpretation to 3 the facts duly found or established." C.R.S. § 24-4-106(7)(d). In addition, the court "must give deference to the reasonable interpretations of the administrative agency that is authorized to administer and enforce the statute at issue." *Gessler v. Grossman*, 488 P.3d 53, 58–59 (Colo. App. 2015). Generally, when a party challenges the sufficiency of the evidence supporting an agency's final decision, the court will "examine the record in the light most favorable to the agency decision." *Schlapp ex rel. Schlapp v. Colorado Dep't of Health Care Policy & Fin.*, 284 P.3d 177, 181 (Colo. App. 2012) (citation omitted). The court will not decide the facts and will uphold the decision if there is substantial evidence in the record as a whole. *Id.*

III. ANALYSIS

A. Wildgrass has standing to pursue its claims against the Interchange A & B, Northwest A, Northwest B, and United Location permits.[1]

An organization has standing to sue when "(1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted, nor the relief requested, requires the participation of individual members of the lawsuit." *Colorado Union of Taxpayers Found. v. City of Aspen*, 418 P.3d 506, 510 (Colo. 2018). The parties do not

[1] Defendants do not challenge Wildgrass's standing to pursue its claims against the Livingston permits as associational standing was definitively found for these claims by the Court of Appeals.

contest that the second and third elements for associational standing are met here. Instead, Defendants claim that none of Wildgrass's members would otherwise have standing to sue in their own right. This element can be established through a traditional showing of standing (i.e. an injury in fact to a legally protected interest) by any one of Wildgrass's members. Here, Defendants challenge a finding that Wildgrass's members have demonstrated an injury in fact.

Wildgrass has associational standing to pursue its claims to the additional permits added to the Complaint following the Court of Appeals decision. As a threshold matter, the Court is not convinced by Defendants' argument that Petitioners must provide specific allegations of injury that are that are traceable specifically to these newly challenged operations to demonstrate injury in fact. The Court is unaware of any legal authority which would mandate such a requirement in a case such as this, nor do Defendants cite to any. Furthermore, such a requirement would make it nearly impossible for a plaintiff to demonstrate standing in a situation such as this where several drilling operations are all occurring within close proximity to one another. Absent legal authority to the contrary, this Court is unwilling to impose such a stringent requirement upon Colorado's traditionally lenient standing test. *See Ainscough v. Owens*, 90 P.3d 851, 856 (Colo. 2004).

The Court is also unconvinced by Defendants' argument that Petitioners live too far from the newly challenged operation sites to suffer any of the claimed injuries which

were found by the Court of Appeals to grant Petitioners standing with respect to the claims against the Livingston permits. While Defendants are correct in stating that the Court of Appeals based its finding of standing upon "[Wildgrass's] members' proximity to the [Livingston] operation as landowners," the Court of Appeals did not hinge this finding on a specific distance within which the Petitioners alleged injuries would become direct and palpable enough to confer standing. COA Opinion, ¶ 27. And while this Court understands the Commission has found that the greatest risk of the type of injuries Petitioners allege occurs within 2,000 feet of oil and gas operation sites, the Court does not understand this determination to mean that there is no occurrence of such injuries outside of this 2,000-foot range. To the contrary, this Court finds it hard to believe that the injuries Wildgrass's members allege in their affidavits (risks associated with increased traffic, risks of explosions, fires, and spills, noise and light pollution, diminished property values, etc.) would not be attributable, at least to some extent, by oil and gas operations occurring less than four miles (and even less distance for some of the affiants) from where they reside and recreate. The Court of Appeals decision further supports a finding that Petitioners have suffered an injury in fact resulting from the operations at these sites despite living outside of the Commission's "high risk" range. When the Court of Appeals decided that Petitioners had standing to pursue their claims against the Livingston permits, the Commission was utilizing a reduced "high risk" range of only 1,000 feet and none of Wildgrass's members lived within this range. *See* Rule

604.a. (2016). Despite this, the Court of Appeals found that Petitioners had suffered an injury in fact. Clearly then, the Commission's determination of where the greatest risk of injury is found because of oil and gas operations is not a constraint upon Courts in determining where such injuries actually occur. Considering the foregoing, Petitioners sufficiently pleaded an injury in fact and, therefore, have standing to pursue their claims against the Interchange A & B, Northwest A, Northwest B, and United Location permits.

B. The Commission did not err by accepting the Form 2 and Form 2A applications.

Petitioners argue that the Comport Obligation requires that Extraction's Form 2 and Form 2A include all the OA BMPs and that the Commission acted arbitrarily and capriciously by accepting Extractions Form 2 and Form 2A permit applications because they did not meet this requirement. Defendants argue that the Comport Obligation merely required that Extractions Form 2 and Form 2A applications "reflect and be consistent with" the OA. Defendants therefore claim that they complied the Comport Obligation under this less stringent meaning of the Comport Obligation.

Regardless of the precise meaning of the Comport Obligation as it pertains to the requirements for Extraction's Form 2 and Form 2A applications (which this Court declines to decide), the Commission complied with the Comport Obligation, even under the stricter meaning Petitioners argued. Extraction submitted all the OA BMPs as an attachment to the Livingston Form 2A application and the United Form 2A application. AR pp. 11845, 14318. The Livingston application was filed on January 16, 2018, and was

one of the first permit applications at issue Extraction submitted (the Interchange application was filed contemporaneously; all other applications were filed after the Livingston application). AR p. 11834. In emails between Extraction and the Commission, Extraction requested that the OA BMPs be incorporated by reference into the Form 2A for the "Broomfield Project." AR p. 11787. The Court finds evidence in the record that Extraction and the Commission understood the "Broomfield Project" to encompass all of the permit applications at issue in this case because reference to the BMPs in the Livingston application (which was one of the first to be filed and contained all OA BMPs) is made during the review of all other permits. AR p. 12547 (Northwest A permit review referencing the Livingston permit: "[Commission] staff has discussed the same issues [regarding BMPs] on previous permits (Livingston and Interchange A and B) with [Extraction]."); AR p. 14306 (United permit review referencing the Livingston permit: "I will keep the [BMP regarding] flammable liquids the same as the Livingston [permit]."); AR p. 13172 (Northwest B permit review referencing the Livingston permit: "I have gone through the BMPs for the Northwest B [permit] and updated to match the Livingston pad [permit]."); AR p. 10535 (Interchange A & B permit review referencing the Livingston permit: "Extraction responded to Broomfield's comments [regarding BMPs], which relate to the Livingston and Interchange B portion of the Plan."). Because all OA BMPs were incorporated by reference into all permit applications belonging to the "Broomfield

Project," the Commission did not err when it accepted applications for the permits at issue here, regardless of the precise meaning of the Comport Obligation.

C. The Commission's approval of the permits at issue here was not arbitrary and capricious or otherwise unlawful pursuant to C.R.S. § 24-4-106(7)(b).

Under Colorado law, "[e]very agency decision respecting the grant. . .of a license shall be based solely upon the stated criteria, terms, and purposes of the statute, or regulations promulgated thereunder, and case law interpreting such statutes and regulations pursuant to which the license is issued or required." C.R.S. § 24-4-104(2). Licensing actions include the granting of permits, such as those at issue. C.R.S. § 24-4-102(7). This means that the "final agency action" subject to review pursuant to C.R.S. § 24-4-106 is the approval of each permit in its entirety, not the approval or rejection of the various BMPs included in the permit applications. Therefore, the Court can only set aside the Commission's approval of the permits at issue if the approval of each permit as whole was arbitrary or capricious or otherwise unlawful pursuant to C.R.S. § 24-4-106(7)(b).

Agency action is arbitrary or capricious if a reviewing court is "convinced from the record as a whole that there is a manifest insufficiency of the evidence to support the agency's decision." *Marek v. State, Dep't of Revenue, Motor Vehicle Div.*, 709 P.2d 978, 979 (Colo. App. 1985). Petitioners provide three main arguments that the approval of the permits was arbitrary and capricious: (1) the approval of the permits occurred in the absence of clear and consistent standards; (2) the articulated standards for rejecting

certain BMPs from the final permits were *post hoc* rationalizations; and (3) the criteria used for rejecting BMPs from the final permits were applied inconsistently and arbitrarily. The Court addresses each of these arguments in turn.

1. Clear and consistent standards guided the Commission's approval of the permits.

Petitioners cite *Farmer v. Colorado Parks & Wildlife Comm'n*, 382 P.3d 1263 (Colo. App. 2016) for the proposition that because the Colorado Oil and Gas Conservation Act (the "Act") only mentions BMPs once and the Commission's regulations provide little to no guidance for the Commission's decision to reject proposed BMPs, the approval of the permits at issue here was arbitrary and capricious. However, Petitioners misunderstand the court's holding in *Farmer*. The Court of Appeals holding in that case provides that agency decision-making which occurs in the absence of sufficient statutory or regulatory standards is inherently arbitrary and capricious. *Id.* at 1268-69. This means that when an agency engages in "quasi-judicial decision-making" subject to judicial review, the agency's decision-making must be guided by sufficient statutory or regulatory standards. *Id.* In *Farmer*, the agency action was the Colorado Parks and Wildlife Commission's decision to suspend an individual's hunting license for a certain period of time. *Id.* at 1266. Here, the agency action subject to judicial review is the Commission's decision to approve the permits at issue in this case; it is not, as Petitioners contend, the Commission's decision to reject certain BMPs from inclusion in the final permits. As such, in order for the Commission's actions at issue here to be found

arbitrary and capricious based upon the basis articulated in *Farmer*, there would need to be no sufficient statutory and regulatory standards in place which would have guided the Commission's decision of whether or not to approve these permits.

The Act establishes the standard which all permits must meet to be approved by the Commission. *See*, C.R.S. § 34-60-106(2)(d) (2013). The Commission's own regulations governing the permitting process have further expanded upon this standard. A division of the Colorado Court of Appeals has previously described the Commission's regulations as a "comprehensive" set of regulations which "regulate when, where, and how an operator may drill." *Town of Frederick v. N. Am. Res. Co.*, 60 P.3d 758, 766 (Colo. App. 2002). The extensive set of standards guiding the Commission here clearly differs from the situation in *Farmer* where the length of the hunting license suspension the Colorado Parks and Wildlife Commission imposed had no statutory or regulatory standards to guide the agency's decision-making process. 382 P.3d at 1269. Therefore, the Court finds sufficient statutory and regulatory standards guided the approval of the permits at issue to not be found arbitrary and capricious.

2. The articulated standards for rejecting certain BMPs from inclusion in the final permits were not post hoc rationalizations.

Petitioners also claim that the rationales the Commission provided for rejecting certain BMPs were *post hoc* rationalizations which would mandate that this Court set aside the approval of the permits under the arbitrary and capricious standard. A *post hoc* justification is one which is given after the action it seeks to justify has already occurred.

See generally, People v. Sotelo, 336 P.3d 188, 196 (Colo. 2014). Based upon this definition, the standards the Commission articulated for rejecting BMPs are clearly not *post hoc* justifications.

The Final Public Comment Responses for the Interchange A & B, Northwest A, and Northwest B permits are all dated August 21, 2018, and are incorporated as attachments to their respective permits which were approved on August 23, 2018. AR pp. 10516, 10533 (Interchange A & B Public Comment Response detailing the standards used by the Commission for evaluating OA BMPs and Interchange A & B approved Form 2A listing the Public Comment Response as an attachment, respectively); AR pp. 12527-28, 12543 (Northwest A and Northwest B Public Comment Response detailing the standards used by the Commission for evaluating OA BMPs and Northwest A approved Form 2A listing the Public Comment Response as an attachment, respectively); AR pp. 12527-28, 13215 (Northwest A and Northwest B Public Comment Response detailing the standards used by the Commission for evaluating OA BMPs and Northwest B approved Form 2A listing the Public Comment Response as an attachment, respectively). In other words, there is no support for the argument that the comments were developed after the decisions were made.

Furthermore, although the Petitioners are correct in stating that the Public Comment Response for the Livingston permit is not dated like the Public Comment Responses for the Interchange A & B, Northwest A, and Northwest B permits, the Public

Comment Response for the Livingston permit is still incorporated as an attachment into the final permit for the Livingston pad, so it existed prior to the final approval of the Livingston permit. AR pp. 11794-95, 11845 (Livingston Public Comment Response detailing the standards used by the Commission for evaluating OA BMPs and Livingston approved Form 2A listing the Public Comment Response as an attachment, respectively). It is, therefore, apparent that for the Interchange A & B, Northwest A, Northwest B, and Livingston permits, the Commission provided its reasons for rejecting certain BMPs prior to the final agency action of approving the permits.

Finally, while it does appear from the record there was no Public Comment Response generated specifically for the United permit which lists out the Commission's reasons for approving or denying specific BMPs, this is irrelevant for this specific permit as a result of four specific facts. First, as previously stated, all the permits at issue in this case were understood to be a part of the "Broomfield Project" (see Section (III)(B) above). Second, for all the permits belonging to the "Broomfield Project" which had Public Comment Responses, the reasons the Commission provided for approving or denying certain BMPs were identical. *Compare*, AR p. 10516 (Interchange A & B Public Comment Response detailing the standards used by the Commission for evaluating OA BMPs), AR pp. 11794-95 (Livingston Public Comment Response detailing the standards used by the Commission for evaluating OA BMPs), and AR pp. 12527-28 (Northwest A and Northwest B Public Comment Response detailing the standards used by the

Commission for evaluating OA BMPs). Third, the United permit was the last permit to be approved as a part of the "Broomfield Project" on October 2, 2018. AR p. 14313. And finally, the Commission has never claimed to use any criteria for evaluating the permits at issue here other than those listed in the Public Comment Responses. Therefore, considering the foregoing facts, it is logical to conclude that the Commission used the same criteria for rejecting or approving BMPs for the United permit. As a result, the Commission did not provide *post hoc* justifications for evaluating BMPs as part of their permit approval process in violation of C.R.S. § 24-4-106(7)(b).

3. The Commission's decision to reject certain BMPs from inclusion in the final permits is entitled to deference.

Finally, Petitioners argue that the Commission's decision to approve the permits at issue here is arbitrary and capricious on the basis that the criteria the Commission articulated for rejecting BMPs appear to have been applied inconsistently with other existing regulations and across different proposed BMPs. The Defendants argue the Commission's decision to reject certain BMPs from inclusion in the final permits is entitled to deference.

"In reviewing an agency's decision, [courts] view the record in the light most favorable to the agency, and ... defer to the agency's factual findings unless they are unsupported by the record or fail to abide by the statutory scheme." *Weld Air & Water v. Colorado Oil & Gas Conservation Comm'n*, 457 P.3d 727, 735 (Colo. App. 2019). Agency decisions that involve "factual and evidentiary matters within an agency's

specialized or technical expertise" are particularly deserving of deference by a reviewing court. *Rags Over the Arkansas River, Inc. v. Colorado Parks & Wildlife Bd.*, 360 P.3d 186, 196 (Colo. App. 2015). An agency's interpretation of statutory law is also entitled to deference "when the statute may be given more than one reasonable interpretation and the agency has employed its expertise to select a particular interpretation." *Colorado State Pers. Bd. v. Dep't of Corr., Div. of Adult Parole Supervision*, 988 P.2d 1147, 1150 (Colo. 1999). Similarly, an agency's interpretation of its own regulations is entitled to deference by a reviewing court when "it has a reasonable basis in law and is warranted by the record, but not if the rule clearly compels the contrary result." *Chase v. Colorado Oil & Gas Conservation Comm'n*, 284 P.3d 161, 165 (Colo. App. 2012). Importantly, these principles also apply to an agency's determination of the extent of its own jurisdiction. *Id.* at 167-68. Therefore, a reviewing court will only overturn an agency's determination as to the extent of its own jurisdiction if it clearly runs counter to the agency's statutory grant of jurisdictional authority or is an unreasonable interpretation of an otherwise ambiguous statute concerning the agency's jurisdictional authority. *Grynberg v. Colorado Oil & Gas Comm'n*, 7 P.3d 1060, 1062-63 (Colo. App. 1999).

It is important to note that Colorado courts have consistently held that in the permitting context, the Commission is not required to provide detailed explanations for why it rejected each individual BMP it did not include in the final permit. *See, Weld Air & Water*, 457 P.3d at 735-37; *Neighbors Affected by Triple Creek v. Colorado Oil & Gas*

Conservation Comm'n, 2021 WL 1300567 ¶¶ 84-94 (Colo. App. 2021) (unpublished). Furthermore, the Court of Appeals has determined that when the Commission retains some of the BMPs proposed as part of the application process, but rejects other BMPs that touch upon similar subject matter, it is implicit that the Commission considered all of the proposed BMPs and determined that the rejected BMPs were not necessary to include in the approved permits in order for the final permits to be compliant with the Act and the Commission's regulations governing permit approval. *Neighbors Affected by Triple Creek*, 2021 WL 1300567 at ¶ 93.

Petitioners make three primary arguments as to how the Commission's rejection of certain BMPs was arbitrary and capricious. First, Petitioners argue that it was arbitrary and capricious for the Commission to reject BMPs from inclusion in the final permits which were more protective than existing Commission regulations and did not create any conflicts that would make enforcement of existing Commission regulations more difficult. Petitioners argue that rejecting these BMPs was arbitrary and capricious because the Commission did not articulate a rationale that would result in these BMPs being rejected. However, as previously stated, it is not necessary for the Commission to provide a lengthy rationale for why it rejected every BMP. And while there might not be an explicit rationale which justifies the Commission's rejection of these BMPs, the implicit understanding is that these BMPs were not necessary to be included in the final permits for them to be compliant with the Act and the Commission's regulations. In fact,

Petitioners have provided no evidence that the final permits are not in compliance with the Act and the Commission's regulations, and this Court is unable to discern any way this could be the case. While the Court agrees it is disconcerting that the Commission would reject BMPs that are more protective of public health and the environment than the baseline the Act and the Commission's regulations provide, it is not within the province of this Court to substitute its judgment for that of the agency. Therefore, it was not arbitrary and capricious for the Commission to reject these BMPs.

The Petitioners' second argument is that the Commission acted arbitrarily and capriciously when it rejected some BMPs which appear to not meet any of the Commission's articulated criteria for rejecting BMPs and included some BMPs in the final permits which do appear to meet these criteria. With respect to this argument, Petitioners take issue with what they allege to be the Commission's inconsistent determination of the extent of its own jurisdiction. As previously stated, this Court must give deference to the Commission's determination of its own jurisdiction unless it is a clear violation of statutory authority or an unreasonable interpretation of an otherwise ambiguous statute. Petitioners have not provided evidence that any such violations or unreasonable interpretations have occurred, and this Court has not been able to discern any such arbitrary or capricious occurrences either with respect to the Commission's determination of its jurisdictional authority as it applies to the accepted and rejected BMPs. Furthermore, Petitioners have not provided any evidence that any of the BMPs

they claim were included in or rejected from the final permits were done so in ways which contravene the relevant statutory and regulatory mandates for permit approval. As such, this Court must defer to the Commission's "specialized [and] technical expertise" for evaluating BMPs as a part of the permit approval process. *Rags Over the Arkansas River*, 360 P.3d at 196. Therefore, the Commission did not act arbitrarily or capriciously when it accepted and rejected these BMPs.

Finally, Petitioners argue that under *Peoples Nat. Gas Div. of N. Nat. Gas Co. v. Pub. Util. Comm'n of the State of Colorado*, 698 P.2d 255 (Colo. 1985) and *Carney v. Civil Serv. Comm'n*, 30 P.3d 861 (Colo. App. 2001), the Court should find the Commission's actions here to be arbitrary and capricious as a result of any inconsistencies the Court might perceive in the Commission's permit approval process. In *Peoples Nat. Gas Div. of N. Nat. Gas Co.*, the Colorado Supreme Court found that the Public Utilities Commission had acted arbitrarily and capriciously when it awarded reparations when such an award ran counter to the factual findings the agency made. 698 P.2d at 265. Petitioners have pointed to no evidence that the Commission's rejection of the BMPs at issue run counter to their factual findings that the permits would not be compliant with the statutory and regulatory requirements for approved permits without the rejected BMPs. Therefore, the argument that the Commission has acted arbitrarily or capriciously in a manner similar to the Public Utilities Commission in *Peoples Nat. Gas Div. of N. Nat. Gas Co.* is unavailing. In *Carney*, the Court of Appeals found the Civil

Service Commission had acted arbitrarily and capriciously when it used an insufficiently objective personnel record evaluation that resulted in highly inconsistent outcomes. 30 P.3d at 864-66. Here, Petitioners have provided no evidence that the Commission's standards for evaluating BMPs are so insufficiently objective that they would result in inconsistent outcomes by the Commission when determining whether to approve a permit. In fact, in this case all the permits were approved in a similar manner based upon the Commission's review. Therefore, this argument that the Commission acted arbitrarily and capriciously in a manner like the Civil Service Commission in *Carney* is also unavailing.

IV. CONCLUSION

In summation, the Court finds that although the Petitioners had standing to seek judicial review of the permits at issue in this case, the Commission's approval of the permits was not arbitrary or capricious or otherwise unlawful pursuant to C.R.S. § 24-4-106(7)(b).

DATED: April 24, 2023.

BY THE COURT:

Sarah B. Wallace
District Court Judge