District Court Denver County, Colorado Court Address: 1437 Bannock Street, Room 281 Denver, CO 80202 Plaintiff: **WILDGRASS OIL AND GAS COMMITTEE** v. Defendant: **COLORADO OIL AND GAS CONSERVATION COMMISSION**	DATE FILED: October 8, 2019 6:59 PM FILING ID: DE298432C7F7E CASE NUMBER: 2019CV33888 ▲ ▲ **COURT USE ONLY**
Attorney or Party Without Attorney (Name and Address): COLORADO RISING FOR COMMUNITIES Joseph A. Salazar PO Box 370 Eastlake, CO 80614-0370 Phone Number: (303) 895-7044 E-mail: jas@salazarlaw.net FAX Number: Atty. Reg. #: 35196	Case Number: Division Courtroom

COMPLAINT FOR JUDICIAL REVIEW PURSUANT TO § 24-4-106, C.R.S. AND REQUEST FOR STAY AND DESIGNATION OF RECORD

Wildgrass Oil and Gas Committee ("WOGC") requests this Court to commence an action for judicial review issued by the Colorado Oil and Gas Conservation Commission on September 4, and 5, 2019 pursuant to § 24-4-106, C.R.S. WOGC is a community organization of individuals located in Broomfield, Broomfield County, Colorado and this Complaint has been timely filed as it is within 35 days after the agency actions became effective.

The following facts show how WOGC has been adversely affected or aggrieved:

1. On April 16, 2019, Governor Jared S. Polis signed into law SB 19-181. SB 19-181 amended the Colorado Oil and Gas Conservation Act (the "Act"), which completely changed the mission of the Colorado Oil and Gas Conservation Commission (the "Commission") and the manner by which the Commission is now required to regulated the oil and gas industry.

2. For example, prior to the passage of SB 19-181, the Act required to: "[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 the protection of the environment and wildlife resources." § 34-60-102(1)(a), C.R.S. (2018).

3. With the passage of SB 19-181, the Act now requires the Commission to: "[R]egulate the development and production of the natural resources of oil and gas in the state of Colorado in a manner that protects public health, safety, and welfare, including the protection of the environment and wildlife resources." § 34-60-102(1)(a)(I), C.R.S. (2019).

4. The director of the Commission is required to administer the provisions of the Act now that it has been amended by SB 19-181. § 34-60-104.5.

5. In addition to being required to adopt rules to conform with the mandates of SB 19-181, the Commission "shall regulate oil and gas operations in a reasonable manner to protect and minimize adverse impacts to public health, safety, and welfare, the environment, and wildlife resources and shall protect against adverse environmental impacts on any air, water, soil, or biological resource resulting from oil and gas operations. § 34-60-106(2.5)(a) and (10); § 34-60-108 (Rules-hearing-process).

6. The Commission also is required to promulgate rules "to establish a timely and efficient procedure for the review of applications for a permit to drill and applications for an order establishing or amending a drilling and spacing unit," and "in consultation with the department of public health and environment, to protect the health, safety, and welfare of the general public in the conduct of oil and gas operations." § 34-60-106(11)(a)(I)(A) and (II).

7. The Act, as amended by SB 19-181, further requires the Commission to consult with the department of public health and environment to "evaluate and address the potential cumulative impacts of oil and gas development." §34-60-106(11)(c)(II).

8. The Act, as amended by SB 19-181, further states: "The commission shall require every operator to provide assurance that it is financially capable of fulfilling every obligation imposed by this article 60 as specified in rules adopted on or after April 16, 2019. The rule-making must consider: Increased financial assurances for inactive wells and for wells transferred to a new owner; requiring a financial assurance account, which must remain tied to the well in the event of a transfer of ownership, to be fully funded in the initial years of operation for each new well to cover future costs to plug, reclaim, and remediate the well, and creating a pooled fund to address orphaned wells for which no owner, operator, or responsible party is capable of covering the cost of plugging, reclamation, and remediation." § 34-60-106(13). An operator may submit a variety of documents demonstrating financial assurance such as: (1) a guarantee of performance where the operator has a sufficient net worth to guarantee performance of every obligation imposed by the Act; (2) a certificate of general liability insurance; (3) a bond or other surety instrument; (4) a letter of credit, certificate of deposit, or other financial instrument; (5) an escrow account or sinking fund dedicated to the performance of every obligation imposed by the Act; (6) a lien or other security interest in real or personal property of the operator. § 34-60-106(13)(a)-(f).

Application:

9. With this legislative and statutory backdrop, on or about July 3, 2019, Extraction Oil & Gas, Inc. ("XOG") filed an Application and Notice of Hearing for a 880-Acre Horizontal Wellbore Spacing Unit for the Livingston S19-25-1N Well ("Application"). The Application was filed under Commission Rule 318A.e(5)C.

10. As of July 3, 2019, none of the Commission's rules, including Rule 318A.e(5)C had been amended to comply with SB 19-181.

11. Prior to filing its Application, XOG was obligated to provide notice to all owners of the proposed boundary well within the proposed wellbore spacing unit. Rule 318A.e(5)A. Owners are then provided a 30-day period after receipt of the notice to file an objection to XOG. Rule 318A.e(5)B. A copy of the objection must also be filed with the Commission. Owners are required to issue objection based on the following three issues:

- The notice did not comply with the information requirements of subsection A;

- Technical objection that either waste will be caused;
- Correlative rights will be adversely affected; or
- The operator is not an "owner" as defined by the Act.

12. Rule 318A.e(5) has not been updated to include considerations such as public health, safety, welfare, environment and wildlife resources, as required by SB 19-181. Rule 318A.e(5) also fails to take into consideration financial assurances from the operator, as required by SB 19-181.

13. WOGC members filed their objection with XOG. On July 17, 2019, WOGC timely filed their Objection to the XOG Application. WOGC's legal basis for the objection is as follows:

- The operator failed to provide any notice to WOGC members in the Application Lands involving a proposed horizontal wellbore spacing unit, as required by 318A.E(5)A. Without receiving any notice, Extraction did not comply with the informational requirements of 318A.E(5)A.

- In addition, SB 19-181 requires that for **any** spacing unit application, there must be proof that a local government siting permit was applied for and the disposition of that permit application, or that the local government does not have siting regulations. (Emphasis added). See *COGCC Operator Guidance, SB 190-181: Hearings and Permitting Groups*; § 34-60-116(b)(I)-(II), C.R.S. (2019). Upon information and belief, Extraction has failed to provide such certification to the COGCC with respect to this Application for a proposed 880-acre horizontal wellbore spacing unit.

- A sworn statement is a jurisdictional prerequisite.

- For WOGC members who did receive Extraction's notice, they object on the basis that Extraction's notice indicates that if an owner does not elect to participate or does not accept a lease offer, the owner will be considered a "nonconsenting owner" by Extraction. Neither state statute nor COGCC regulations give authority to Extraction to consider a mineral owner as "nonconsenting". WOGC further objects to Extraction's Application as, upon information and belief, Extraction failed to provide certification that it owns, or has secured the consent of the owners of, more than forty-five percent of the mineral interests to be pooled. See *COGCC Operator Guidance.* Extraction also fails to indicate that its offer was made in "good faith".

- A sworn statement to force pool mineral owners is a jurisdictional prerequisite.

- Additionally, WOGC objects to Extraction's Application as the rule of capture, upon which Colorado's Oil and Gas Conservation Act is based, does not apply to the forced pooling of nontransient minerals, such as shale, and any Commission orders allowing for such forced pooling is an unconstitutional and *ultra vires* act.

- WOGC objects to Extraction's notice and Application as mineral owners were not advised about all costs associated with the project, from inception to the closing and remediation of any drilled wells in this spacing unit.

- Based on Extraction's recent conduct in the area, particularly with respect to using toxic materials during drilling and violating the operator's agreement with Broomfield,

this Application for a proposed 880-acre wellbore spacing unit does not comply with § 34-60-106(2.5)(a), which states the "Commission shall regulate oil and gas operations in a reasonable manner to protect and minimize adverse impacts to public health, safety, welfare, the environment and wildlife resources and shall protect against adverse environmental impacts on any air, water, soil, or biological resource."

- WOGC members also object that the proposed 880-acre wellbore spacing unit would create waste or adversely affect their correlative rights as the production of gas and oil from this formation cannot be done without jeopardizing the public health, safety, and welfare, the environment, or wildlife resources. See §§ 34-60-103(11)(b), (12)(b), and (13)(b).

- WOGC members further object based on the fact that the Commission has not adopted rules that "evaluate and address the potential cumulative impacts of oil and gas development." § 34-60-106(11)(c)(II).

- WOGC members further object as rulemaking pursuant to SB 19-181 has not been completed and the Commission has not adopted rules to "minimize emissions of methane and other hydrocarbons, volatile organic compounds, and oxides of nitrogen from oil and natural gas exploration and production facilities and natural gas facilities in the processing, gathering and boosting, storage, and transmission segments of the natural gas supply chain." § 25-7-109(10)(a).

14. WOGC also sought the following relief from the Commission:

- The Commission affirm this objection and reject Extraction's Application.

- Any hearing on the Application be held after the COGCC rulemaking process has completed, particularly since neither the 300 Series nor the 500 Series rules are complete nor in compliance with SB 19-181.

- Any hearing on the Application be held after the COGCC and the Colorado Department of Health and Environment have completed their review of the cumulative impacts of this operation on public health, safety, welfare, environment, and wildlife resources pursuant to SB 19-181.

- The Commission reject Extraction's Application as Extraction cannot provide any objective assurance that this project can be completed in a manner that protects the public health, safety, welfare, environment, and wildlife resources.

- The Commission accept WOGC as protestants in the above-referenced cause and docket number and allow its full participation in the hearing.

July 22, 2019 Pre-Hearing Conference:

15. On July 22, 2019, a prehearing conference was held with the hearing officer, attorneys with XOG, various objectors, and representatives from Boulder County.

16. During the hearing WOGC asked the hearing officer what rules would be utilized during this process since SB 19-181 was now in effect and Rule 318A.e.5 was not in compliance with the statute. In a recording of the hearing, WOGC specifically noted:

> 28:45-29:27 318A no longer is in compliance with the law now that Senate Bill 181 is in effect. We have nothing here in terms of cumulative rights. There is nothing in 318 that talks about health, safety, welfare, environmental concerns, wildlife resources and we've indicated in our own objection some concerns about issues related to… minimizing emissions of methane and hydrocarbons….

17. A bit later in the hearing, the hearing officer expressed some concern about how the rules and SB 181 would be applied:

> 31:10-31:33 We are kind of in this awkward stage shall we say. The Commission and the director have determined that the statute does not require a complete shutdown until all the regulations are retooled. So I'm working with old regulations and trying to superimpose the gloss of SB 181 health, safety, welfare that sort of thing on it.

18. The director and Commission have taken the public position that they will not halt permitting despite the fact that rulemaking under SB 19-181 has not addressed dire procedural and substantive concerns involving the Commission's current rules as it relates to SB 19-181 mandates.

19. WOGC further addressed concerns that moving forward with this case would result in a failure to take into consideration SB 19-181's statutory mandate about analyzing the effects of oil and gas operations on the environment:

> 34:32-34:41 318 does not take into consideration cumulative impacts, we now believe that 318 is out of compliance with SB181.

20. With respect to WOGC's objection involving financial assurances, the hearing officer indicated:

> 46:05-46:16 There's concern about Extraction's economic health. That is simply not an issue we are going to take to the commission. It's not in the rule. It's not in the statute. Economic health is just not an issue.

21. WOGC objected to the hearing officer's ruling and presented an argument that financial assurances was contemplated by SB 19-181, which resulted in the following dialogue between WOGC counsel and the hearing officer:

> WOGC:
> 49:13-50:08 SB 181 talks about, and we all know this, that it's an issue of public, not just health and safety, but also welfare. Welfare also means economics. That what kind of economics will be impacted upon the public with respect to this drilling unit. What kind of bonds are being placed? What might the public have to face with respect to Extraction not being able to, from start to finish, which we put in our objection, from start to finish, be able to have the financial resources, from birth to remediation, of these wells? And so that does encompass public welfare

and so I understand where you're going with this, but we will just for the record verbalize our objection to not being able to look at the economic health.

Hearing Officer:

50:12-50:20 Is there any legislative history to support it? That's all we got is how to interpret 181 is legislative history.

WOGC:

50:20-51:00 I think that with respect to the legislature, the legislature did capture in their discussion as well as on the arguments on the floor as well as in committee some concern about the financial health of oil and gas companies. That's why we see in SB 181 bonding issues and that there will be rulemaking based off of bonding because there is concern about the public having to pay for oil and gas companies coming in and fouling the water, air, and land and what it means to remediate. So I think there's very strong legislative history with respect to that.

22. XOG's attorney argued that the old rules should apply in this case, which received a rebuke from the hearing officer:

Hearing Officer:

58:49-59:19 The rule is clear, but what I don't understand is the gloss of 181 health, safety, welfare, whatever on top of it since we are required in everything we do and every order we issue to take health, safety, welfare, environment, wildlife and all those good things into account. The last time I checked, it's been a long time since I was in law school, but the last time I checked statutes still trump rules.

Motion to Stay Proceedings:

23. As a result of the confusion generated by the prehearing discussion, WOGC filed a Motion to Stay Proceedings on August 1, 2019. As argued by WOGC, due process considerations and concerns that the Commission would engage in *ultra vires* acts required the matter be stayed until after rulemaking is completed by the Commission. In particular, WOGC argued:

> *With the Hearing Officer and the parties at a loss about the effects of SB 19-181 and the Director's Objective Criteria on the current rules, it should not be left up to the parties to divine what conduct the rules prohibit or allow, and there is a very real possibility of arbitrary and discriminatory enforcement.*

24. WOGC further noted that as a cumulative impacts analysis is required by SB 19-181, and as no analysis has been done by the Commission and the Colorado Department of Public Health and Environment, how can the Hearing Officer meet this statutory obligation in this matter?

25. WOGC also raised questions about what discovery, evidence, and testimony will be allowed in the process.

26. Furthermore, WOGC questioned what financial information will it be allowed to discover in the process.

27. On September 5, 2019, the hearing officer denied WOGC's Motion to Stay Proceedings arguing that the Director's Objective Criteria ("Criteria") is the interim standard. However, when the Director's Criteria was raised during the prehearing, it appeared that the Criteria does not apply until after a Rule 318A is completed. Thus, the Criteria are not taken into consideration during the 318A hearing.

28. Moreover, the Criteria do not describe any process related to hearings, at all.

29. Based on recorded community discussions involving the director, there is concern how the "objective" Criteria were developed and what evidence-based information was relied upon in the development of the Criteria.

Motion for Request for Discovery:

30. On August 7, 2019, WOGC moved to conduct discovery in this matter. WOGC fashioned its discovery based on the language found in Rule 318A and in SB 19-181. In particular, WOGC sought, among other things, discovery about:

- Public health, safety, welfare, environment, and wildlife resources;
- Cumulative impacts;
- Methane emissions monitoring; and
- Financial condition of XOG and financial assurances.

31. On September 4, 2019, the hearing officer denied WOGC's request for discovery related to: 1) the cumulative impacts of drilling the wellbore spacing unit on public health, safety, welfare, environment, and wildlife resources; 2) whether the wellbore spacing unit would have adverse impacts on public health, safety, welfare, environment or wildlife resources; 3) how methane emissions would be monitored at the subject site; 4) Broomfield County sending XOG cease and desist letters related to XOG oil and gas operations; 5) any complaints filed against XOG with the Commission; 6) any fines, sanctions, or penalties issued by the Commission against XOG; the amount of oil and gas (in US dollars) expected to be extracted from the unit; 7) the price oil needs to be to make the wellbore spacing unit profitable; 8) the economic stability of XOG; 9) communications between XOC and its landman related to offers made to mineral owners; 10) what costs would be borne by Extraction and any mineral owners for the wellbore spacing unit from the start of the project until reclamation and remediation; and 11) any financial schedule for the development of the wellbore spacing unit.

32. The hearing officer also denied each of WOGC's request for admissions involving: 1) the drop of XOG stock value; 2) XOG's total debt; 3) the drop in XOG's production; 4) the amount of assets sold by XOG in 2019; 5) the amount of assets sold by XOG in 2018; 6) that XOG has not performed any cumulative impacts analysis involving the wellbore spacing unit; 7) XOG has not performed an adverse impact analysis involving the wellbore spacing unit; 8) XOG cannot provide financial assurances to the state or local government that it will have the financial means to complete the project; 9) XOG has been fined by the state of Colorado in 2019; 10) XOG received a cease and desist letter from Broomfield County; and 11) XOG was asked by the Commission to stop using a drilling mud that caused Broomfield residents to have respiratory and other health problems.

Reasons for Relief:

33. The acts of the Agency, by and through the hearing officer, to deny the stay until rulemaking is complete and to deny discovery that is clearly warranted under SB 19-181 are arbitrary and capricious, a denial of a statutory right, contrary to a constitutional right, in excess of statutory jurisdiction, authority, purposes, or limitations, and an abuse or clearly unwarranted exercise of discretion, based upon findings of fact that are clearly erroneous on the whole record, unsupported by substantial evidence when the record is considered as a whole, or otherwise contrary to law. § 24-4-106(7).

34. These acts place WOGC at a significant disadvantage litigating the merits of the controversy and remedy on appeal would be inadequate. This case also presents issues of significant importance due to the fact that the Commission still presses ahead with permitting despite the significant changes to its organic statute (SB 19-181), the Commission's failure to adopt rules under SB 19-181, and unresolved questions about whether the Director's Objective Criteria can be applied during permit hearings.

35. Exhaustion of any administrative process would be futile as the director and the Commission have publicly stated their refusal to stay any permitting despite rulemaking not being complete and this controversy raises questions of law rather than issues committed to the COGCC's discretion and expertise.

Relief Requested:

36. WOGC requests that the Court stay permitting in this case and in all cases involving permitting of any drilling, pooling, and spacing units until COGCC rulemaking is completed.

37. WOGC further requests that the Commission be ordered to allow for discovery of information related to public health, safety, welfare, environment and wildlife resources; cumulative impacts of this operation; detailed financial information related to XOG and this project; information related to methane monitoring; fines and penalties levied against XOG by the state of Colorado; information related to the financial projections involving this project; and information related to cease and desist letters sent by the City and County of Broomfield to XOG related to public health, safety, welfare, environment and wildlife resources.

38. Declaratory and injunctive relief.

39. WOGC requests an immediate stay of all agency actions on the grounds that said actions will cause irreparable injury as follows: **(Please identify each issue separately and if you need more space than is provided, attach additional pages to the form.)**

Continuing this hearing without a clear set of rules and rules that comply with SB 19-181 will result in a violation of WOGC members' constitutional rights to due process and statutory rights under SB 19-181 and will cause irreparable injury.

Continuing this hearing without affording WOGC relevant discovery will unfairly prejudice WOGC's case and will inhibit WOGC's ability to meet its burden of proof, which also will cause irreparable injury.

I designate the following documents as relevant parts of such record, pursuant to §24-4-106(6), C.R.S.

1. The original or certified copies of all pleadings, applications, evidence, exhibits, and other papers presented to or considered by the agency.

2. A complete transcript of the hearing held on July 22, 2019 (date) at 9:00 a.m. (time) by the agency identified in this action.

3. The written order issued by the agency identified in this action.

I, hereby request that this Court find that the hearing officer's decision be reversed.

/s/Joseph A. Salazar 10/08/19

Signature of Attorney for Plaintiff Date