

<p>SUPREME COURT, STATE OF COLORADO</p> <p>Colorado State Judicial Building 2 East 14th Avenue, Suite 300 Denver, Colorado 80203</p>	
<p>Colorado Court of Appeals Case Number 16CA0564 Opinion by Judge Fox; Judge Vogt concurring; Judge Booras dissenting</p> <p>City and County of Denver District Court No. 14CV32637 Judgment by Judge J. Eric Elliff</p> <p><b>Petitioners:</b> Colorado Oil and Gas Conservation Commission</p> <p>and</p> <p>American Petroleum Institute and Colorado Petroleum Association</p> <p>v.</p> <p><b>Respondents:</b> Xiuhtezcatl Martinez, Itzcuahtli Roske-Martinez, Sonora Brinkley, Aerielle Deering, Trinity Carter, and Emma Bray, minors appearing by and through their legal guardians Tamara Roske, Bindi Brinkley, Eleni Deering, Jasmine Jones, Robin Ruston, and Diana Bray.</p>	<p>▲ COURT USE ONLY ▲</p> <p>Case Number: 2017SC297</p>
<p>Attorney for <i>Amicus Curiae</i> Northwest Colorado Council of Governments Torie Jarvis, #46848 P. O. Box 2308, Silverthorne, CO 80498 Phone No.: 970-596-5039 Email: <a href="mailto:qqwater@nwccog.org">qqwater@nwccog.org</a></p>	
<p><b><i>AMICUS CURIAE</i> BRIEF OF NORTHWEST COLORADO COUNCIL OF GOVERNMENTS, BY AND THROUGH ITS WATER QUALITY AND QUANTITY COMMITTEE, IN SUPPORT OF THE RESPONDENTS</b></p>	

## **CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief in support of Respondents complies with all requirements of C.A.R. 28, C.A.R. 29, and C.A.R. 32, including all formatting requirements set forth in those rules.

Specifically, I certify that:

The brief complies with the applicable word limit set forth in C.A.R. 29(d).  
It contains 2,760 words, which is not more than the 4,750 word limit.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28, C.A.R. 29, and C.A.R. 32.

/s/     *Torie Jarvis*

Torie Jarvis, #46848  
Attorney for Northwest  
Colorado Council of Governments

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## **I. INTEREST OF AMICUS CURIAE**

The Northwest Colorado Council of Governments is an association of local governments in the mountain region of northwest and central Colorado that works together on a regional basis. NWCCOG appears as *amicus curiae* by and through its Water Quality and Quantity Committee, a subcommittee of NWCCOG whose mission includes the protection and implementation of local government authority to protect water resources. Member jurisdictions of NWCCOG represent a southern portion of the gas-rich Piceance Basin which, like the Front Range of Colorado, is experiencing dramatically increased development of natural gas. NWCCOG regularly plans for, and reasonably regulates local impacts from, oil and gas development. Thus, it has an interest in how the COGCC interprets its statutory authority to protect public health, safety, and welfare.

NWCCOG writes in support of the Respondents and also supports the *amicus curiae* brief of the Local Governments in support of Respondents.

## **II. STATEMENT OF THE CASE**

The issue in this case is whether the Colorado Oil and Gas Conservation Commission (“Commission” or “COGCC”) rejected a petition for rulemaking based on a proper interpretation of its authority under the Colorado Oil and Gas Conservation Act, Sections 34-60-101 to -130, C.R.S. (2017) (“Act”), and Section

34-60-102(1)(a)(I) of the Act in particular. For the reasons set forth in this brief, the Court of Appeals correctly ruled that the COGCC misinterpreted the statute.

In May of 2014, the COGCC denied a petition for rulemaking from Martinez and other youth (“Martinez petition”), which requested a rule that would have required the COGCC to ensure drilling could occur without adverse impacts to human health or the environment before issuing any approvals to drill. When the COGCC denied the petition, it relied on an interpretation of its authority proffered by a memo from the Assistant Attorney General Jake Matter. The memo stated that the proposed rule was beyond the COGCC’s authority based on Section 34-60-102(1)(a)(I), of the Act, which reads in relevant part, “It is declared to be in the public interest 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.”

The Court of Appeals disagreed with the COGCC, holding that the COGCC “erred in interpreting Section 34-60-102(1)(a)(I), C.R.S., as requiring a balance between development and public health, safety, and welfare. The plain meaning of the statutory language indicates that fostering balanced, nonwasteful development is in the public interest when that development is completed subject to the protection of public health, safety, and welfare.” *Martinez v. Colorado Oil and Gas*



*Conservation Comm’n*, 2017 COA 37 at ¶ 25 (Colo. App. 2017). The Court of Appeals based its opinion on the plain language of Section 34-60-102(1)(a)(I) of the Act because the COGCC’s denial of the petition was based on that provision. As explained below, the Court of Appeals was correct to conclude that the plain language of the Act unambiguously allows for COGCC Rules that protect public health, safety, and welfare, without balancing a requirement to “foster” the industry.

### **III. ARGUMENT**

The question of whether the COGCC misinterpreted its authority “is a matter of statutory interpretation. This is a question of law, and therefore, [courts] review the case de novo.” *Ryals v. St. Mary-Corwin Reg’l Med. Ctr.*, 10 P.3d 654, 659 (Colo. 2000).

#### **A. The Court Should Focus on the COGCC’s Interpretation of its Authority under the Act.**

The only issue before this court is whether the COGCC, when it denied the Martinez petition, misinterpreted the Act as requiring any COGCC Rule for the protection of public health, safety, and welfare to strike a balance with fostering the industry. Because the COGCC has broad authority to deny a petition for rulemaking under the Colorado Administrative Procedures Act, the Court of Appeals properly “[did] not reach the merits of whether the Commission abused its

discretion in refusing to promulgate Petitioners' proposed rule. Instead, [its] decision only addresses the Commission's interpretation of its authority under the Act as a part of its denial of the petition for rulemaking, which [it] conclude[s] is incorrect.” § 24-4-103(7), C.R.S.; *Martinez*, 2017 COA 37 at ¶ 33. Judicial review of the denial of a petition for rulemaking is narrow. *Massachusetts v. U.S. Envtl Prot. Agency*, 549 U.S. 497, 527 (2008). The question before this court is not “the wisdom of” the COGCC’s denial of a rulemaking petition, but “the soundness of the reasoning by which [a] [c]ommission reaches its conclusions.” *United States v. Allegheny- Ludlum Steel Corp.*, 406 U.S. 742, 749 (1972).

In deciding whether to deny the petition, the COGCC relied on a memo from Assistant Attorney General Jake Matter, which stated that “[t]he Act charges the Commission with creating rules and policies that ‘[f]oster the responsible and **balanced** development . . . of oil and gas in the state of Colorado in a manner consistent with protection of public health, safety, and welfare . . .’ The Proposed Rule, if adopted, would require the Commission to readjust the balance crafted by the General Assembly under the Act, and is therefore beyond the Commission’s limited grant of statutory authority.” Jake Matter, Ass’t Attorney General, *Mem. to Comm’rs of the Colo. Oil and Gas Consv’n Comm’n*, at \*5 (April 11, 2014), citing § 34-60-102(1)(a)(I), C.R.S. The COGCC stated that this memo was “the primary

basis for the Commission’s denial of the Petition,” and “incorporated [relevant sections of the memo] by reference” into its order denying the petition. *Xiuhtezcatl Martinez, et. at.*, COGCC Order 1-187 at \*2 (May 29, 2014). The COGCC determined that “[t]he Proposed Rule, if adopted, would have required the Commission to readjust the balance crafted by the General Assembly under the Act, and is therefore beyond the Commission’s limited grant of statutory authority.” *Id.*

This is why the Court of Appeals focused on Section 34-61-102(1)(a)(I), C.R.S., and why this Court should do the same in determining whether the COGCC correctly interpreted its rulemaking authority.

**B. The General Assembly Delegated Authority to the COGCC to Craft Rules to Protect Public Health, Safety, and Welfare, without Requiring that Each Rule Foster the Industry.**

Nothing in the Act precludes the COGCC from enacting individual rules that protect public health, safety, and welfare, but that do not explicitly “foster” oil and gas development. “In construing statutory language, [Courts] read the statute as a whole.” *People vs. Sowell*, 327 P.3d 273, 275 (Colo. App. 2011). Some sections of the Act empower the COGCC to protect public health, safety, and welfare, while others empower the COGCC to foster development.

To protect public health, safety, and welfare, for example, the COGCC has the “authority to require . . . [t]he drilling, casing, operation, and plugging of seismic holes or exploratory wells in such manner as to prevent . . . the pollution of fresh water supplies by oil, gas, salt water, or brackish water; and measures to prevent blowouts, explosions, cave-ins, seepage, and fires.” § 34-60-106(1)(c), C.R.S. The COGCC “shall also have the power to perform all acts for the purpose of protecting underground sources of drinking water” and “shall promulgate rules and regulations to protect the health, safety, and welfare of any person at an oil or gas well.” § 34-60-106(9-10), C.R.S.

In 2008, the General Assembly directed the COGCC to “[p]romulgate rules, in consultation with the department of public health and environment, to protect the health, safety, and welfare of the general public in the conduct of oil and gas operations.” § 34-60-106(11)(a)(II), C.R.S. The COGCC also has “exclusive authority to regulate the public health, safety, and welfare aspects, including protection of the environment, of the termination of operations,” and can issue a certificate of closure only if the “applicant demonstrates that its closure plan protects public health, safety, and welfare.” § 34-60-106(17)(a-e), C.R.S. The COGCC also has authority to regulate oil and gas operations “to the extent necessary to protect public health, safety, and welfare . . . taking into consideration

cost-effectiveness and technical feasibility.” § 34-60-106(2)(d), C.R.S. Even this qualified grant of authority does not require the COGCC to “balance” protection of public health, safety, and welfare with fostering the industry – it simply requires the COGCC to consider cost-effectiveness and technical feasibility when choosing among alternative practices to protect the public.

In other sections of the Act, the General Assembly gave the COGCC authority to create rules that foster oil and gas development. For example, the COGCC has “authority to prevent waste and protect correlative rights of all owners in every field or pool.” § 34-60-117(1), C.R.S. This includes the authority “to establish drilling units of specified and approximately uniform size and shape” in order to “prevent or to assist in preventing waste, to avoid the drilling of unnecessary wells, or to protect correlative rights.” § 34-60-116(1), C.R.S. The COGCC also has “authority to. . . [l]imit the production of oil or gas, or both, from any pool or field for the prevention of waste, and to limit and to allocate the production from such pool . . . on a fair and equitable basis so that each such tract will be permitted to produce no more than its just and equitable share from the pool.” § 34-60-106(3)(a), C.R.S.

If the General Assembly had intended to require *all* COGCC rules to balance protection of public health, safety, and welfare with fostering oil and gas

development, it would have done so. But the word “balance” only shows up in provisions that have nothing to do with such a requirement. The General Assembly “declares [it] to be in the public interest to . . . plan and manage oil and gas operations in a manner that *balances development* with wildlife conservation.” § 34-60-102(1)(a)(IV), C.R.S. (emphasis added). The phrase “balances development with” wildlife conservation stands in contrast to the language relied upon by COGCC where the term “balanced” is used as an adjective to modify the term “development”:

It is declared to be in the public interest 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 protection of the environment and wildlife resources. § 34-60-102(1)(a)(I), C.R.S. (emphasis added).

Courts “assume that the General Assembly made intentional distinctions in the language of . . . related provisions and avoid ‘presum[ing] that the legislative body used the language idly and not with intent that meaning should be given to its language.’” *Hall v. Walter*, 969 P.2d 224, 231 (Colo. 1998) (quoting *Colorado Ground Water Comm'n v. Eagle Peak Farms, Ltd.*, 919 P.2d 212, 218 (Colo.1996)).

The General Assembly knows how to require that regulations are balanced, as it did with wildlife protection. Interpreting the phrase “in a matter consistent with protection of public health, safety, and welfare” as requiring a balance with fostering the industry overlooks the fact that the General Assembly knows how to articulate its intent to strike a balance. § 34-60-102(1)(a)(I), C.R.S.

The statutory structure of the Act unambiguously authorizes the COGCC to develop rules for the protection of public health, safety, and welfare, just as it authorizes rules that foster the industry. The Act does not require every rule to balance protecting public health, safety, and welfare with fostering oil and gas development.

**C. The COGCC’s Interpretation of its Authority does not Uniformly or Consistently Require Each Rule to Strike a Balance.**

Because the statutory scheme is unambiguous, the Court need not consider the COGCC’s previous understanding of its statutory authority. Courts “will not defer to administrative interpretation when the regulatory language is so clear as to compel the contrary result.” *Board of County Com'rs, LaPlata County v. Colorado Oil and Gas Conservation Com'n*, 81 P.3d 1119, 1125 (Colo. App. 2003). In this case, the language of the Act clearly empowers the COGCC to enact rules that protect public health, safety, and welfare without a concern for fostering the industry.

Moreover, courts do not accord deference “[w]hen an agency interpretation is not uniform or consistent.” *Lobato v. Industrial Claim Appeals Office*, 105 P.3d 220, 223 (Colo. 2005). The COGCC has not uniformly or consistently indicated that its authority requires it to balance any regulation for public health, safety, and welfare with a duty to foster oil and gas development, so no deference is due to its interpretation in this case.

COGCC Rules begin by stating that all rules are intended “to prevent waste and to conserve oil and gas in the State of Colorado *while protecting* public health, safety, and welfare, including the environment and wildlife resources.” 2 Colo. Code Regs. § 404-1, Rule 201 (2017). And the COGCC has enacted many other rules for the sole purpose of protecting of public health, safety, and welfare. *See, e.g.*, 2 Colo. Code Regs. § 404-1, Rule 508(b)(1)(“The rules and regulations of the Commission as they are applied to oil and gas operations are expected to *adequately address* impacts to public health, safety and welfare” (emphasis added)); *see also* 2 Colo. Code Regs. § 404-1, Rule 216(f)(5) (to request hearing on drilling permit, party must “establish . . . that the conditions of approval are insufficient to protect public health, safety, [and] welfare.”); 2 Colo. Code Regs. § 404-1, Rule 523(c)(2)(F) (requiring penalty calculations to assess “the degree of adverse impact to public health, safety, or welfare”).



Moreover, the COGCC Director may withhold approval of an Application for Permit-to-Drill (APD) if “the Director has reasonable cause to believe the proposed well or Oil and Gas Location . . . presents an imminent threat to public health, safety and welfare.” 2 Colo. Code Regs. § 404-1, Rule 303(j)(1); *see also* 2 Colo. Code Regs. § 404-1, Rule 325(b) (where Director may withhold application for underground injection well “when the Director has reasonable cause to believe that the proposed disposal well could result in a significant adverse impact on the environment or public health, safety and welfare”). In a 2015 rulemaking, the COGCC determined that its Director had the statutory authority to impose “conditions of approval [for an APD] to address public health, safety, or welfare concerns, on a case by case basis,” with no reference to balancing. *COGCC Statement of Basis, Specific Statutory Authority, and Purpose*, Cause No. 1R Docket No. 151100667, Governor’s Taskforce Rulemaking at \*22-23 (adopted Jan. 25, 2016), <http://cogcc.state.co.us/documents/reg/Rules/GtfRulemaking/Final%20Rule%20Docs/20160204%20Statement%20of%20Basis%20and%20Purpose%20Docket%20151100667%20w%20Exh.pdf>.

With the intention of protecting public health, safety, and welfare, the COGCC instituted rules in 2012 for statewide groundwater monitoring and

sampling. 2 Colo. Code Regs. § 404-1, Rule 609. In its statement of basis and purpose for the rulemaking, the COGCC explained:

The primary purpose of Rule 609 is to set forth a statewide rule for groundwater sampling and monitoring. The rule is entirely new. The quality of groundwater can affect not only human health, wildlife resources and the environment, but also society and the economy. Groundwater contamination can adversely affect property values, the image of a community, economic development, and the overall quality of life. *COGCC Statement of Basis, Specific Statutory Authority, and Purpose*, Cause No. 1R Docket No. 1211-RM-03, Statewide Water Sampling and Monitoring (new Rule 609 and amended Rule 318A.e.(4)), at \*3 (adopted Nov. 9, 2012), [http://cogcc.state.co.us/documents/reg/Rules/2012/groundwater/StatementofBasisPurpose\\_Rule609\\_FINAL\\_012513.pdf](http://cogcc.state.co.us/documents/reg/Rules/2012/groundwater/StatementofBasisPurpose_Rule609_FINAL_012513.pdf).

Finally, the COGCC's 2015 *Enforcement Guidance and Penalty Policy* begins with a summary of the COGCC's understanding of its statutory authority to regulate for the protection of public health, safety, and welfare:

The mission of the [COGCC] is to foster the responsible development of Colorado's oil and gas natural resources. In Colorado, this means that the development of these natural resources must be consistent with protection of public health, safety, and welfare, including the environment and wildlife resources, *at all times*. *COGCC Enforcement Guidance and Penalty Policy*, at \*32 (adopted Jan. 26, 2015, revised April 27, 2015), [http://cogcc.state.co.us/documents/reg/Policies/Final%20Enforcement\\_Guidance%20-](http://cogcc.state.co.us/documents/reg/Policies/Final%20Enforcement_Guidance%20-)

%20Jan%202015%20revs%204-27-2015.pdf  
(emphasis added).

The COGCC does not portray a consistent understanding that its authority to regulate for public health, safety, and welfare is tempered by a requisite balancing with fostering oil and gas development. Instead, it has enacted many rules to protect public health, safety, and welfare.

#### **IV. CONCLUSION**

The Colorado Oil and Gas Conservation Act authorizes COGCC rules that provide exclusively for the protection of public health, safety, and welfare. The COGCC has enacted many rules for the protection of public health, safety, and welfare. In this case, the COGCC improperly rejected the proposed rule under the false assumption that each rule had to also “foster” the industry. Therefore, COGCC’s denial of the Martinez petition is based on an incorrect interpretation of the statute.

Respectfully submitted this 25th day of May 2018.

/s/ Torie Jarvis

Torie Jarvis, #46848  
Attorney for *Amicus Curiae* Northwest  
Colorado Council of Governments  
P. O. Box 2308, Silverthorne, CO 80498  
Phone No.: 970-596-5039  
Email: [qqwater@nwccog.org](mailto:qqwater@nwccog.org)

## **CERTIFICATE OF SERVICE**

I hereby certify that on the 25<sup>th</sup> of May, 2018, the foregoing *amicus curiae brief of the Northwest Colorado Council of Governments in support of the Respondents* was served via the Colorado Courts E-filing System on all counsel who have consented to electronic service in this case.

/s/ Torie Jarvis

Torie Jarvis, #46848  
Attorney for Northwest  
Colorado Council of Governments