DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202 Plaintiffs: **GEORGE R. HILTON** and **MARY J. HILTON** **v.** Defendants: **COLORADO OIL AND GAS CONSERVATION COMMISSION,** and **BILL BARRETT CORPORATION,** and **WPX ENERGY ROCKY MOUNTAIN, LLC.**	DATE FILED: February 26, 2013 ▲ ▲ **COURT USE ONLY** Case Number: **2010CV9841** Courtroom: 309

ORDER

This matter is before the Court on Defendants' motions to dismiss Plaintiffs' complaint. The Court has reviewed the pleadings, the file, the applicable law, and being fully advised on the matter, finds, concludes and orders as follows:

APPLICABLE FACTS

Plaintiffs George Hilton and Mary Hilton own a mineral interest underlying lands in Garfield County, Colorado, including a one-half mineral interest underlying the land described as the NW1/4NE1/4 and NE1/4NW1/4 of Section 36, Township 6 South, Range 91 West, 6th P.M. The Hilton lands have been leased to different oil and gas operators since the Hiltons acquired the mineral interest, and during the time periods relevant to this matter, the lands were leased to Orion Energy, LLC. Through various assignments, Orion's interest was transferred to Williams Production RMT Company (now WPX Energy Rocky Mountain, LLC).

The Hilton lands are subject to the orders of the Colorado Oil and Gas Conservation Commission (the Commission). These orders establish drilling and spacing units. Specifically, in 2005, the Commission established a 640 acre drilling and spacing unit with 10 acre density drilling, which applies to the Hilton lands. As lessors, the Hiltons have a royalty interest in the drilling unit.

On July 28, 2010, Plaintiffs filed an application with the Commission to vacate the existing 640 acre drilling and spacing unit. According to Plaintiffs, they filed their application in response to applications filed by Bill Barrett Corporation (BBC) regarding the Hilton lands. One application, filed on March 20, 2010, sought to vacate the 640 acre drilling unit. BBC later withdrew this application. On May 19, 2010, BBC also filed an application to force pool Plaintiffs' lands with the other lands in the 640 acre drilling unit. The parties agree that, currently, no force pooling action is in place.

Defendants BBC and WPX Energy Rocky Mountain, LLC, (formerly Williams Production RMC Company) filed a motion to dismiss the Plaintiffs' application to vacate the existing drilling unit, asserting that Plaintiffs were not proper applicants under the Commission's promulgated rules. Specifically, the motion to dismiss stated that, under the Commission's rules, only owners within an existing drilling unit may apply for modification of that drilling unit. Defendants asserted that Plaintiffs had only a royalty interest in the drilling unit, and that, in granting a lease, Plaintiffs granted lessees the exclusive right to drill and produce oil and gas from the Hilton lands. Therefore, according to the motion to dismiss, Plaintiffs did not fall within the definition of "owner."

On September 14, 2010, a hearing officer for the Commission issued a recommendation that Plaintiffs' application be denied for lack of standing. On October 21, 2010, the Commission

heard oral argument regarding whether Plaintiffs were entitled to a hearing. At the conclusion of the hearing, the Commission approved the hearing officer's recommendation and dismissed Plaintiffs' application.

PROCEDURAL HISTORY

1. On December 21, 2010, Plaintiffs filed their Complaint for Judicial Review under C.R.S. § 34-60-111 and C.R.S. § 24-4-106. There, Plaintiffs requested judicial review of the Commission's dismissal without a hearing of Plaintiffs' application.

2. On February 4, 2011, the Commission filed its motion to dismiss and motion to strike. Defendants WPX and BBC also filed a motion to dismiss Plaintiffs' complaint. WPX and BBC also filed their joinder in the Commission's motion to strike.

3. On March 4, 2011, Plaintiffs filed their combined response brief and cross motion to find Plaintiffs standing as a matter of law.

4. On April 8, 2011, the Commission filed a reply to Plaintiffs' brief. BBC and Williams also filed a reply.

5. On February 7, 2012, the Court stayed this appeal, pending decision of the Colorado Supreme Court on the *Grand Valley Citizens' Alliance v. Colorado Oil and Gas Conservation Commission* case.

6. On August 25, 2012, Plaintiffs filed a supplemental brief and motion for remand.

7. On September 18, 2012, WPX and BBC filed a response to Plaintiffs' brief.

8. On September 21, 2012, the Commission filed its response.

9. On September 28, 2012, Plaintiffs filed their combined reply to the response briefs of WPX and BBC and the Commission.

MOTIONS TO DISMISS

In their motions to dismiss, Defendants assert that Plaintiffs do not have standing to invoke this Court's jurisdiction. Specifically, Defendants argue that (1) Plaintiffs have failed to show that the Commission's action caused Plaintiffs an injury in fact, and (2) Plaintiffs do not have a legally protected interest in initiating a Commission hearing to vacate a drilling unit.

Law and Analysis

There are two elements which a plaintiff must satisfy to show standing. First, a plaintiff must allege that the challenged action has caused him or her injury in fact. *Wimberly v. Ettenberg*, 194 Colo. 163, 166, 570 P.2d 535, 538 (1979). Second, the interest which the plaintiff seeks to protect must arguably be within the zone of interests protected or regulated by the statute in question. *Id.; see also Cloverleaf Kennel Club, Inc. v. Colorado Racing Commission*, 620 P.2d 1051, 1055-57 (Colo. 1980) ("[W]e must inquire whether the petitioners' complaint sufficiently alleges that they sustained an injury in fact to an interest which, as a matter of law, is entitled to legal protection under the act."). If either of these elements is not satisfied, the plaintiff lacks standing and his or her case must be dismissed. *Wimberly*, 194 Colo. at 168, 570 P.2d at 539.

An allegation that a plaintiff does not have standing raises a challenge to the court's subject matter jurisdiction. *Lobato v. State*, 218 P.3d 358, 368 (Colo. 2009). Standing is a threshold issue, and it requires a court to make determinations based primarily upon the allegations contained in the complaint. *Ainscough v. Owens*, 90 P.3d 851, 857 (Colo. 2004); *see also Colorado General Assembly v. Lamm*, 700 P.2d 508, 516 (Colo. 1985). In determining whether a plaintiff has asserted an injury sufficient to confer standing, the court must accept the

averments of the complaint as true and may consider other evidence supportive of standing. *Lamm*, 700 P.2d at 516.

If the complaint fails to allege injury, the case must be dismissed. *Id*. If the plaintiff's allegations establish sufficient injury, the question of whether the plaintiff is protected by law from the alleged injury must be answered. *Id*. The determination of whether a plaintiff is protected by law from the alleged injury is "inextricably tied" to the merits of the dispute. *Id*. A decision that a plaintiff lacks standing because the alleged injury does not infringe upon any legally protected right of the plaintiff may be viewed as equivalent to a holding that the plaintiff has failed to state a claim upon which relief may be granted. *Id*.

Injury in Fact

Plaintiffs claim that the Commission's action caused them several different injuries in fact. For the following reasons, the Court disagrees.

Royalty Interests

First, Plaintiffs assert that the Commission's denial of their application to modify the drilling unit has caused their royalty payments to be diluted. However, even assuming that their royalty payments are being diluted, Plaintiffs have failed to show that the Commission's denial of their application caused this injury. As set forth above, a plaintiff "must allege that the challenged action has caused him injury in fact." *Wimberly*, 194 Colo. at 166, 570 P.2d at 538. Here, Plaintiffs' claim regarding royalty payments appears to be a contractual dispute between Plaintiffs and their lessees. Further, it is unclear whether vacating the current drilling unit would resolve the contractual dispute. Accordingly, the Court finds that Plaintiffs' claims regarding dilution of their royalty payments does not state an injury in fact.

Force Pooling

Plaintiffs next assert that there is a threat that their lessees will re-file a request to force pool Plaintiffs' interests, and therefore, Plaintiffs have standing to request a hearing to vacate the drilling unit. The Court disagrees.

When two or more separately owned tracts of land are within one drilling unit, the parties may pool their interests. § 34-60-116(6), C.R.S. The Commission also may force pool interests, upon application of an interested party, but only after notice and hearing. § 34-60-116(6), C.R.S.

To satisfy the injury in fact prong of the standing test, the injury must be direct and palpable. *Cloverleaf Kennel Club, Inc.*, 620 P.2d at 1057-59; *Olson v. City of Golden*, 53 P.3d 747, 752 (Colo. App. 2002). A claimed injury that is presently speculative and that cannot be determined until a remote time in the future is not sufficiently direct and palpable to support a finding of injury in fact. *Olson*, 53 P.3d at 747. Here, although an application to force pool Plaintiffs' interests was filed previously, Plaintiffs do not assert that their interests are subject to a force pooling order. Also, there are no allegations that, at present, the Commission is considering any application to force pool Plaintiffs' interests. Further, even if an application for force pooling were to be filed in the future, Plaintiffs' would be entitled to notice and hearing under section 34-60-116(6), C.R.S. Accordingly, the Court rejects Plaintiffs' claim that the possibility of future force pooling causes Plaintiffs injury in fact.

Correlative Rights

Plaintiffs also assert that the Commission's denial of their application to vacate the existing drilling unit caused an injury in fact to Plaintiffs correlative rights. The Court disagrees. Under section 34-60-103, C.R.S., correlative rights "means that each owner and producer in a common pool or source of supply of oil and gas shall have an equal opportunity to obtain and

produce his just and equitable share of the oil underlying such pool or source of supply." Here, Plaintiffs have transferred their rights to obtain and produce oil to lessees. Accordingly, Plaintiffs' claim that the Commission violated their right to equal opportunity to obtain and produce does not establish an injury in fact sufficient to confer standing.

Allegations that the Original Drilling Unit Violates Statutory Provisions

Plaintiffs also assert that the drilling unit they sought to vacate violated various statutory provisions. Plaintiffs assert that the violation of these provisions causes them an injury in fact. The Court disagrees.

The following are some of the expressed legislative purposes for the Oil and Gas Conservation Act: (1) to foster 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; (2) to protect public and private interests against waste in the production and utilization of oil and gas; and (3) to plan and manage oil and gas operations in a manner that balances development with wildlife conservation. §34-60-102, C.R.S. Further, the commission has the power to create drilling units for the following reasons: to prevent waste, to avoid drilling unnecessary wells, or to protect correlative rights. § 34-60-116, C.R.S.

As noted above, to satisfy the injury in fact prong of the standing test, the injury must be direct and palpable. *See Cloverleaf Kennel Club, Inc.* 620 P.2d at 1057-59; *see also Olson,* 53 P.3d at 752. An alleged injury that is presently speculative and that cannot be determined until a remote time in the future is not sufficiently direct and palpable to support a finding of injury in fact. *Olson*, 53 P.3d at 752. Here, any injury to Plaintiffs based on the Commission's alleged violation of the above statutory provisions is neither direct nor palpable. Instead, any claimed

injury based on these provisions would be speculative and remote in time. Accordingly, the Court finds that Plaintiffs have not asserted a sufficient injury in fact based on these alleged statutory violations.

Legally Protected Right

Further, even if Plaintiffs could establish injury in fact, Plaintiffs have failed to establish that they have a legally protected interest in initiating a hearing to modify the existing drilling unit.

First, under the Oil and Gas Conservation Act, the Commission is clearly permitted to administer and regulate oil and gas and to establish rules and regulations regarding practice and procedure. Under section 34-60-105, C.R.S., the commission has the power "to make and enforce rules, regulations, and orders pursuant to this article, and to do whatever may reasonably be necessary to carry out the provisions of this article." Further, "the commission shall prescribe rules and regulations governing the practice and procedure before it." § 34-60-108(1), C.R.S. The Commission also has the power to create and modify drilling units. Specifically, section 34-60-116(1), C.R.S., provides as follows:

> To prevent or assist in preventing waste, to avoid the drilling of unnecessary wells, or to protect correlative rights, the commission, upon its own motion or on a proper application of an interested party, but after notice and hearing as provided for in this section, has the power to establish drilling units of specified and approximately uniform size and shape covering a pool.

Upon application, notice and hearing, the commission "may decrease or increase the size of the drilling units or permit additional wells to be drilled within the established units in order to prevent waste or avoid the drilling of unnecessary wells, or to protect correlative rights[.]" § 34-60-116(4), C.R.S. These statutory provisions give the Commission the power to establish and

modify drilling units. When read together, sections 34-60-116(1) and (4), C.R.S., provide that interested parties may apply for establishment or modification of a drilling unit.

"Interested party," is not statutorily defined in the Oil and Gas Conservation Act. *See generally* § 34-60-103, C.R.S. However, under the rules promulgated by the Commission, "for purposes of applications for the creation of drilling units…[or] other applications for modifications to existing drilling unit orders…only those owners within the proposed drilling unit, or within the drilling unit to be affected by the application, may be applicants." 2 CCR 404-1:503(b)(1). Defendants assert that Plaintiffs do not fall within the statutory definition of "owner" set forth in the Colorado Oil and Gas Conservation Act, and therefore are not proper applicants under the Commission's rules. This Court agrees.

"'Owner" means the person who has the right to drill into and produce from a pool and to appropriate the oil or gas he produces therefrom either for himself or others or for himself and others[.]" § 34-60-103(7), C.R.S. Here, Plaintiffs' mineral interest has been subject to a lease during all times applicable to this appeal. Defendants assert, and Plaintiffs do not disagree, that in exchange for a royalty interest in the land, Plaintiffs have leased away their right to drill into the pool or to appropriate or produce from the pool. Accordingly, Plaintiffs do not fall within the statutory definition of "owner."

Plaintiffs, however, assert that this rule limiting those who my file applications to modify drilling units violates the statutory provision permitting "interested parties" to file applications regarding drilling units. This Court disagrees.

Reviewing courts should give considerable weight to an agency's interpretation of its own enabling statute, unless the agency's interpretation is not in accordance with the law. *State Dept. of Labor and Employment v. Esser*, 30 P.3d 189, 193 (Colo. 2001). Further, administrative

regulations are presumed valid and will not be struck down on review unless the challenging party has carried its burden to demonstrate that the regulation is in excess of statutory authority or otherwise invalid beyond a reasonable doubt. *Barr Lake Village Metropolitan Dist. v. Colorado Water Quality Control Com'n*, 835 P.2d 613, 615 (Colo. App. 1992).

Here, Rule 503 does not violate the Colorado Oil and Gas Conservation Act. As noted above, the Commission is empowered to create rules and regulations governing the practice and procedure before it. Rule 503 is an example of such a rule. Further, Rule 503 does not contradict section 34-60-116, C.R.S. As noted above, "interested party" is not defined in the Colorado Oil and Gas Conservation Act. Accordingly, because there is no clear violation of the Commission's enabling statute, and because it is within the powers of the Commission to promulgate rules and regulations governing the procedure before it, this Court finds that Rule 503 is valid and not in violation of the Commission's enabling statute.

Plaintiffs, however, assert that, under sections 34-60-105(1), C.R.S., and 34-60-108(7), C.R.S, they are entitled to a hearing on their application. The Court disagrees.

Section 34-60-105(1), C.R.S., provides in pertinent part, that "any person… may apply for any hearing before the commission... and jurisdiction is conferred upon the commission to hear and determine the same and enter its rule, regulation, or order in respect thereto." This section, however, does not specifically entitle any party to a hearing. Instead, the statute provides that any person may apply for a hearing. Nothing in this statute requires the Commission to conduct a hearing. Accordingly, this section does establish a right to a hearing.

Plaintiffs also assert that section 34-60-108(7), C.R.S., entitles them to a hearing. The Court disagrees.

Section 34-60-108(7), C.R.S., states as follows:

> The commission may act upon its own motion, or upon the petition of any interested person. On the filing of a petition concerning any matter within the jurisdiction of the commission, it shall promptly fix a date for a hearing thereon and shall cause notice of the filing of the petition and of the date for the hearing to thereon be given[.]

First, the Court notes that the provision requiring that the Commission fix a date for hearing is clearly subject to the preceding sentence, which permits the Commission to act upon petition of any interested person. "Interested person," like the term "interested party," is not defined in the Colorado Oil and Gas Conservation Act. Accordingly, as noted above, the Commission does not violate its enabling statute by setting rules and regulations regarding who specifically is entitled to a hearing when the enabling statute does not define who is an "interested person" or "interest party".

Second, the Court finds that section 34-60-105(1), C.R.S., and section 34-60-108(7), C.R.S., are not the controlling statutory provisions for this appeal. The underlying factual grounds for this appeal relate to an application to modify an existing drilling unit. Section 34-60-116, C.R.S., specifically addresses the Commission's powers to establish and modify drilling units. To the extent statutory provisions conflict, the specific prevails over the general. *See Comcast of California/Colorado, L.L.C. v. Express Concrete, Inc.*, 196 P.3d 269, 273 (Colo. App. 2007); *see also* § 2-4-205, C.R.S. Here, section 34-60-116, C.R.S., is the statutory provision which specifically addresses establishment and modification of drilling units. Therefore, if section 34-60-105, C.R.S, and section 24-60-108, C.R.S., were to conflict with section 34-60-116, C.R.S., the language in the more specific section 34-60-116, C.R.S., is the controlling provision.

The Court also rejects Plaintiffs' assertion that *Williams Natural Gas Co. v. Mesa Operating Ltd. Partnership*, 778 P.2d 309 (Colo. App. 1989), applies here. In *Williams Natural Gas Co.*, the issue on appeal related to who could participate or intervene in an already-scheduled hearing. Accordingly, *Williams Natural Gas Co.* does not directly apply to the factual situation presented in this appeal, where a party seeks to initiate a hearing to modify a drilling unit.

Plaintiffs argue, however, that the recent decision of the Supreme Court of Colorado in *Colorado Oil and Gas Conservation Com'n v. Grand Valley Citizens' Alliance* supports Plaintiffs' position that they have standing. The Court disagrees.

First, it is unclear to this Court whether the decision in *Grand Valley Citizens' Alliance* directly applies to the facts of this appeal. In *Grand Valley Citizens' Alliance*, the Supreme Court found that the Commission acted within its discretion when it limited who could obtain a hearing on the issuance of a permit to drill. *Grand Valley Citizens' Alliance*, 279 P.3d 646, 647 (Colo. 2012). More specifically, the Supreme Court found that: (1) section 34-60-108, C.R.S., did not mandate a hearing regarding issuance of a permit, and (2) a different section of the Colorado Oil and Gas Conservation Act dictated how the Commission should address permits. *Id*. at 647-649.

Further, although the opinion in *Grand Valley Citizens' Alliance* indicates that section 34-60-108(7), C.R.S., must be read in context with section 34-60-108(2), C.R.S., such a determination does not affect this appeal. Here, Plaintiffs assert that, because of *Grand Valley Citizens' Alliance,* the last sentence of section 34-60-108(7), C.R.S., must be read in context of section 34-60-108(2), C.R.S. Section 34-60-108(7), C.R.S., provides that "any person affected by any order of the commission shall have the right at any time to apply to the commission to

repeal, amend, modify, or supplement the same." Section 34-60-108(2), C.R.S, provides as follows: "No rule, regulation, or order, or amendment thereof, shall be made by the commission without at least twenty days' notice[.] The hearing shall be held at such time and place as may be prescribed by the commission, and any interested person shall be entitled to be heard."

This Court notes the last sentence of section 34-60-108(7), C.R.S., must also be read in context with the first sentence of section 34-60-108(7), C.R.S., which provides that: "[t]he commission may act upon its own motion, or upon the petition of any interested person." Again, interested person, as used in section 34-60-108(2), C.R.S., and section 34-60-108(7), C.RS., is not defined in the Colorado Oil and Gas Conservation Act. *Grand Valley Citizens' Alliance* does not interpret or apply this term and does not address whether the Commission's Rule 503 conforms to the applicable statutory provisions. Accordingly, the Court rejects Plaintiffs' claim that *Grand Valley Citizens' Alliance* entitles Plaintiffs to a hearing.

FAILURE TO STATE A CLAIM

Defendants also assert that Plaintiffs have failed to state a claim on which this Court could grant relief. For the reasons set forth above, the Court agrees that Plaintiffs have failed to establish that they were statutorily entitled to a hearing. Further, the Court notes that the State Administrative Procedure Act (APA) does not confer substantive rights upon which a claim for relief may be based. *Romer v. Board of County Com'rs of County of Pueblo, Colo.*, 956 P.2d 566, 576 (Colo. 1998). "[S]ubstantive legal rights must exist either by statutory language, by the agency's rules and regulations, or by some constitutional command." *Id*. Accordingly, the Court finds that the APA does not provide Plaintiffs a right to a hearing in this case. *See Bazemore v. Colorado State Lottery Div.*, 64 P.3d 876, 880 (Colo. App. 2002).

CONCLUSION

For the reasons set forth above, this Court finds that, as a matter of law, Plaintiffs lack standing and are not entitled to a hearing regarding their application to vacate an existing drilling unit. The Court, therefore, grants Defendants' motions to dismiss[1].

Date: February 26, 2013

Shelley I. Gilman
District Court Judge

[1] The Court rejects Defendants' requests to strike portions of Plaintiffs' complaint.