

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock St. Denver, Colorado 80202	DATE FILED: July 29, 2020 5:33 PM CASE NUMBER: 2020CV31022
Plaintiff: BOARD OF COUNTY COMMISSIONERS OF WELD COUNTY, COLORADO, v. Defendant: JILL HUNSAKER RYAN, in her official capacity as the Executive Director of the Department of Public Health and the Environment for the State of Colorado, THE COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT, and THE COLORADO AIR QUALITY CONTROL COMMISSION, an agency of the State of Colorado.	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> Case No: 20CV31022 Courtroom: 259
ORDER RE DEFENDANT’S C.R.C.P. 12(b)(1), (5) MOTION TO DISMISS PLAINTIFF’S COMPLAINT FOR LACK OF STANDING AND FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED, RESPECTIVELY	

THIS MATTER is before the Court on Defendant Jill Hunsaker Ryan (“Defendant Ryan”), the Colorado Department of Public Health and Environment (“Defendant CDPHE”), and the Colorado Air Quality Control Commission’s (the “Commission”) (collectively, the “State Defendants”) Motion to Dismiss Plaintiff’s Complaint for Lack of Standing and for Failure to State a Claim Upon Which Relief Can Be Granted (“Motion”). The Court, having reviewed the Complaint, the Motion, Plaintiff the Board of County Commissioners of Weld County’s (“Plaintiff”) Response, and all pertinent pleadings and authority, and being otherwise fully advised in the premises, finds and orders as follows:

FACTUAL AND PROCEDURAL BACKGROUND

On April 16, 2019, Governor Jared Polis signed Senate Bill 19-181 into law. Senate Bill 181 directed the Colorado Air Quality Control Commission to adopt rules to minimize emissions from a variety of sources. On September 19, 2019, the Air Pollution Control Division proposed

changes to Regulation 7, which relates to various types of emissions and emission sources and requested the Commission to hold hearings on the proposed changes. Plaintiff attended the hearing process and filed requests for a Regulatory Analysis and Cost-Benefit Analysis of the Division's proposed rules on October 15, 2019. Plaintiff then submitted expert testimony and other information in opposition to a variety of provisions of the proposed rulemaking during the prehearing phase in November 2019 and provided testimony at the December 2019 Hearing. On December 19, 2019 the Commission formally adopted its revisions to Regulation 7, which then became effective on February 14, 2020.

On March 13, 2020, Plaintiff filed their Complaint stating claims against the Defendants alleging that the Defendants (1) violated the Colorado Air Pollution Prevention and Control Act (hereafter, "Colorado Air Act") by failing to give the Plaintiff priority as a local government; (2) violated the Administrative Procedure Act ("APA") by failing to give the Plaintiff priority as a local government; (3) violated the Colorado Air Act, the APA, and the Commission's Procedural Rules by adopting a local community organizations' alternative rules; and (4) that Plaintiff should be granted a declaratory judgment related to the aforementioned claims. The Defendants now move to dismiss Plaintiff's claims in their entirety for lack of standing, or in the alternative seek to dismiss Plaintiff's first and fourth claims for failure to state a claim upon which relief can be granted and seek to dismiss Defendant Ryan and Defendant CDPHE for being improperly joined to the suit.

Defendant's Motion has been fully briefed and is now ripe for disposition.

LEGAL STANDARD

If the Plaintiff lacks standing to bring a suit, then courts do not have jurisdiction to hear it. Therefore, standing is a threshold issue that must be determined first to decide a case on its merits. *Ainscough v. Owens*, 90 P.3d 851, 855 (Colo. 2004). When it decides whether a party meets standing requirements, this Court will first determine whether there has been an injury in fact to a legally protected interest. *Wimberly v. Ettenberg*, 194 Colo. 163, 168, 570 P.2d 535, 539 (1977). Additionally, the Court will preclude standing when a government party seeking judicial

review is subordinate to the state agency whose action is challenged, and there has been no specific statutory authorization to seek review of the superior agency's action. *Douglas Cty. Bd. of Comm'rs v. Pub. Utilities Comm'n of State of Colo.*, 829 P.2d 1303, 1309–10 (Colo. 1992).

Under C.R.C.P. 12(b)(1) the plaintiff has the burden of proving jurisdiction. *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001). The Court does not need to treat the facts alleged by the non-moving party as true as it would under C.R.C.P. 12(b)(5). *Lee v. Banner Health*, 214 P.3d 589, 593 (Colo. App. 2009). Instead, C.R.C.P. 12(b)(1) “permits the court to weigh the evidence and satisfy itself as to the existence of its power to hear the case.” *Id.* “Any factual dispute upon which the existence of jurisdiction may turn is for the district court to resolve.” *Trinity Broad. Of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 924-25 (Colo. 1993). However, “[i]n resolving whether the plaintiff has alleged an injury sufficient to confer standing, a court must accept as true the allegations set forth in the complaint and may weigh other evidence supportive of standing.” *Dunlap v. Colo. Springs Cablevision, Inc.*, 829 P.2d 1286, 1289 (Colo. 1992).

DISCUSSION

As a threshold matter, the Court first considers the issue of whether Weld County has standing to seek judicial review of the Commission's rulemaking adoption of revisions to Regulation 7. “The question of standing involves a consideration of whether a plaintiff has asserted a legal basis on which a claim for relief can be predicated.” *Romer v. Board of County Com'rs of County of Pueblo, Colo.*, 956 P.2d 566, 572 (Colo. 1998) (quoting *Board of County Comm'rs v. Bowen/Edwards Assoc.*, 830 P.2d 1045, 1052 (Colo. 1992)). To demonstrate standing a Plaintiff must first show (1) an injury-in-fact; and (2) that injury was to a legal right protected by statutory provisions which allegedly have been violated. *Wimberly v. Ettenberg*, 570 P.2d 535, 539 (Colo. 1977).

Here, Plaintiff asserts that it will suffer injuries-in-fact including harm to Weld County's tax base, intrusion on the county's land use authority, and that those injuries implicate its claimed legal right to have been afforded priority as a local government during the Commission's hearing process under C.R.S. 25-7-105(16). Under that provision “[t]he commission shall give priority to and take expeditious action upon the following: (c) A request by a unit of local

government that the commission consider local concerns respecting ... economic effects in the context of a proceeding where the state is targeting a source for imposition of additional air pollution controls.” C.R.S. § 25-7-105(16)(c). According to Plaintiffs, the Commission failed to give priority to its requests for additional economic analysis during the Regulation 7 rulemaking proceeding, then disregarded its expert testimony and recommendations, before it ultimately adopted an alternate proposal by a local community organization. For the following reasons, these allegations fail to meet the required burden to establish standing.

First, although a party challenging a regulatory scheme can establish standing when the regulation “threatens to cause injury to the plaintiff’s present or imminent activities,” the County has not shown in its Complaint that it will suffer any direct harm or cost from compliance with the revised Regulation 7. Instead, the Plaintiff points to indirect and incidental impacts that will flow from the subsequent, intervening business decisions that third party oil and gas producers will make in response to an increased regulatory burden. Even if the Court grants that these harms will result, such indirect injuries are insufficient to confer standing. *Brotman v. E. Lake Creek Ranch, L.L.P.*, 31 P.3d 886, 891 (Colo. 2001). Likewise, the Plaintiff’s claim that Regulation 7 infringes on its land use authority is not enough to confer standing because the potential injury from third party oil and gas producers seeking to locate new operations in agricultural property is also indirect and incidental.

Second, the Plaintiff has failed to show that its claimed injuries-in-fact implicate a legally protected right. Weld County argues that general provisions of the Colorado APA and the Colorado Air Act grant it standing to seek review, but neither statute offers specific protection for the claimed injuries of lost tax revenue or infringement on land use authority. As for the claimed violation of C.R.S. § 25-7-105(16)(c), this court agrees with State Defendants that Section 105(16) does not apply in the context of a state-wide rulemaking proceeding applicable to the entire oil & gas industry. Therefore, the Commission’s adoption of revisions to Regulation 7 did not injure a legally protected right that supports standing for Weld County.

Accordingly, the Court finds that Plaintiff has failed to satisfy the standing requirement set forth by *Wimberly*.

Next, the court considers whether prudential considerations also preclude standing for Weld County. *Maurer v. Young Life*, 779 P.2d 1317, 1324 (Colo. 1989). Colorado follows the “general rule that counties do not have standing to obtain judicial review,” unless the legislature has granted them a specific statutory right to sue over an agency action. *Romer*, 956 P.2d at 573 (citing *Maurer*, 779 P.2d at 1324; *Martin v. District Court*, 550 P.2d 864, 866 (Colo. 1976)). However, a county may have standing if the legislature granted it an express statutory right to sue a superior agency. *Id.*

Here, the Commission is a superior state agency for purposes of regulating air pollution under Section 25-7-128, which states that counties have authority only to adopt air quality regulations that “are at least the same as, or may be more restrictive than, the emission control regulations adopted pursuant to this article.” C.R.S. § 25-7-128(1). Other provisions in Section 25-7-128 then limit the authority of local governments to sources not covered by the Colorado Air Act and restricts the authority of local governmental units in some instances to have more stringent measures than the state. *See e.g.* C.R.S. 25-7-128(1); C.R.S. 25-7-128(7)(a)-(f). Section 25-7-128 clearly circumscribes the authority of counties so that they may not conflict with any air quality regulations promulgated by the Commission. Therefore, as a county of the State of Colorado, Plaintiff is a “subordinate state agency” for the purposes of air quality regulation and lacks standing unless it possesses specific statutory authority to sue.

Plaintiff alleges that it has that statutory authority to sue under Section 25-7-120 of the Colorado Air Act, which grants that “any final order or determination by the division or commission shall be subject to judicial review in accordance with the provisions of this article and the provisions of article 4 of title 24, C.R.S.” C.R.S. § 25-7-120(1). Plaintiff additionally cites Section 24-4-106(4) of the APA, which allows that “any person adversely affected or aggrieved by any agency action may commence an action for judicial review,” and Section 24-4-102(12), which includes counties within the definition of person. C.R.S. § 24-4-106(4); C.R.S. § 24-4-102(12). However, the inclusion of counties into the definition of ‘person’ in the APA does not confer substantive rights upon counties to sue the State. *Romer*, 956 P.2d at 577. The Plaintiff’s citation of Section 25-7-120 of the Colorado Air Act does not avoid this rule from *Romer*, as the language of Section 25-7-120 does not plainly and unmistakably grant the Plaintiff the ability to obtain judicial review of a superior agency. Although the Plaintiff does assert that

specific authorization is granted by C.R.S. § 25-7-105(16)(c), this provision contains no mention of judicial review, and as discussed above does not apply to a state-wide rulemaking of general applicability. Therefore, as a subordinate state agency Weld County has no statutory authority to challenge the Commission's adoption of revisions to Regulation 7.

Accordingly, the Court finds that Weld County has met neither the substantive standings requirements of *Wimberly*, nor the prudential requirements for a County to sue a superior State agency in order to challenge the Commission's adoption of Regulation 7. Where the Plaintiff lacks standing, the substance of the Weld County's further claims and Defendant's other motions need not be reached, nor do the issues raised by Intervenors need to be further addressed.

CONCLUSION

WHEREFORE, as set forth above, the Court hereby **GRANTS** the Defendants' Motion to Dismiss for lack of standing pursuant to Rule 12(b)(1). It is hereby **ORDERED** that the Complaint filed by Weld County is dismissed in its entirety with prejudice.

Dated this 29th day of July, 2020.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Michael A. Martinez", with a long horizontal stroke extending to the right.

MICHAEL A. MARTINEZ
District Court Chief Judge