

**BEFORE THE OIL AND GAS CONSERVATION
COMMISSION OF THE STATE OF COLORADO**

COMPLAINT

Colorado Rising for Communities hereby files this Complaint seeking enforcement of the Colorado Oil and Gas Conservation Act (the “Act”) related to the failure of 316 oil and gas operators to properly file or to file reports related to severance tax since 2016. Colorado Rising for Communities further seeks that the maximum penalties be assessed against said oil and gas operators for their failure to abide by the Act.

BACKGROUND

1. On January 14, 2020, the Colorado Office of the State Auditor published a performance audit involving severance taxes.¹ For the first time, Colorado taxpayers became aware that 316 oil and gas operators, under the jurisdiction of the Colorado Oil and Gas Conservation Commission (the “COGCC”), failed to properly submit and/or failed to submit over 50,000 monthly well reports from 2016 to 2018. As a result of their failures, the state of Colorado and its taxpayers may have been shortchanged hundreds of millions of dollars in severance taxes that could have helped both local and state governments protect public health, safety, welfare, environment, and wildlife resources.

PARTIES

2. Colorado Rising for Communities is a Colorado nonprofit corporation organized under the laws of the state of Colorado. Colorado Rising for Communities represents thousands of Coloradans throughout the state of Colorado to hold the oil and gas industry accountable for the harm caused to public health, safety, welfare, environment, and wildlife resources. Colorado Rising for Communities has a legally protected interest in the enforcement of the Act. Colorado Rising for Communities is adversely affected or aggrieved by the acts of 316 oil and gas operators that failed to properly file or failed to file any reports related to severance tax; a tax that has a direct economic impact on Coloradans.

3. 316 oil and gas operators as reported by the State Auditor, who failed to submit proper well reports from 2016 to 2018 or who failed to submit any reports. The COGCC has the names, addresses, and the telephone numbers of each operator that failed and/or refused to submit proper well reports.

JURISDICTION

¹ https://leg.colorado.gov/sites/default/files/documents/audits/1928p_severance_taxes_0.pdf.

4. The COGCC has personal and subject matter jurisdiction over this proceeding and venue with the COGCC is proper pursuant to § 34-60-121, C.R.S. (2019); COGCC Rule 522.

FACTUAL ALLEGATIONS

Purpose of Severance Tax

5. Colorado ranks 7th in oil and gas production in the United States and oil and gas is the largest source of severance tax revenue for the state of Colorado.²

6. Colorado's statutory severance tax rate for oil and gas production is 2 percent of gross income for amounts between \$0-24,999, 3 percent of gross income from \$25,000-99,999, 4 percent of gross income from \$100,000-299,999, and 5 percent of gross income \$300,000 and up. §§ 39-29-103 through 107.

7. According to the Colorado law, the purpose for severance tax is as follows:

- (1) *The general assembly finds and declares that, when nonrenewable natural resources are removed from the earth, the value of such resources to the state of Colorado are irretrievably lost. Therefore, it is the intent of the general assembly to recapture a portion of this lost wealth through a special excise tax, in addition to other business taxes, on the nonrenewable natural resources removed from the soil of this state and sold for private profit.*
- (2) *The general assembly further finds and declares that the severance of nonrenewable resources provides a potential source of revenue to the state and its political subdivisions. Therefore, it is the intent of the general assembly to impose a tax on the process of severance in addition to other business taxes.*
- (3) *It additionally is the intent of the general assembly that a portion of the revenues derived from such severance taxes be used by the state for public purposes, that a portion be held by the state in a perpetual trust fund, and that a portion be made available to local governments to offset the impact created by nonrenewable resource development.*

§§ 39-29-101(1)-(3) (emphasis added).

² *Id* at p. 4.

8. According to the Audit, in Calendar Year 2018, operators produced 178 million barrels of oil and 2.3 billion MCFs (i.e. thousands of cubic feet) of natural gas.³

COGCC's Responsibilities

9. Oil and gas operators are required by statute to: “The making and filing with the Commission copies of well logs, directional surveys, and reports on well location, drilling, and production, [and provides] that every person who produces, sells, purchases, acquires, stores, transports, refines, or processes oil or gas in this state shall keep and maintain, within this state, for a period of five years, complete and accurate reports of the quantities thereof...” § 34-60-106(1)(b) and (e).

10. Operators who violate state statute or COGCC rules are expressly advised that that may be subjected to a penalty of not more than \$15,000 for **each act of violation per day that such violation continues**. § 34-60-121(1)(a).

11. As this matter involves filing and reporting of severance taxes through reports, the date of the act and when penalties can be assessed, “[B]egins on the day that the report should have been made or other corrective action should have been taken; and ends when the required report is submitted or other corrective action is commenced.” § 34-60-121(1)(c)(I)(A).

12. Penalties are levied on a variety of factors, including, but not limited to, whether the violation was a pattern of violations, or whether an egregious violation resulted from gross negligence or knowing and willful misconduct. § 34-60-121(1)(c)(II)(C)-(D).

13. To deter noncompliance, the general assembly encourage operators to come into compliance “as soon as possible,” but that the Commission “should not reduce the number of days of violation for which a penalty is assessed below that number which the evidence supports.” § 34-60-121(1)(e).

Continuing Violation

14. Colorado law indicates that any violation of state law or any rule, regulation, or order of the commission shall be commenced or maintained within one year from the date of violation. § 34-60-115.

15. However, the one year limitation **does not** apply to continuing violations where reporting is mandatory and where penalties are assessed on a daily basis. *Crowell v. Indus. Claims Appeals Ofc.*, 298 P.3d 1014, 1016 (Colo. App. 2012) (holding that when conduct is ongoing, imposition of a daily penalty is required), citing *Pueblo Sch. Dist. No. 70 v. Toth*, 924 P.2d 1094-1097 (Colo. App. 1996) (delay in paying bill for 645 days resulted in “645 separate offenses,” and pursuant to statute, imposition of the penalty at a “daily rate” is mandated).

³ *Id.* at p. 13.

16. Therefore, each date oil and gas operators fail to timely and/or correctly file their mandatory reports is a continued violation from the first day the violation occurred until the violation has been corrected. § 34-60-121(1)(a); COGCC Rule 523.b(1).

17. According to the State Auditor's report, there are approximately 51,264 improper or missing reports involving 316 oil and gas operators.⁴

Penalties

18. According to the penalty schedule adopted by the COGCC, penalties will be assessed based on the severity of the potential consequences of a violation "combined with an assessment of the degree of actual or threatened adverse impact to public health, safety, and welfare, including the environment and wildlife resources." COGCC Rule. 523.c.

19. On first blush, it appears that paperwork violations involve a range of \$200 to \$5,000 for each violation. COGCC Rule 523.c(1).

20. However, as this matter involves the reporting of severance taxes, the impacts are far more severe to public health, safety, welfare, environment, and wildlife resources than just simple paperwork violations. § 39-29-101.

21. All oil and gas operators are aware that they **must** pay severance taxes for the irretrievable loss of wealth experienced by the state of Colorado through the removal of our mineral resources. *Id.*

22. With respect to severance taxes, the Colorado Oil and Gas Association ("COGA") admits:

Colorado severance taxes are allocated to a variety of energy, resource, and local uses. By statute, the first \$1.5 million of annual receipts flow to the Innovative Energy Fund. The remainder of severance tax revenues is split evenly between the Department of Natural Resources Severance Tax Trust Fund and the Department of Local Affairs Local Government Severance Tax Fund. The Severance Tax Trust Fund allocates funds to natural resources and energy related programs and water and other capitol projects. The Local Government Severance Tax Fund allocates approximately 70 percent to local impact grants and loans, with the remaining 30 percent distributed to local governments according to metrics proportionate to local oil and gas mining activities.

⁴ *Id.* at p. 1.

23. On its website, COGA further admits that severance tax help local governments “mitigate impacts of oil and gas development.”⁵ Furthermore, COGA admits that severance taxes also help pay for “gardens at schools, fire trucks and broadband infrastructure.”⁶

24. Thus, the oil and gas industry fully recognizes that severance taxes are essential to public health, safety, welfare, environment, and wildlife resources.

25. Even though Colorado has a statutory severance tax rate of 2% to 5% percent depending on gross income, overall the oil and gas industry, through various statutory loopholes pays an average effective severance tax rate of 0.54%, which is the lowest out of peer states.⁷

26. Not only is Colorado failing to realize the full statutory severance tax rate from these oil and gas operators who take our irreplaceable nonrenewable natural resources, but they also are not reporting or are improperly reporting severance tax, which makes it difficult for the Colorado Department of Revenue to fully collect severance taxes owed to our state.⁸

27. Oil and gas operators fully know they are mandated to timely provide reports related to severance taxes.

28. Both the COGCC and the Department of Revenue provide forms to oil and gas operators to make such reporting easy.

29. The State Auditor’s Report indicates that 51,246 reports were improperly submitted or were missing from 316 operators. Just three operators, alone, had over 5,000 missing reports.⁹

30. The conduct of these oil and gas operators, related to severance tax owed to the people of Colorado, is gross negligence or knowing and willful misconduct. § 34-60-121(1)(c)(II)(C)-(D). This conduct harms public health, safety, welfare, environment, and wildlife resources, and presents actual significant impact to those interests. COGCC Rule 523.c(1).

31. Upon information and belief, the offending oil and gas operators further benefited economically by their failure and/or refusal to submit properly completed reports or to submit any reports at all.

32. These acts also are a pattern of violations that the COGCC is required to take into account when weighing penalties.

⁵ <https://www.coga.org/standingonthedivide/the-severance-split>

⁶ *Id.*

⁷ State Auditor’s Report, p. 67.

⁸ *Id.* at p. 19.

⁹ *Id.* at p. 21.

33. As appointed officials to a taxpayer funded commission, the COGCC owes a fiduciary duty to Colorado taxpayers to hold those oil and gas operators accountable for their illegal conduct. See generally, *Holub v. Gdowski*, 68 F.Supp.3d 1329, 1341 (D. Colo. 2014) (holding that public officials are representative of taxpayers to whom they owe a fiduciary duty).

PRAYER FOR RELIEF

WHEREFORE, Colorado Rising for Communities respectfully requests:

1. The COGCC to immediately commence an enforcement action seeking penalties by issuing a Notice of Alleged Violation.
2. Penalize the offending oil and gas operators at the maximum statutory amount of \$15,000 per violation per day.
3. Order the offending oil and gas operators to cease and desist their illegal conduct by timely, fully and truthfully completing and submitting the required reports from the date of violation until present date.
4. Enjoin said offending operators from engaging in further reporting violations.
5. Sue each of the operators in Denver District Court should the COGCC fail to or refuse to bring an administrative action against said operators.
6. Any further relief as may be just and proper.

Date: February 3, 2020

Respectfully submitted,

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