



COGCC v. Martinez

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The Colorado Supreme Court issued its decision in *COGCC v. Martinez*, at a time when oil and gas development is a hotly-debated issue, particularly along the Front Range in Colorado. In *Martinez*, the Court held that the Colorado Oil and Gas Conservation Commission properly declined to consider a rule proposed by youth activists pursuant to the Colorado Oil and Gas Conservation Act (Act). The proposed rule would have precluded the Commission from issuing a permit for an oil and gas well “unless the best available science demonstrates, and an independent, third-party organization confirms, that drilling can occur in a manner that does not cumulatively, with other actions, impair Colorado’s atmosphere, water, wildlife, and land resources, does not adversely impact human health, and does not contribute to climate change.”

In 2013, a group of youth activists petitioned the Commission for a rulemaking to put public health and the environment above oil and gas development. The Commission received public comment, but declined to engage in rulemaking, claiming that (1) the rule would have required the Commission to violate the Act, (2) the Commission was already working with the Colorado Department of Public Health and Environment (“CDPHE”) to address these concerns, and (3) other Commission concerns took precedence. The Denver District Court upheld the Commission’s decision, the Colorado Court of Appeals reversed the district court, and here the Colorado Supreme Court reversed the Court of Appeals.

The Colorado Supreme Court reviewed the narrow issue of “whether the Court of Appeals erred in determining that the Colorado Oil and Gas Conservation Commission misinterpreted section 34-60-102(1)(a)(I) as requiring a balance between oil and gas development and public health, safety, and welfare.”

The Act’s legislative declaration states that it is 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) (emphasis added). Based on this language, the youth activists argued that protection of public health, safety, and welfare is a mandatory condition, not a balancing act.

The Act also authorizes the Commission to regulate oil and gas operations

"so as to prevent and mitigate significant adverse environmental impacts on any air, water, soil, or biological resource resulting from oil and gas operations to the extent necessary to protect public health, safety, and welfare, including protection of the environment and wildlife resources, taking into consideration cost-effectiveness and technical feasibility."

§ 34-60-106(2)(d). Based on this language, the Commission argued that this statutory language requires the Commission to balance oil and gas development with the protection of public health and the environment.

The Court reasoned that the Act could direct the Commission to balance oil and gas development with public health, safety, and the environment, or it could direct the Commission to regulate oil and gas development subject to protection of public health, safety, and the environment. The Court decided through a review of the legislative history that the legislature did not intend public health or the environment as a check on development, but rather intended to promote multiple policy objectives.

Oddly, the Court stated that it did not hold that the Act requires a balancing test by which the Commission must weigh the public's interest in oil and gas development against public health and the environment. However, the Court also stated that the Act does not allow the Commission to condition one legislative priority (oil and gas development) on another (public health and the environment). It is unclear how this does not create a balancing test between multiple and competing priorities.

First, the Court reasoned that if the Act were intended to preclude any adverse impacts, then the language would not require the Commission to "mitigate significant" adverse impacts or to take into consideration "cost-effectiveness and technical feasibility."



Second, the Court pointed out that the legislative declaration in the Act outlines multiple policy goals that include development, public health, protecting owners' and producers' rights, wildlife conservation, and preventing waste. Third, the Court cited to testimony of the bill sponsors that indicated their intent was to minimize adverse impacts while still fostering oil and gas development. In the end, the Court held that the Commission did not act arbitrarily or capriciously, a highly deferential standard, in declining to engage in rulemaking

In 2016, the Court held in two cases that local governments do not have the power to regulate oil and gas development in any significant way to protect public health, safety, and welfare because the Commission has that power. *City of Longmont v. Colo. Oil and Gas Ass'n*, 2016 CO 29, 369 P.3d 573 (Colo. 2016); *City of Fort Collins v. Colo. Oil and Gas Ass'n*, 2016 CO 28, 369 P.3d 586 (Colo. 2016). In *Martinez*, the Court now holds that the Act only requires the Commission to "mitigate significant" adverse environmental impacts, and only after considering cost and feasibility. If local governments and now the State do not have the power under Colorado law to prioritize public health, safety, and the environment over oil and gas development, who does?