

Energy Pipeline: Industry Insights — Tipping the Scales: Ruling against balance test could strangle oil and gas

Dan Larson *For Energy Pipeline* March 29, 2018

Of the many avenues opponents travel to block or rein in oil and gas development, raising regulatory hurdles is a favorite.

When Boulder County commissioners saw their series of drilling permit moratoria to be legally untenable, they approved a series of regulatory barriers and time-outs designed to test the resolve of any company looking to develop resources there. So far, despite mineral leases held by several different companies, just one, Crestone Peak Resources, has started down the long path it must travel to win permission to drill from the county.

Crestone's Comprehensive Drilling Plan, the first such plan by a company in the DJ Basin and now in its third draft, proposes drilling its first well in Boulder County in 2020.

Another potential regulatory roadblock came from a Colorado Court of Appeals ruling last year that tossed out the balance test regulators use in deciding if an oil and gas project would be approved to go forward.

According to the Colorado Oil and Gas Conservation Commission, it relies on a balance test of objectives when it reviews a permit application.

That review must equally consider four goals:

- » Maximize efficient production of the resource pool;
- » Protect correlative rights;
- » Prevent waste;
- » and protect human health and the environment.

However, in a March 2017 ruling, the Colorado Court of Appeals directed the COGCC to reconsider its rejection three years earlier of a petition by a group of teenagers to make protecting health and the environment the overriding factor in permit review decision-making.

The ruling, if upheld, could fundamentally alter COGCC rulemaking and permit reviews, according to Mark Mathews, an attorney at the Denver law firm, Brownstein

Hyatt Farber Schreck.

Not only does the teenagers' petition, which was supported by filings from 27 local and national environmental and community organizations, jettison a standard for rule-making and permit review that for decades has weighed environmental priorities as one concern among others, Mathews said, it also opens the door to a permitting approach forcing oil and gas companies to prove a negative, a nearly impossible task.

The Martinez petition, as it is called, demanded the commission not approve a permit unless the company could prove, and independently verify, that project would not impair the environment. The petition does not, however, say how that would be done, Mathews said.

In *Martinez vs. COGCC*, the Appeals Court ruled 2-1 that, according to statute, oil and gas development and production must be "in a manner consistent with" environmental protection. Such language "does not create a balancing test," wrote Judge Terry Fox. The appeals court ruling did not order the commission to stop what it was doing but to reconsider its rejection of the Martinez petition, Mathews said.

In January, the state Supreme Court agreed to review the appeals court ruling. The request was filed by Attorney General Cynthia Coffman on behalf of the COGCC and over the objection of Gov. John Hickenlooper.

At the Capitol, the central premise of the Martinez case, that state regulators should put health, safety and the environmental considerations above property rights and responsible resource development, was put into a bill and introduced into the Legislature.

Sponsored by Rep. Joseph Salazar (D-Adams County) and Sen. Dominic Moreno (D-Adams County), House Bill 1071 would require the state to consider protection of public health, safety and the environment above oil and gas development and production.

On Feb. 9, the Martinez bill passed the House on a 34-30 vote and was sent to the Senate. In the Senate, the bill was assigned to the Agriculture, Natural Resources and Energy committee. That committee rejected the bill on a bipartisan vote on March 7.

The bill was opposed by the Colorado Oil and Gas Association, which said it ignores the balancing test and tries to place a statute on the books before the Supreme Court rules on the matter.

In a prepared statement, Tracee Bentley, executive director of the Colorado Petroleum Council said, "Our state should not rewrite the Colorado Oil and Gas Conservation Commission's mission at the request of out-of-state, out-of-touch activists, who hope to transform every permitting decision into protracted litigation, costing the state millions to defend administrative and judicial appeals, not to mention millions more in lost tax and royalty revenues due to permitting delays."

Bentley said the petitioners in the Martinez case hope to persuade the COGCC to ban oil and natural gas development in Colorado. "The state Senate saw through this ruse and rightly voted against this ill-conceived legislation," she said in the release. "The

state's natural gas and oil industry embraces working with all stakeholders as we continue to use the highest standards and safety practices possible in providing Colorado and the rest of the country affordable and dependable energy produced here in Colorado."

— Dan Larson is a Colorado journalist and PR pro. He has three decades experience in the oil and gas industry as a communications specialist. Working industry segments upstream and down, Dan led marketing programs, neighbor discussions, community development and contribution programs, and crisis response efforts. Lately, he is writing for Energy Pipeline, online news services and trade magazines serving the energy and automotive industries. Visit Dan's website at <http://www.larson-comms.com>.

Oil and Gas Bills, Colorado Legislature 2018 Session

House

HB 1071: References Martinez case, directs state to regulate oil and gas for public safety. Passed House, Feb. 9; introduced in Senate; killed in Senate committee March 7.

HB 1098: Retain environmental clean-up funds in account at end of year. Passed House March 9.

HB 1150: Any local government that bans hydraulic fracturing is liable to mineral owner and operator for lost revenue. Sent to committee. Postponed indefinitely March 7.

HB 1157: Increased reporting of operational incidents. Sent to committee.

HB 1201: Ballot issue for retention of severance tax revenue. Hearing scheduled April 9 in House Finance Committee.

HB 1215: Prohibit disposal of NORM materials during study for rulemaking. Sent to committee.

Senate

SB 03: Colorado Energy Office reauthorization. Passed Senate. Assigned to House Transportation and Energy Committee.

SB 48: "Protect Act" gives final authority on well siting to local government. Sent to committee, postponed indefinitely.

SB 63: Raise financial assurance level for site reclamation. Sent to committee, postponed indefinitely.

SB 64: Require 100 percent renewable energy in Colorado. Sent to committee, postponed indefinitely.

Legislation introduced through Feb. 26, 2018. Session scheduled to end May 9.