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# CURRENT TOPICS IN COLORADO'S REGULATORY LANDSCAPE

JOHN JENNINGS<sup>†</sup>

## INTRODUCTION

Economic regulation in the United States dates back to the late 1800s, and the landscape continues to evolve today.<sup>1</sup> Recent U.S. Supreme Court cases have addressed federal government regulation in areas such as product labeling, telecommunications, and healthcare.<sup>2</sup> In Colorado, several current topics center on regulation and the interplay between state and local government. This article will describe the Colorado state regulatory process and highlight two areas of national interest—marijuana and oil and gas—playing out in our state. Lawyers practicing in these areas will be familiar with the industries, government agencies, and trends discussed below.

## OVERVIEW OF THE COLORADO REGULATORY PROCESS

The Colorado Department of Regulatory Agencies defines a regulation generally as “a policy or procedure created by a state agency that has an impact on the public. The regulation is the state agency’s action in implementing, interpreting, applying or enforcing a statute enacted by the legislature and signed into law by the Governor.”<sup>3</sup> State agencies engaged in the regulatory process are bound by the State Administrative Procedure Act (APA).<sup>4</sup> The APA’s legislative declaration includes themes of economic efficiency, cost-benefit analysis of potential regulation, and encouraging consumer choice and market competition.<sup>5</sup> To accomplish these goals, the APA provides the statutory framework for agency rulemaking, licensing and permitting, hearings and administrative decision-making, and judicial review of agency action. The Code of Colorado Regulations is the official source of the state’s administrative

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1. See, e.g., Edward L. Glaeser & Andrei Shleifer, *The Rise of the Regulatory State*, 41 J. ECON. LIT. 401, 401–08 (2003); Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. OF ECON. AND MGMT. SCI. 335, 336–37 (1974).

2. See *Pom Wonderful L.L.C. v. Coca-Cola Co.*, 134 S. Ct. 2228, 2237–41 (2014) (product labeling); *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1866–69 (2013) (telecommunications); *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2585–93 (2012) (healthcare).

3. *Colorado Regulatory Structure*, Colorado Dept. of Regulatory Agencies, <http://cdn.colorado.gov/cs/Satellite/DORA-OPRRR/CBON/DORA/1251624421211>.

4. COLO. REV. STAT. § 24-4-101 to 24-4-108 (2014).

5. § 24-4-101.5.

rules, and the Colorado Register is the official source of notices of rule-making, proposed rules, and Attorney General rules opinions.<sup>6</sup>

Under this framework, state agencies make rules, policies, and administrative decisions within their area of expertise. For example, the Department of Regulatory Agencies focuses on consumer protection, and includes banking, financial, and professional and occupational licensing departments, as well as the Public Utilities Commission.<sup>7</sup> The Department of Revenue is responsible for state tax collections, motor vehicles, and licensing and enforcement for the liquor, marijuana, and gaming industries.<sup>8</sup> The Department of Natural Resources focuses on managing the state's natural resources, mining, water, and oil and gas operations.<sup>9</sup> In addition to state requirements, lawyers advising businesses and individuals in regulated industries must often navigate federal and local regulatory systems.

### *Colorado Marijuana Regulation*

Colorado's regulation of medical and recreational (retail) marijuana is closely watched nationally and internationally. Although several states allow medical marijuana and a few allow retail marijuana under a variety of different contexts, Colorado's implementation and timing have been unique.<sup>10</sup> Colorado voters passed state constitutional amendments regarding medical marijuana in 2000 and retail marijuana in 2012.<sup>11</sup> The state legislature enacted the Colorado Medical Marijuana Code in 2010 and Colorado Retail Marijuana Code in 2013, establishing regulatory systems for the production and sale of marijuana to medical patients and adult consumers, respectively.<sup>12</sup>

The Colorado Marijuana Enforcement Division (MED), under the Department of Revenue, is the state agency responsible for licensing and enforcement pertaining to medical and retail marijuana operations.<sup>13</sup> The MED develops the administrative rules for these industries, with input

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6. The Colorado Secretary of State publishes both resources online at <http://www.sos.state.co.us/CCR>.

7. See Colorado Dept. of Regulatory Agencies, [www.dora.state.co.us](http://www.dora.state.co.us) (last visited Dec. 23, 2014).

8. See Colorado Dept. of Revenue, <https://www.colorado.gov/revenue> (last visited Dec. 23, 2014).

9. See Colorado Dept. of Natural Resources, [www.dnr.state.co.us](http://www.dnr.state.co.us) (last visited Dec. 23, 2014).

10. As of November 2014, twenty-three (23) states allow medical marijuana and four (4) states allow retail marijuana. See *State Medical Marijuana Laws*, National Conference of State Legislatures, <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>.

11. COLO. CONST. art. XVIII, §14; COLO. CONST. art. XVIII, § 16.

12. The Medical Marijuana Code is codified at C.R.S. § 12-43.3-101 to 12-43.3-1102 and the Retail Marijuana Code at § 12-43.4-101 to 12-43.4-1101.

13. See Colorado Marijuana Enforcement Division, <https://www.colorado.gov/enforcement/marijuanaenforcement> (last visited Dec. 23, 2014).

from public stakeholders.<sup>14</sup> Modeled after the state's liquor licensing regulatory scheme, commercial medical and retail marijuana must be grown, manufactured, and sold in licensed facilities. Additionally, the state oversees medical marijuana patients and caregivers primarily through its health department, the Colorado Department of Public Health and Environment.<sup>15</sup>

Under this statewide structure, local governments can choose whether to allow commercial marijuana production and sale within their own borders. Local jurisdictions can prohibit the business of growing, manufacturing, and selling marijuana through their political process but not the state constitutional aspects of personal medical or recreational use.<sup>16</sup> As of the end of 2014, fifty (50) different Colorado municipalities allow medical marijuana facilities, and forty-four (44) allow retail marijuana facilities.<sup>17</sup> The City of Denver, for example, enacted medical and retail marijuana ordinances authorizing and regulating both types of facilities, including licensing requirements that are more restrictive than statewide standards in some instances.<sup>18</sup> In 2015 and beyond, local governments throughout Colorado will continue determining whether, and to what extent, to allow marijuana establishments in their communities. At the statewide level, marijuana edible product labeling, packaging, and potency will be key issues for lawmakers and regulators.<sup>19</sup> Finally, the Colorado Supreme Court's decision in *Coats v. Dish Network*<sup>20</sup>, the state's most closely watched marijuana case thus far, is expected in 2015.

### *Colorado Oil and Gas Regulation*

Oil and gas regulation, especially regarding hydraulic fracturing or "fracking," is a second nationally recognized topic unfolding in Colorado. With the advent of new drilling technology, the state's shale gas resources, and the location of wells near residential communities, Colorado is a major part of the current fracking debate.<sup>21</sup> The principal statu-

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14. The current MED medical and retail rules, including prior versions for historical context, are available at <https://www.colorado.gov/enforcement/laws-constitution-statutes-and-regulations-marijuana-enforcement>.

15. See COLORADO DEPT. OF PUBLIC HEALTH AND ENVIRONMENT, <https://www.colorado.gov/cdphe> (last visited Dec. 23, 2014).

16. See COLO. REV. STAT. § 12-43.3-106 (2014) (medical marijuana "local option"); § 12-43.4-104 (retail marijuana "local option").

17. See *Local Authorities Allowing Medical Marijuana & Local Authorities Allowing Retail Marijuana*, COLORADO MARIJUANA ENFORCEMENT DIVISION, <https://www.colorado.gov/enforcement/marijuanaenforcement>.

18. See Denver Revised Municipal Code Sections 24-501 to 24-514 and 6-200 to 6-219.

19. See Jack Healy, *New Scrutiny on Sweets With Ascent of Marijuana in Colorado*, N.Y. TIMES, Oct. 29, 2014 at A13.

20. 303 P.3d 147 (Colo. App. 2013), cert. granted, 2014 WL 279960 (Colo. Jan. 27, 2014).

21. See Cary Weiner, *Oil and Gas Development in Colorado*, COLO. STATE UNIV. EXTENSIONS (2014), available at <http://www.ext.colostate.edu/pubs/consumer/10639.pdf>.

tory source of the state's oil and gas regulation is the Colorado Oil and Gas Conservation Act, originally enacted in 1951.<sup>22</sup>

The Colorado Oil and Gas Conservation Commission (COGCC), under the Department of Natural Resources, is the state agency responsible for oil and gas regulation.<sup>23</sup> The COGCC's mission is to "provide for the responsible development of the oil and gas resources within the state" and is led by nine (9) commission members—seven (7) appointed by the Governor and two (2) executive directors of state agencies.<sup>24</sup> The Commission's rules cover topics such as oil and gas operator registration, well permitting, notice to surface landowners, technical production requirements, public comment and hearings, safety, and enforcement.<sup>25</sup> The Commission maintains an online database of its fracking-specific rules and reports on Colorado fracking practices.<sup>26</sup>

With the COGCC as the state regulator, the ability of local governments to regulate oil and gas operations is a longstanding legal issue in Colorado. The tension centers on state interest in uniformity of rules governing multi-jurisdictional natural resources versus local government interest in land use regulation within its own borders.<sup>27</sup> Two seminal Colorado Supreme Court cases in this area, *Board of County Commissioners of La Plata County v. Bowen/Edwards Associates, Inc.* and *Voss v. Lundvall Brothers, Inc.*, stand for the general proposition that local governments can regulate oil and gas operations from a land use perspective but cannot completely prohibit state-sanctioned oil and gas development within their jurisdictions.<sup>28</sup> Under this backdrop, fracking, a process used more often in recent years to access shale formations, has taken center stage. Starting in 2012, several local jurisdictions along Colorado's populated Front Range enacted bans or moratoriums on fracking, and litigation ensued among municipalities, the COGCC, oil and gas trade associations, and others.<sup>29</sup> In 2014, four (4) competing

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22. COLO. REV. STAT. § 34-60-101 to 34-60-130 (2014).

23. See COLORADO OIL AND GAS CONSERVATION COMMISSION, <http://cogcc.state.co.us/> (last visited Dec. 23, 2014).

24. COLO. REV. STAT. § 34-60-104 (2014).

25. The current COGCC rules, including prior versions for historical context, are available at <http://cogcc.state.co.us/>.

26. See *Hydraulic Fracturing Information*, COLORADO OIL AND GAS CONSERVATION COMMISSION, [http://cogcc.state.co.us/Announcements/Hot\\_Topics/Hydraulic\\_Fracturing/Hydra\\_Frac\\_topics.html](http://cogcc.state.co.us/Announcements/Hot_Topics/Hydraulic_Fracturing/Hydra_Frac_topics.html) (last visited Dec. 23, 2014).

27. See, e.g., Debra S. Kalish, Gerald E. Dahl, & Christopher Price, *The Doctrine of Preemption and Regulating Oil and Gas Development*, 38 COLO. LAWYER 10 (2009); Geoff Wilson, *State and Local Regulation of Oil and Gas Operations in Colorado*, COLO. MUNICIPAL LEAGUE: KNOWLEDGE NOW (2012), available at <http://www.cml.org/Issues/Oil-and-Gas/State-and-Local-Regulation-of-Oil-and-Gas-Operations-in-Colorado/>.

28. See *Bd. of Cnty Comm'rs of La Plata Cnty v. Bowen/Edwards Assocs, Inc.*, 830 P.2d 1045, 1056-60 (Colo. 1992); *Voss v. Lundvall Bros., Inc.*, 830 P.2d 1061, 1067-69 (Colo. 1992).

29. See Cathy Proctor, *Colorado's Court Rulings Against Fracking Bans Drawing National Attention*, DENVER BUS. J., Oct 15, 2014, available at

ballot initiatives to amend the state constitution were proposed and later withdrawn before the general election.<sup>30</sup> Into 2015, the field will remain timely with litigation pending on local regulations and an oil and gas task force appointed by the Governor set to make its recommendations.<sup>31</sup>

#### CONCLUSION

With current topics such as marijuana and oil and gas, Colorado's regulatory landscape will continue drawing national interest for the near future. The state's experience with marijuana licensing, enforcement, and taxation should be useful for others with potential votes and lawmaking. The state's experience with oil and gas regulation should be insightful for others with similar natural resources and state-local government structures. Regulation will remain an evolving concept, and Coloradans' participation in the political, legislative, and regulatory process will shape these important issues and more to come.

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[http://www.bizjournals.com/denver/blog/earth\\_to\\_power/2014/10/colorado-s-court-rulings-against-fracking-bans.html](http://www.bizjournals.com/denver/blog/earth_to_power/2014/10/colorado-s-court-rulings-against-fracking-bans.html).

30. See Lynn Bartels, *Let's Make a Deal: How Colorado Came to a Fracking Compromise*, DENVER POST (August 23, 2014), [http://www.denverpost.com/election2014/ci\\_26394883/lets-make-deal-how-colorado-came-fracking-compromise](http://www.denverpost.com/election2014/ci_26394883/lets-make-deal-how-colorado-came-fracking-compromise).

31. See *id.*