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MEMORANDUM

TO: Thomas Williams and James Newell
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: October 26, 2020
SUBJECT: Proposed initiative measure 2021-2022 #3, concerning prohibiting hydraulic fracturing

Section 1-40-105 (1), Colorado Revised Statutes, requires the directors of the Colorado Legislative Council and the Office of Legislative Legal Services to "review and comment" on initiative petitions for proposed laws and amendments to the Colorado Constitution. We hereby submit our comments to you regarding the appended proposed initiative.

The purpose of this statutory requirement of the directors of the Legislative Council and the Office of Legislative Legal Services is to provide comments intended to aid proponents in determining the language of their proposal and to avail the public of knowledge of the contents of the proposal. Our first objective is to be sure we understand your intent and your objective in proposing the amendment. We hope that the statements and questions contained in this memorandum will provide a basis for discussion and understanding of the proposal.

An earlier version of this proposed initiative, proposed initiative 2021-2022 #2, was the subject of a memorandum dated September 21, 2020. Proposed initiative 2021-2022 #2 was discussed at a public meeting on September 24, 2020. The substantive and technical comments and questions raised in this memorandum will not include comments and questions that were addressed at the earlier meeting, except as necessary to fully understand the issues raised by the revised proposed initiative.

However, the prior comments and questions that are not restated here continue to be relevant and are hereby incorporated by reference in this memorandum.

Purposes

The major purposes of the proposed amendment to the Colorado Revised Statutes appear to be:

1. In order to preserve the public health, safety, welfare, the environment, and wildlife, to prohibit all hydraulic fracturing not on federal land;
2. To allow the proposed initiative to be enforced by the Colorado attorney general or by one or more civil actions initiated by a resident of Colorado, who shall have standing and, if they are the prevailing party in the enforcement action, shall be awarded attorney fees and costs.

Substantive Comments and Questions

The substance of the proposed initiative raises the following comments and questions:

1. The proponents have added a definition of "hydraulic fracturing" in subsection (5) of the proposed initiative that is very close to the definition in regulation, 200 CCR 404-1 100-Series, but with a few slight modifications.
 - a. The proponents have changed the term "expressly designed" to "intended" and the word "initiate" to "create." By using terms that differ from the terms used in the regulation, do the proponents intend to alter the meaning of "hydraulic fracturing" as used in the measure? If so, how do these different terms change the meaning of the definition of "hydraulic fracturing"?
 - b. Likewise, the proponents changed the phrase "enhance production of oil and natural gas" to "create or enhance production of oil and natural gas," thus adding the word "create" to the phrase. Do the proponents intend this to mean something different than the phrase used in regulation? If so, what different meaning do the proponents intend?
2. In subsection (6) of the proposed initiative, how is it decided if another statute or a regulation is "arguably contradictory" to the proposed initiative? How is that determination different from a determination that the statute or regulation is contradictory?

3. In subsection (6), use of the word "resident" implies a natural person. Do the proponents intend that corporations, partnerships, and other entities such as nonprofit organizations, which entities otherwise qualify as a "person" under section 34-60-103 (8), C.R.S., be entitled to file suit as well? If so, the proponents may consider modifying the language to make that clear.
4. The Oil and Gas Conservation Act, sections 34-60-101 to 34-60-131, C.R.S., provides for enforcement against violations of the Act. That enforcement includes the oil and gas conservation commission's authority, pursuant to section 34-60-121 (1)(b), C.R.S., to issue an order to impose a penalty for a violation after a hearing on the matter has been held and, pursuant to section 34-60-109, C.R.S., to bring suit in the name of the state, through the attorney general, for a violation of a commission order. Do the proponents intend that the commission would not have any enforcement power with regard to alleged violations of the hydraulic fracturing ban, including the authority to issue an order imposing a penalty or to enforce such order in court for a violation of the hydraulic fracturing ban established in the proposed initiative? If that is the intent, the proponents might consider amending sections 34-60-121 (1)(b) and 34-60-109, C.R.S., to clarify that the commission cannot issue an order for a violation of section 34-60-132 or enforce any such order in court. If the proponents intend that the commission would have enforcement power with regard to alleged violations of the hydraulic fracturing ban, the proponents may wish to clarify that in the proposed measure.
5. Pursuant to section 34-60-108 (4), C.R.S., the commission may receive complaints regarding alleged violations of the Act and hold a hearing on the complaint. Is it the proponents' intent that the attorney general would be able to receive complaints regarding alleged violations of the hydraulic fracturing ban and file suit based on such complaints? If so, the proponents might consider adding language that authorizes the attorney general "on the basis of a third-party complaint or on its own motion" to bring suit.
6. As reflected in section 34-60-124 (4)(a)(III), C.R.S., the commission has the power to investigate alleged violations of the Act. Is it the proponents' intent that the attorney general would have investigative power to investigate whether a violation has occurred before deciding to bring suit for an alleged violation of the hydraulic fracturing ban? If so, the proponents might consider adding

language that authorizes the attorney general to investigate whether a violation of the hydraulic fracturing ban has occurred.

7. It is unclear from the language of subsection (6) when it would be appropriate for the attorney general to bring suit versus when it would be appropriate for a private party to bring suit. The proponents may wish to clarify this in the proposed measure.
8. Standard drafting practice discourages use of the phrase "and/or" in statutory language as it may create ambiguity in meaning. "And" is used to connect two or more phrases, conditions, events, etc., all of which must occur. "Or" is used to connect two or more phrases, events, conditions, etc., when only one or more, but not all, need occur. Instead of using "and/or," the proponents may want to rephrase the second sentence in subsection (6) of the proposed initiative to read: "This section may be enforced by the attorney general of the state of Colorado, by any one or more civil actions initiated by any resident of the state of Colorado, or by both the attorney general or civil action initiated by a resident, who shall have"
9. Regarding the second sentence of subsection (6) of the proposed initiative and the phrase ". . . who shall have standing to enforce this section and who shall be awarded attorney fees and costs if such person is the prevailing party in any enforcement action," do the proponents intend the "who" and the "person" to mean both the attorney general and the resident, or only the resident? In other words, do the proponents intend that the attorney general would be awarded attorney fees and costs if the attorney general prevails in an enforcement action? Would the proponents consider modifying the measure to clarify the intent and applicability of this provision?

Technical Comments

The following comments address technical issues raised by the form of the proposed initiative. These comments will be read aloud at the public meeting only if the proponents so request. You will have the opportunity to ask questions about these comments at the review and comment meeting. Please consider revising the proposed initiative as suggested below.

1. At the end of the enacting clause, change the period to a colon.

2. In the amending clause:
 - a. "SECTION 1" should be in bold-faced type (e.g., **SECTION 1**); and
 - b. The comma after "24-60-132" is unnecessary.
3. In subsection (3) of the proposed initiative, the word "the" should be inserted before the word "official."
4. For subsection (5), the following is the standard drafting language for creating a definition: As used in this section, "hydraulic fracturing" means all stages
5. It is standard drafting practice to not capitalize titles, but to only capitalize proper nouns, such as "Colorado." Therefore, in subsection (6) of the proposed initiative, "Attorney General" and "State" should not be capitalized.
6. Title 2 of the Colorado Revised Statutes sets forth certain rules of statutory construction. Section 2-4-102, Colorado Revised Statutes, states: "The singular includes the plural, and the plural includes the singular." It is common drafting practice to state statutory provisions in the singular, unless the context otherwise requires. In subsection (6), therefore, "state statute(s)" and "regulation(s)" could be written as "state statute" and "regulation," respectively. "Civil action(s)" should be written as "civil actions," as the context requires.