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MEMORANDUM

TO: Sam Bradley and Greg Brophy
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: March 23, 2020
SUBJECT: Proposed initiative measure 2019-2020 #301, concerning requiring regulatory impact analysis for oil and gas conservation commission rules

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.

Purpose

The major purpose of the proposed amendment to the Colorado Revised Statutes appears to be to require the oil and gas conservation commission to adopt regulatory impact findings regarding the economic, social, health, and welfare costs of a proposed rule before the commission adopts the rule.

Substantive Comments and Questions

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

1. Article V, section 1 (8) of the Colorado Constitution requires that the following enacting clause be the style for all laws adopted by the initiative: "Be it Enacted by the People of the State of Colorado." To comply with this constitutional requirement, this phrase should be added to the beginning of the proposed initiative.
2. Article V, section 1 (5.5) of the Colorado Constitution requires all proposed initiatives to have a single subject. What is the single subject of the proposed initiative?
3. Under section 1-40-105.5, Colorado Revised Statutes, the director of research of the Legislative Council is required to prepare an initial fiscal impact statement, which includes an abstract that appears on petition sections, for each initiative that is submitted to the Title Board. In preparing the statement, the director is required to consider any fiscal impact estimate prepared by the proponents.
 - a. Will you submit the initiative to the Title Board? If so, when do you intend to do so?
 - b. Are you submitting a fiscal impact estimate today? If not, do you plan to submit an estimate in the future, and if so, when do you intend to do so?
 - c. To ensure that there is time for consideration, you are strongly encouraged to submit your estimate, if any, at least 12 days before the measure is scheduled for a Title Board hearing. The estimate should be submitted to the Legislative Council staff at BallotImpactEstimates.ga@state.co.us.
4. Subsection (1)(c) of the proposed initiative states that "[r]evenue generated from oil and gas development helps fund essential services across the state and in cities, towns, and municipalities ...".
 - a. Would the proponents consider adding counties to the list?
 - b. "Municipalities" is usually used to mean cities and towns. The proponents might consider deleting "municipalities" or "cities and towns" to avoid confusion between the two similar terms.

5. Subsections (1)(b) and (1)(e) of the proposed initiative refer to "direct and indirect employment." What do the proponents mean by that phrase?
6. Subsections (1)(f), (2)(b), (3) introductory portion, and (3)(h) of the proposed initiative refer to "the act." For clarification, the proponents should consider referring to "this article 60" instead of "the act" to inform readers that the relevant statutes being referenced are those within article 60 of title 34, C.R.S.
7. Subsections (1)(f), (2)(b), (3), and (5) of the proposed initiative all refer to "rules and regulations" or "rule or regulation." Section 24-4-102 (15), C.R.S., of the "State Administrative Procedure Act" (APA) defines "rule" and indicates that "[r]ule includes 'regulation.'" As a rule-making agency pursuant to the definition in section 24-4-102 (3) of the APA, the commission is subject to the rule-making procedures of the APA. Would the proponents consider deleting "and regulations" and "or regulation" from the references to "rules and regulations" and "rule or regulation" in subsections (1)(f), (2)(b), (3), and (5) of the proposed initiative to conform to the definition of "rule" in the APA?
8. Subsection (2)(a) of the proposed initiative defines "commercially available" to mean a product or technology that "has been adequately tested and is generally available through a common marketplace, is affordable, is fit and suitable for the purpose required, generates reliable and quality data, and requires little or no modification." Subsection (3)(g) of the proposed initiative requires the commission to make findings for any proposed rule whether the rule requires the acquisition or use of commercially available technology or equipment.
 - a. For the definition in subsection (2)(a) of the proposed initiative, a number of the criteria are general and subject to differing interpretations or opinions. What constitutes "adequately tested," "generally available," "affordable," or "generat[ing] reliable and quality data"? Would the proponents consider defining these terms in the proposed initiative or requiring the commission to promulgate rules to further describe these terms?
 - b. Subsection (2)(a) of the proposed initiative refers to "product or technology" but subsection (3)(g) refers to "technology or equipment"? Is the intent that they mean the same thing? If so, would the proponents consider referring to "product or technology" or "technology or equipment" in both subsections?
 - c. The definition of "commercially available" requires that any product or technology "generates reliable and quality data". Many types of oil and

gas products or technology may not generate any data. Would the proponents consider clarifying the initiative in this regard?

9. With regard to the introductory portion of subsection (3) of the proposed initiative:
 - a. The subsection begins with "The people of the state of Colorado hereby establish that ...". As this subsection is operative law and not part of the legislative declaration, the proponents should consider deleting this phrase from subsection (3) and beginning the sentence with "[P]rior to adopting any rule ...".
 - b. Would the proponents consider establishing a more specific timeline for the completion of the written regulatory impact findings required by the proposed initiative? How much in advance of a proposed rule's adoption should the findings be made? Do the findings need to be completed before the commission holds the hearing required for agency rule-making pursuant to section 24-4-103 (4), C.R.S.? Before the commission issues a notice of the hearing required by section 24-4-103 (3), C.R.S.? Or before the commission establishes a representative group of interested stakeholders when rule-making is contemplated pursuant to section 24-4-103 (2), C.R.S.?
 - c. To whom do you intend the commission's regulatory impact findings should be distributed and how? Should the findings be submitted to the Secretary of State along with the notice of proposed rule-making pursuant to section 24-4-103 (2.5), C.R.S.? Should the findings be published on the commission's public website? Would the proponents consider adding information to clarify their intent regarding the requirements for the commission to share written regulatory impact findings?
 - d. The introductory portion of subsection (3) requires written findings regarding the items listed in subsections (3)(a) through (3)(h) for the "first, fifth, and tenth year following the effective date of the [proposed] rule." However, the items listed in subsections (3)(f), (3)(g), and (3)(h) - regarding whether the rule is capable of implementation, whether the rule would require the acquisition of technology or equipment, and the statutory authorization for the rule - appear to have fixed impacts that would not change between the first, fifth, and tenth year after a rule's adoption. Would the proponents consider exempting these items from

the requirement to identify their impacts in the fifth and tenth years following a rule's adoption?

10. Subsection (3)(c) of the proposed initiative refers to "state, local, or municipal tax revenue." Municipal tax revenue is a subset of local tax revenue. Would the proponents consider reworking the sentence to refer to "state or local, including municipal, tax revenue" or identifying what types of tax revenue are contemplated by the phrase "local tax revenue" that are distinct from "municipal tax revenue"?
11. For subsection (3)(d) of the proposed initiative, would the proponents consider specifying the royalty payments being referred to by stating "on all royalty payments for oil and gas development in the state"?
12. Similarly, for subsection (3)(e) of the proposed initiative, would the proponents consider specifying the "oil and gas industry" as the "oil and gas industry in the state"?
13. Subsection (3)(f) of the proposed initiative requires findings that identify "[t]hat the rule or regulation is capable of implementation." That language implies a consideration of whether the commission itself can implement its own administration and enforcement of the rule. If the proponents instead intend to refer to the rule's effect on the regulated community's oil and gas operations, would the proponents consider changing the phrase to something like "whether compliance with the rule would hinder oil and gas operations" or adding a phrase such as "by the commission" or "by oil and gas operators"?
14. Subsection (5) of the proposed initiative:
 - a. States that the proposed initiative applies to "any rule or regulation proposed and adopted after the effective date ...". Under subsection (3) of the proposed initiative, it appears that the regulatory impact findings are required for all proposed rules, whether the rules are ultimately adopted or not. The addition of "and adopted" in subsection (5) seems to contradict that and require the regulatory impact findings only for those proposed rules that are ultimately adopted. Would the proponents consider deleting the "and adopted" language to clarify that the requirement applies to all rules proposed after the effective date, whether the proposed rules are ultimately adopted or not?

- b. Refers to the effective date but does not specify the effective date of what. Would the proponents consider adding "of this section" after "the effective date" to clarify what provision's effective date is at issue?
- c. Provides "... after the effective date or upon the proclamation of the governor, whichever is later." This language seems to conflict with subsection (4) of the proposed initiative and with section 1 (4) of article V of the Colorado Constitution, which constitutional provision provides that the effective date of a proposed initiative is the date of the official declaration of the vote issued by proclamation of the governor. Because the effective date of the proposed initiative, if passed, would be the date of the governor's proclamation, would the proponents consider deleting "or upon the proclamation of the governor, whichever is later"?

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. The Colorado Revised Statutes are divided into sections, and each section may contain subsections, paragraphs, subparagraphs, and sub-subparagraphs as follows:

X-X-XXXX. Headnote. (1) Subsection.

(a) Paragraph

(I) Subparagraph

(A) Sub-subparagraph

(B) Sub-subparagraph

(II) Subparagraph

(b) Paragraph

(2) Subsection

(3) Subsection

The proposed initiative lists paragraphs with capital letter designations, such as "(A)." Would the proponents consider changing the capital letter designations for paragraphs to lowercase letter designations, such as "(a)"?

2. For purposes of this statutory initiative, the word "shall" is defined in section 2-4-401 (13.7), C.R.S., and it means "that a person has a duty." The related word "must," which is defined in section 2-4-401 (6.5), C.R.S., "means that a person or thing is required to meet a condition for a consequence to apply." Furthermore, "'must' does not mean that a person has a duty." Would the proponents consider changing the "must" to a "shall" in the introductory portion of subsection (3) of the proposed initiative?
3. Although the text of the proposed initiative should be in small capital letters, the proponents should use an uppercase letter to indicate capitalization where appropriate. The following should be large-capitalized:
 - a. The first letter of the first word of each sentence;
 - b. The first letter of the first word of each entry of an enumeration paragraphed after a colon; and
 - c. The first letter of proper names.
4. Subsection (1)(e) is the second-to-last item in a series listed under "(1) The people of the state of Colorado find and declare that:". As such, the proponents should consider adding an "and" after the semicolon in that subsection. The proponents should consider addressing the same issue in subsection (3)(g).
5. Subsection (1)(f) ends with a semicolon, but should end with a period since it is the end of the sentence that starts with "(1) The people of the state of Colorado find and declare that:". The proponents should consider addressing the same issue in subsection (3)(h).
6. The introductory portion of subsection (3) refers to "regulatory impact finding(s)." Section 2-4-102, C.R.S., applies to all statutes and provides that "[t]he singular includes the plural". As such, use of the word "finding" would include a singular finding or plural findings. Moreover, the statutes do not contain words followed by "(s)" to indicate a plural alternative. Would the proponents consider changing "finding(s)" to "finding", so the sentence would read: "... the commission must adopt, in writing, a regulatory impact finding that identifies ..."?
7. In subsection (1)(c), "the oil and gas and environmental response fund" should be "oil and gas conservation and environmental response fund." There is also a reference in subsection (1)(c) to "the Colorado parks and wildlife". Do the

proponents intend to refer to "Colorado parks and wildlife" or "the division of parks and wildlife"?