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Colorado General Assembly

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MEMORANDUM

TO: Jessica Goad and Alicia Ferruffino-Coqueugniot
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: April 2, 2024
SUBJECT: Proposed initiative measure 2023-2024 #270, concerning oil and gas operations strict liability for damages

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 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.

This initiative was submitted with a series of initiatives, including proposed initiatives 2023-2024 #271 and #272. The comments and questions raised in this memorandum will not include comments and questions that were addressed in the memoranda for proposed initiatives 2023-2024 #271 and #272.

Purpose

The major purpose of the proposed amendment to the Colorado Revised Statutes appears to be to hold any oil and gas operator, owner, or producer strictly liable for any damages that result from oil and gas operations.

Substantive Comments and Questions

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

1. 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?
2. Should subsection (2)(b) of the proposed initiative state that the purpose of the proposed initiative is to promote responsible practices within the industry if subsection (4)(b) of the proposed initiative states that strict liability applies regardless of whether the operator, owner, or producer adhered to industry best practices?
3. Subsection (2)(b) of the proposed initiative uses the term "oil and gas operator." The proponents should consider changing that term to "operator" to align with the definition in subsection (3)(b) of the proposed initiative.
4. Subsection (4)(a) of the proposed initiative holds operators, owners, and producers strictly liable for any damages resulting from oil and gas operations.
 - a. Do the proponents intend for strict liability to only apply to oil and gas operations occurring on or after the effective date of the proposed initiative? If so, the proponents should consider adding language to the proposed initiative that states that the requirements of proposed section 34-60-114.1 only apply to conduct occurring on or after the effective date of proposed section 34-60-114.1.
 - b. Do the proponents intend for operators, producers, or owners to be strictly liable for indirect damages resulting from oil and gas operations, such as lost wages or loss of earning capacity? If not, the proponents should consider clarifying that strict liability only applies to damages directly resulting from oil and gas operations.
 - c. In the event that there are damages resulting from oil and gas operations and there are multiple operators, producers, or owners involved, how do

the proponents intend for liability to be allocated if there is no fault determination?

- d. Section 34-60-124, C.R.S., allows a person that conducts oil and gas operations *in a manner that violates the law* to be sued by the energy and carbon management commission for the costs to mitigate significant adverse environmental impacts caused by the oil and gas operations. Further, section 34-60-124 (9), C.R.S., provides that responsible parties are only liable for a proportionate share of any costs imposed. Do the proponents intend for the language in the proposed initiative to supersede section 34-60-124 (9), C.R.S., which allocates proportionate liability based on violation of the law? If so, proponents should consider adding "Notwithstanding any provision of law to the contrary..." to the beginning of subsection (4)(a) of the proposed initiative or making amendments to section 34-60-124, C.R.S.

5. Section 2 of the proposed initiative contains a severability clause. Section 2-4-204, C.R.S., states:

If any provision of a statute is found by a court of competent jurisdiction to be unconstitutional, the remaining provisions of the statute are valid, unless it appears to the court that the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one; or unless the court determines that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

Because section 2-4-204, C.R.S., applies to all statutes in the Colorado Revised Statutes, a separate severability clause is unnecessary and the proponents should consider removing it.

Technical Comments

The technical issues raised in the technical comments for proposed initiatives 2023-2024 #271 and #272 apply to this proposed initiative as well. 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 amending clause adding section 34-60-114.1 in section 1 of the proposed initiative is incorrect. It should read:

In Colorado Revised Statutes, **add** 34-60-114.1 as follows:

2. Each section of the Colorado Revised Statutes has a headnote that briefly describes the content of the section. A headnote usually includes the main subject of the section and, if provisions such as a short title, declaration, definitions, or rule-making authority are included in the section, the headnote makes mention of those provisions. A headnote should be added to section 1 of the proposed initiative and be in bold-faced type. For example:

34-60-114.1. Strict liability for damages caused by oil and gas operations – short title – purposes and findings – definitions.

3. In proposed section 34-60-114.1, "this Act" should be changed to "this section" in subsections (1), (2)(a), and (4)(b).
4. In regard to subsection (2) of the proposed initiative:
 - a. It is standard drafting practice to use a serial comma, otherwise referred to as an Oxford comma, in a list with more than two items. The phrase "public health, safety, property, wildlife and the environment," which appears twice, should be changed to "public health, safety, property, wildlife, and the environment."
 - b. Because subsections (2)(a) and (2)(b) are part of a list that reads off the introductory portion language "The people...find and declare that:", consider changing subsection (2)(a) to end with a semicolon and the word "and," as shown below:
 - (a) The purpose of this section is to ensure the protection...of the environment by establishing strict liability for damages..., including... earthquakes; and
 - c. Subsection (2)(b) states that it is necessary to hold "[oil and gas operators, etc.] accountable for any harm caused [by their operations], and to promote responsible practices." The comma between "oil and gas operations" and "and to promote responsible practices" is grammatically incorrect and should be removed.
5. The definitions in section 34-60-103, C.R.S., are applicable to all of article 60 of title 34, C.R.S. It is not necessary to restate a definition in proposed section 34-60-114.1 unless the proponents intend the definition to have a different meaning. For that reason, subsections (3)(a) to (3)(d) of the proposed initiative

can be removed entirely. Should the proponents make this change, subsection (3) would then read:

(3) **Definition.** As used in this section, unless the context otherwise requires, "strict liability" means liability without regard to fault, negligence, or intent.

6. For purposes of the proposed 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."

In light of these definitions, please consider changing the word "shall" in subsections (4)(a) and (4)(b) of the proposed initiative. For example, in subsection (4)(a), instead of "Any operator, owner, or producer *shall be* strictly liable..." use "Any operator, owner, or producer *is* strictly liable..." because the operator, owner, or producer does not *have a duty* to be strictly liable. Likewise, in subsection (4)(b), instead of "Strict liability under this act *shall apply* regardless..." use "Strict liability under this [section] *applies* regardless."

7. In section headnotes and subheadings, only the first word of the headnote has a capital letter. In the subheading for subsection (4) of the proposed initiative, the words "liability" and "damages" should not be capitalized.