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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 #271, concerning Private Action to Enforce Oil and Gas Statutes and Regulations

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 #270 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 #270 and #272.

Purposes

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

1. To create a private right of action for any person residing in Colorado, the attorney general, or any county, city, or other political subdivision of the state (covered person) to enforce or seek damages for a violation of title 34, C.R.S., or any rule, regulation, or permit issued by the energy and carbon management commission (commission) pursuant to article 60 of title 34, C.R.S., in order to protect the public health, air, water, land, wildlife, or other natural resources in the state from pollution, impairment, or destruction; and
2. To require a district court, in making a final judgment, ruling, or order related to the private right of action, to award the litigation costs of the private right of action to the complaining party if the award is appropriate.

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. Section 2-4-401, C.R.S., contains a list of definitions that are applicable to the entirety of the Colorado Revised Statutes. Because section 2-4-401 (13), C.R.S., defines "rule" to include "regulation," the proponents should consider removing the word "regulation" in subsections (3) and (4) of the proposed initiative as it is redundant with the word "rule."
3. In regard to subsection (3) of the proposed initiative:
 - a. The proposed initiative allows a civil action for violations of "any statute in title 34." Along with article 60 of title 34, C.R.S., which contains the statutes related to oil and gas regulation, title 34, C.R.S., also contains statutes related to mines and minerals, underground storage of natural gas, geothermal resources, and other areas related to mineral resources. Do the proponents intend for a person to be able to commence a civil action to enforce those statutes as well? If so, the proponents should consider changing the headnote of proposed section 34-60-140 to "Private action to enforce statutes and rules related to mineral resources."
 - b. The proponents should consider changing the reference to "the energy and carbon management commission" to "the commission" because that term is already defined in section 34-60-103 (2), C.R.S.

- c. The proposed initiative allows a covered person to commence a civil action for "both enforcement and damages." Is this language intended to allow the covered person to seek injunctive relief against the alleged violator? If so, the proponents should consider adding language that includes the words "injunction" or "enjoin" to clarify that intent.
- d. The proposed initiative allows a covered person to recover damages "in the name of the state of Colorado." If this language is intended to mean that the damages should go directly to the state rather than the covered person, the proponents should consider adding language clarifying where the proponents intend the damages to go (the general fund, a specific cash fund, etc.). If the proponents intend for these damages to operate similarly to the penalties currently assessed against oil and gas operators by the energy and carbon management commission, the proponents could add language similar to section 34-60-121 (1)(d), C.R.S., that requires the state treasurer to credit the damages to the environmental response account in the energy and carbon management cash fund created in section 34-60-122 (5), C.R.S.
- e. Section 34-60-114, C.R.S., provides that "in the event the commission does not bring suit to *enjoin* any actual or threatened violation of this article or any rule...or order issued under this article, then any person or party in interest adversely affected and *who has notified the commission in writing* of such violation or threat thereof ... may, to prevent any or further violation, bring suit for that purpose...." This language appears to be inconsistent with the proposed initiative, which allows a covered person to bring suit without any prior notice to the commission and for compensatory relief. The proponents should consider amending the language of section 34-60-114, C.R.S., in the proposed initiative or adding language to proposed section 34-60-140 to avoid creating an inconsistency in the law.
- f. Section 13-80-102 (1)(i), C.R.S., requires that a civil action for which no other statute of limitation is provided must be commenced within two years after the cause of action accrues. Do the proponents intend to require the civil actions described in the proposed initiative to be commenced within two years? If not, the proponents may consider stating so or specifying another period of limitation.

4. In regard to subsection (4) of the proposed initiative:

- a. Do the proponents intend for the notice and intervention timelines to be business days?
 - b. The proposed initiative requires that the notice of the civil action be provided to the applicable state or political subdivision "within fourteen days." The proponents should consider adding language to clarify what event begins the fourteen-day period (e.g., the filing of a complaint with the applicable district court).
 - c. How do the proponents intend for notice to be submitted to the state or applicable political subdivision? The proponents should consider clarifying in the language how this notice should be provided (certified mail, electronic mail, etc.).
 - d. What is the proponents' intent in including the word "policy" in the phrase "the state or political subdivision responsible for enforcing the ... policy ... at issue"? For the purpose of consistency, should the word "policy" also be included in subsection (3) of the proposed initiative, where the new language notes that a person aggrieved by the violation of "any statute ... or any rule, regulation, or permit ... may commence a civil action ... to enforce such statute, rule, regulation, or permit"? If the intent is for the proposed initiative to only apply to statutes, rules, regulations, and permits related to oil and gas as indicated in the headnote, should "the state or political subdivision" be changed to "the commission" because the commission is the state agency responsible for enforcing state laws related to oil and gas regulation pursuant to section 34-60-121, C.R.S.?
5. Subsection (6) of the proposed initiative uses the phrase "cause of action." The phrase "civil action" is used in all other portions of the proposed initiative. The proponents should consider changing this phrase to "civil action" to be consistent with other language in the proposed initiative.

Technical Comments

The technical issues raised in the technical comments for proposed initiatives 2023-2024 #270 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. In regard to subsection (1) of the proposed initiative:
 - a. It is standard drafting practice to use an Oxford comma in a list of more than two words. In subsection (1) of the proposed initiative, "clean air, pure water and protecting ecosystems..." should be changed to "clean air, pure water, and protecting ecosystems...."
 - b. In the phrase "it is in the public interest to enable access to the court to remedy pollution, impairment, and destruction of such resources," because of the structure of the sentence, the word "the" should be added before "pollution," so that the sentence is understood to read "the pollution of, the impairment of, and the destruction of such resources."
2. In regard to subsection (2) of the proposed initiative:
 - a. 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 unless the proponents intend the definition to have a different meaning. For that reason, subsection (2) of the proposed initiative can be removed entirely.
 - b. However, should you decide to keep the definition in subsection (2) of the proposed initiative:
 - i. It is standard drafting practice to use the phrase "As used in the section," as opposed to "For purposes of this section" when introducing a definition; and
 - ii. The letter "p" in the word "Person" should be lowercase, as, except in certain circumstances (e.g., Colorado), only the first word in a sentence should be capitalized.
3. It is standard drafting practice to specify "*this* article 60" or "*this* title 34" when referring to the same article or title in which the language is added or amended. Because the proposed initiative is adding section 140 to article 60 of title 34, the two references to "article 60 of title 34" should be changed to "this article 60."
4. When citing a subdivision within a section, all subdivisions are called subsections, and when referring to a different subsection within a section, include the phrase "of this section." In subsection (4) of the proposed initiative, the reference to "paragraph (3)" should be changed to "subsection (3) of this

section." And in subsection (5) of the proposed initiative, the reference to subsection (3) should read "subsection (3) of this section."

5. 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 subsection (6) of the proposed initiative. For example, instead of "Nothing in this section shall be construed...", use "Nothing in this section is construed," because there is no person that has a duty.

6. It is standard drafting practice to avoid archaic or ambiguous words, such as herein, therefor, above, of, and other similar words because it can cause confusion.
 - a. In subsection (4) of the proposed initiative, the word "of" in the phrase "within ninety days of receiving the required notice" could mean either "before" or "after" ninety days; for that reason, the phrase should be changed to read "within ninety days *after* receiving the required notice," if that is the proponents' intent.
 - b. In subsection (6) of the proposed initiative, the use of the word "herein" in the phrase "The cause of action *herein* authorized shall be in addition to any other right or remedy" is unclear. Does "herein" mean "in this section," "in this subsection (6)," "in this article 60," or "in this title 34"? The proponents may want to rephrase so the sentence reads "The cause of action authorized *in this section* shall be in addition to any other right or remedy." Please also note that this sentence may require further change due to substantive questions (4)(b) and (5).