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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 #272, concerning Right to Healthy Environment

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 #271. 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 #271, except as necessary to fully understand the issues raised by the revised proposed initiative. Comments and questions addressed in those other memoranda may also be relevant, and those questions and comments

are hereby incorporated by reference in this memorandum. Only new comments and questions are included in this memorandum.

Purposes

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

1. Ensuring that every person in Colorado has a right to clean air, clean soil, clean water, a safe climate, and a healthy environment;
2. Requiring the state government and any agency, institution, and political subdivision of the state to give the highest prioritization to the protection of a healthy environment when enacting legislation, regulations, policies, and ordinances; and
3. Authorizing any resident of Colorado, the attorney general, and a political subdivision of the state to bring an action against the state government or any agency, institution, or political subdivision of the state for failure to abide by or enforce the right to a healthy environment.

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. The proposed initiative seeks to amend title 24 of the Colorado Revised Statutes. Because the proposed initiative amends statute, if it becomes law, the General Assembly may later amend or even repeal the language of the proposed initiative. Is it your intent that the proposed initiative could be later amended or even repealed by the General Assembly?
3. The proposed initiative states that every person has a "right to have clean air, clean soil, clean water, a safe climate, and healthy environment."
 - a. How is the cleanliness of air, soil, and water being measured? How is the safety of the climate being measured? How is the health of the environment being measured?
 - b. Who makes these determinations?

4. What does it mean for the state and political subdivisions of the state to serve as trustees of the natural resources of Colorado? What happens when the state or a political subdivision of the state, as a trustee of the natural resources of Colorado, enacts a statute, regulation, policy, or ordinance that violates its duties as a trustee?
 - a. As trustees, would the state and political subdivisions be authorized to do the following:
 - i. Issue permits for discharges of pollution into state waters pursuant to the federal "Clean Water Act"?
 - ii. Issue permits for emissions of air pollution pursuant to the federal "Clean Air Act"?
 - iii. Issue oil and gas permits?
 - iv. Issue hunting licenses?
 - v. Conduct prescribed burns of forests?
5. How are you defining "natural resources"?
 - a. What types of resources are considered "natural resources"?
 - b. What does it mean to "conserve, protect, and maintain" those resources?
6. The proposed initiative states that it is necessary for the state "to prioritize protection of a healthy environment."
 - a. What is the state prioritizing protection of a healthy environment over? Is protection of the healthy environment prioritized over private property rights? If so, could that constitute a taking requiring just compensation under the Fifth Amendment of the United States Constitution and section 15 of article II of the Colorado constitution? How would just compensation be provided to property owners whose property rights were not prioritized?
 - b. Does the protection of a healthy environment take precedence over all other state statutes, regulations, polices, and ordinances?
7. What happens when there is a conflict between healthy environment and another state policy?
8. Section 24-20-103 of the proposed initiative defines "healthy environment."

- a. How does one determine if the state is maintaining "safe and sustainable conditions for human life and wildlife"?
 - i. What does it mean for conditions to be "safe and sustainable"?
 - ii. Conditions that are "safe and sustainable" for humans might not be conditions that are "safe and sustainable" for wildlife and vice versa. How should the language be interpreted with respect to conditions that are safe and sustainable for one but not the other?
 - b. What entity or entities must "safeguard against the undo degradation and depletion of naturally sustaining resources"?
 - c. When is degradation and depletion of naturally sustaining resources considered "undue"? Are there instances where degradation and depletion of naturally sustaining resources is warranted?
 - d. Does "naturally sustaining resources" as used in the definition of "healthy environment" refer to the same resources as the term "natural resources" that is used in other sections of the proposed initiative? If not, what is the difference between a "natural resource" and a "naturally sustaining resource"?
9. The second sentence of section 24-20-103 (1) in the definition of "healthy environment" ("The failure to ensure a healthy...") seems like operative law setting forth responsibilities of parties. It is standard drafting practice to not include operative law in a definition. Have you considered moving this provision to a different section of the proposed initiative?
10. What if compliance with a state or federal law involves the undue "degradation or depletion" of natural resources? For instance, a federal or state permit or policy to develop certain minerals would necessarily involve the depletion of a natural resource.
11. In section 24-20-105 of the proposed initiative, the phrase "GOVERNMENTAL ENTITY" is used. Was this intentional, or should we instead use the defined term of "POLITICAL SUBDIVISION OF THE STATE"?
12. Section 24-20-105 of the proposed initiative permits the attorney general, political subdivisions of the state, or any resident of Colorado to enforce the provisions of the right to a healthy environment.
- a. What provisions in the proposed initiative are you referring to?

- b. Have you considered adding specific provisions to the proposed initiative that would allow an entity to determine whether or not a violation of the right to a healthy environment is occurring?
- c. How would a person determine that an action of the state or a political subdivision of the state is the cause of a violation of the right to a healthy environment?
- d. Do you intend that agencies of the state that are already tasked with enforcing environmental policies, such as the air quality control commission, solid and hazardous waste commission, and water quality control commission within the department of public health and environment and the energy and carbon management commission and the Colorado water conservation board within the department of natural resources, would be authorized to enforce the provisions of the proposed initiative as well? If so, you should consider adding a reference to "state agencies" in the list of persons who may enforce the right to a healthy environment in section 24-20-105 of the proposed initiative.
- e. Does the reference to "any resident" specifically mean individuals? Do you intend that private entities, including corporations and nonprofit organizations, could enforce the provisions? If so, you might consider changing "any resident of Colorado" to "person in Colorado."
- f. Given the expansive enforcement power authorized in section 24-20-105 of the proposed initiative, and the availability of reasonable costs and attorney fees to a prevailing plaintiff but not to a prevailing defendant, the proposed initiative could lead to a considerable increase in the number of complaints received by the attorney general's office and political subdivisions and the number of cases filed in the courts.
 - i. How do you intend the attorney general, political subdivisions, and the courts prioritize these numerous complaints and cases?
 - ii. The proposed initiative does not indicate where the money to investigate, prosecute, and adjudicate the complaints and cases that will likely arise from this expansive enforcement power will come from. What money do you intend be used to pay for these enforcement activities?

13. Have you considered which courts have jurisdiction over legal claims attempting to assert the right to a healthy environment?

14. What happens if a statute, regulation, policy, or ordinance of the state or political subdivision of the state is determined to have violated the right to a healthy environment?
15. If the proposed initiative becomes law, do you intend that the General Assembly could enact subsequent legislation to exempt certain statutes from the provisions of this proposed initiative?
16. Have you considered establishing standards for determining when the right to a healthy environment has been violated or not upheld?
 - a. Does there need to be a certain level of "degradation and depletion" of natural resources for there to be a violation of the right to a healthy environment? Does any degradation or depletion constitute a violation?
 - b. Have you considered establishing a baseline level for measuring whether air, water, land, and the environment is considered "healthy" or "safe" or "clean"?
 - c. Is Colorado's environment currently "safe and sustainable"? How would you determine if "safe and sustainable conditions" are being maintained?
 - d. Have you considered whether there should be a state agency or similar entity that tracks and reports environmental conditions to measure if the environment is healthy?
17. Have you considered how the proposed initiative may conflict with Colorado's prior appropriation doctrine related to the appropriation and use of water in Colorado pursuant to sections 5 and 6 of article XVI of the Colorado constitution? Would certain uses for water be considered "degradation and depletion" of a natural resource?
18. Have you considered how establishing a right to a healthy environment may conflict with existing state and federal law?
 - a. For example, under federal law people are allowed to discharge certain pollutants into both surface and ground waters at appropriate levels governed by federal regulations and authorized by permit. Would this be considered a violation of the right to a healthy environment because it degrades surface and groundwater even though it is permitted by federal law?

- b. Would implementation of those federal acts that allow a discharge of certain pollutants into water or emissions of certain pollutants into the air conflict with a healthy environment under the proposed initiative? If so, does the proposed initiative then violate the supremacy clause under article VI, paragraph 2, of the United States Constitution?
19. Will the right to a healthy environment apply retroactively to existing statutes or programs that may degrade or deplete natural resources or just statutes and regulations that are enacted after the effective date of the proposed initiative?

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. Article 20 of title 24, C.R.S., already exists. This act will need to be created somewhere else in title 24.
2. The standard drafting language used for short titles is: THE SHORT TITLE OF THIS ARTICLE 20 IS THE "COLORADO HEALTHY ENVIRONMENT ACT".
3. 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

For section 24-20-102 of the proposed initiative, the introductory portion should be shown as (1), and the current subsections (1), (2), and (3) should be lettered as (a), (b), and (c). For example:

24-20-102. Purposes and findings. (1) THE PEOPLE OF THE STATE OF COLORADO HEREBY FIND AND DECLARE THAT:

- (a) THE PURPOSE OF...
- (b) THE STATE AND POLITICAL SUBDIVISIONS OF THE STATE SHALL...
- (c) IT IS NECESSARY FOR THE STATE...

4. Instead of using the phrase "THIS ACT" to refer to the new statutes (see sections 24-20-102 and 24-20-105 of the proposed initiative), standard language in this case would be "THIS ARTICLE 20," though the article number will need to be updated according to technical question #1.
5. An Oxford comma (or serial comma) is used before "and" or "or" in all lists of three or more items. A comma is missing after "A SAFE CLIMATE" in section 24-20-102 (1) of the proposed initiative and after "STANDARD" in section 24-20-103 (1) of the proposed initiative.
6. Other than in a definitions section, and unless the subsection contains more than one sentence, subsections that follow from an introductory portion should end in a semi-colon, with the penultimate subsection ending in "; AND" and the final subsection ending in a period. For example, section 24-20-102 of the proposed initiative should contain the highlighted punctuation and "AND."

24-20-102. Purposes and findings. (1) THE PEOPLE OF THE STATE OF COLORADO HEREBY FIND AND DECLARE THAT:

- (a) THE PURPOSE OF...GENERATIONS;
- (b) THE STATE...GENERATIONS; AND
- (c) IT IS NECESSARY...ENVIRONMENT.

7. When creating a new article, the definitions should apply to the entire article, not just the section where the definitions are being created. Additionally, "AS USED IN THIS..." is the preferred language instead of "FOR PURPOSES OF THIS...". Accordingly, the introductory portion for section 24-20-103 of the proposed initiative should read: AS USED IN THIS ARTICLE XX, UNLESS THE CONTEXT OTHERWISE REQUIRES: ...

8. It appears that reference to "undo" in the definition of "healthy environment" in section 24-20-103 of the proposed initiative is a typo and the word "undue" would be more appropriate in the sentence.
9. In section 24-20-103 (1) of the proposed initiative, the phrase "AND TO SAFEGUARD" does not properly connect with "MEANS" at the beginning of the paragraph. Consider rephrasing to something like: "HEALTHY ENVIRONMENT" MEANS SAFE AND SUSTAINABLE CONDITIONS FOR HUMAN LIFE AND WILDLIFE, INCLUDING HEALTHY AIR, WATER, LAND, AND ECOSYSTEMS, WHICH CONDITIONS REQUIRE SAFEGUARDING AGAINST...
10. In section 24-20-105 of the proposed initiative, "ANY" should be added before "OTHER POLITICAL SUBDIVISION OF THE STATE." Since "THE" precedes "ATTORNEY GENERAL," the "ANY" before "PERSON" does not apply to all items in the list, and therefore, each item needs its own indefinite article.
11. In section 24-20-105 of the proposed initiative, the phrase "ATTORNEY'S FEES" is used. Standard drafting language for that phrase is not possessive and should instead be shown as "ATTORNEY FEES."
12. In the severability clause, **SECTION 2.** of the proposed initiative, the "a" in "act" does not need to be capitalized. Additionally, section 2-4-204, severability of statutory provisions, applies to all laws of the state of Colorado, so the severability clause is not necessary; however, if you wish to retain the severability clause, consider using standard drafting language for a severability clause:

SECTION 2. Severability. If any provision of this act or the application of this act to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act that can be given effect without the invalid provision or application, and to this end, the provisions of this act are declared to be severable.