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MEMORANDUM

TO: Steven Ward and Suzanne Taheri
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: April 3, 2024
SUBJECT: Proposed initiative measure 2023-2024 #280, concerning Construction Permits for Oil and Gas Operations

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.

Purposes

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

1. To establish that a request for a general permit registration does not constitute obtaining or having a valid construction permit;
2. To require the division of administration (division) in the department of public health and environment or the air quality control commission (AQCC), when

evaluating a construction permit application for a proposed new or modified oil and gas system, to aggregate emissions across the oil and gas system and include emissions from exploration and preproduction activities;

3. To allow the division or the AQCC, as applicable, to grant a construction permit application for any proposed new or modified oil and gas system in a federally designated nonattainment area only if certain criteria are satisfied;
4. To require, on and after January 1, 2025, the division or the AQCC to base determinations concerning compliance with national ambient air quality standards to be based on air quality modeling and not on air quality monitoring;
5. To require air quality modeling to include certain components;
6. To require the division or the AQCC, in granting a construction permit application, to include any assumptions regarding the air quality modeling and any emissions reductions that the owner or operator will achieve in the construction permit as an enforceable permit condition; and
7. To require the energy and carbon management commission (ECMC) in the department of natural resources to require that an operator applying for a permit from the ECMC obtain any required construction permit for an oil and gas location from the division or the AQCC, as applicable, before a final determination is made regarding the permit application.

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. What is the intended effective date of the proposed initiative? The proponents should consider including an effective date clause at the end of the initiative.
3. Article V, section 1 (8) of the Colorado Constitution requires all laws adopted by the people through the initiative process to include the words "Be it Enacted by the People of the State of Colorado." To comply with this requirement, the proponents should consider capitalizing the word "enacted" and inserting the word "the" before "People" in the first line of the initiative text.

4. The definition of "shared equipment" in section 1 of the proposed initiative includes the terms "phase separators," "natural gas dehydrators," and "amine sweetening units." It appears that there are no existing instances of these terms in the Colorado Revised Statutes. The proponents may consider supplying definitions for these terms.
5. In section 1 of the proposed initiative, subsection 25-7-114.2 (3) requires the division or the AQCC to do two things in "evaluating a construction permit application for a proposed new or modified oil and gas system":
 - a. Aggregate emissions across the oil and gas system; and
 - b. Include emissions from exploration and preproduction activities.

These two requirements seem to be applicable to applications to modify *existing* oil and gas systems, but it is unclear how they apply to applications for *new* systems—that is, if a "new oil and gas system" is understood to be a system that does not yet exist and is not yet producing measurable emissions. The proponents might consider adding the words "existing or estimated" before "emissions" in both subsections (3)(a) and (3)(b) of section 1 of the proposed initiative to contemplate such new systems.

6. In section 2 of the proposed initiative, the definition of "nonattainment air pollutant" includes the words "including any precursor air pollutants." With regard to this language:
 - a. To conform with drafting protocol, the proponents should consider stating "air pollutants" in the singular (i.e., "air pollutant"); and
 - b. The proponents may consider defining "precursor air pollutant," as it appears that there are no instances of this term in the Colorado Revised Statutes.
 - c. Section 25-7-103 (1.5), C.R.S., defines "air pollutant" and states that the term "includes any precursors to the formation of any air pollutant, to the extent the administrator of the United States environmental protection agency or the commission has identified such precursor or precursors for the particular purpose for which the term 'air pollutant' is used." Because "air pollutant" is already defined for article 7 of title 25, C.R.S., to include precursors:
 - i. The phrase "including any precursor air pollutants" in the definition of "nonattainment air pollutant" in section 2 of the

proposed initiative appears to be redundant to the definition of "air pollutant" for all of article 7 of title 25, C.R.S.

- ii. If the phrase "precursor air pollutants" should remain, the proponents might consider removing "air pollutants" from the phrase so that it would read as "including any precursor" to better align with the language in the definition of "air pollutant" in section 25-7-103 (1.5), C.R.S.
7. In section 2 of the proposed initiative, subsection (2)(a) introductory portion, the phrasing "may grant a construction permit application" is awkward. Presumably, the proponents intend that the division will *receive*, and not *grant*, "construction permit applications," and the division will then grant construction permits to certain applicants. Therefore, the proponents may consider rephrasing this as "may grant a construction permit" or "may approve a construction permit application."
 8. In section 2 of the proposed initiative, subsection (2)(a)(II), there appears to be an issue that is similar to the issue described above in substantive comment #5. That is, the provision requires an applicant for a new or modified oil and gas system to "[achieve] emissions reductions...from existing sources," which is confusing if a "new oil and gas system" is understood to be a system that does not yet exist and is not yet producing measurable emissions.
 9. In section 2 of the proposed initiative, subsection (2)(a)(III), it states that, for a proposed new or modified oil and gas system in a nonattainment area, a construction permit may only be granted if the proposed new or modified oil and gas system is not located in a disproportionately impacted community.
 - a. Is the intent to disallow all construction permits for new or modified oil and gas systems in a disproportionately impacted community of a nonattainment area?
 - b. If construction permits for new or modified oil and gas systems in disproportionately impacted communities of a nonattainment area are prohibited under the proposed initiative, have the proponents considered the potential effect of the prohibition that mineral rights owners in those areas will effectively lose their property rights to the minerals, constituting a potential taking requiring just compensation under the Fifth Amendment of the U.S. Constitution and article II, section 15 of the Colorado Constitution?

10. In section 2 of the proposed initiative, subsection (2)(b)(I), the date "January 1, 2025," is used. This date seems to be too soon to be used for the purposes described in the proposed initiative. The proponents may consider using another date.
11. In section 2 of the proposed initiative, subsection (2)(c) introductory portion, the phrasing "[i]f a construction permit application is granted by the division or commission," is awkward and stated in passive voice. Presumably, this should be reworded to state that the division or AQCC either "*approves* a construction permit application" for or "*grants* a construction permit" to an applicant. (See substantive comment #7.)

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. In sections 1 and 2 of the proposed initiative, regarding the respective definitions for "'Modify' or 'Modified'":
 - a. It is unnecessary to capitalize "modified" because the word does not begin either sentence;
 - b. It is unnecessary to include "or 'Modified'" because defining the word "modify" is sufficient and will apply to instances of "modified" that appear in sections 1 and 2 of the proposed initiative;
 - c. The definitions of "modify" read as if they are defining the noun form of this word ("modification") rather than the verb "modify." Proponents may consider rewording the definitions accordingly. For example:
 - (a) "MODIFY" OR "MODIFIED" MEANS *TO MAKE ANY PHYSICAL CHANGE IN, OR TO MAKE ANY CHANGE IN THE METHOD OF OPERATION OF, A STATIONARY SOURCE...*
 - d. To clarify that the respective subparagraphs (I) and (II) apply to the aforementioned modification, or "change," and not to "stationary source," the proponents may consider removing "source that:" and

substituting "source, which physical change or change of method of operation:".

2. In section 1 of the proposed initiative, subsection (1)(a)(II), a single double quotation mark appears at the end of the provision and should be deleted.
3. In section 1 of the proposed initiative, subsection (1)(d)(II), regarding the definition of "oil and gas system," the proponents may consider inserting the word "as" before "measured."
4. In section 1 of the proposed initiative, subsection (1)(f), in the definition of "shared equipment," the proponents may consider rewriting "spark ignition and compression ignition engines" as "spark ignition engines and compression ignition engines" to clarify that these are two discrete items in the list.
5. In section 2 of the proposed initiative, subsection (1)(a), in the definition of "air quality modeling," the proponents may consider removing "system that" and substituting "system, which modeling" in order to clarify that the language that follows applies to the modeling and not to the "modified oil and gas system."
6. In section 2 of the proposed initiative, subsection (1)(b), the double quotation mark following "Modified" is missing. Also see technical comment #1 regarding this definition.
7. In section 2 of the proposed initiative, subsection (1)(d), regarding the definition of "nonattainment area," the proponents may consider removing "any area" and substituting "an area of the state" in order to match the language to the existing definitions of this term in sections 24-38.5-116 (2)(h), 24-28.5-502 (7), and 25-7-1402 (8), C.R.S.
8. In section 2 of the proposed initiative, the proponents may consider shortening subsection (2)(b)(I) to read as follows:

(b) (I) ON AND AFTER JANUARY 1, 2025, THE DIVISION OR COMMISSION, AS APPLICABLE, SHALL BASE ANY DETERMINATION MADE PURSUANT TO SUBSECTION (2)(a)(I) OF THIS SECTION ON AIR QUALITY MODELING AND NOT ON AIR QUALITY MONITORING.

9. In section 2 of the proposed initiative, subsection (2)(b)(II)(B), there is a reference to "the one-hour nitrogen dioxide national ambient air quality standards," which are not defined, described, or mentioned in the proposed initiative. The proponents may consider elaborating here to describe exactly what they are referring to.

10. In section 3 of the proposed initiative, subsection (1)(k), the proponents may consider removing "making" and substituting "the commission makes" in order to clarify that it is the ECMC, and not the operator, that "[makes] a final determination on the permit application."
11. In section 4 of the initiative, the proponents should consider removing the final two words, "effective date.", and substituting "effective date of this act." in order to clarify that the words refer to the effective date of the act and not to the effective date of the determination of an application.
12. The following are correctly in small capital letters but need to be in **lowercase**, rather than uppercase, small capital letters:
 - a. In section 1 of the proposed initiative, subsection (2)(a), the word "A" between "æ" and "construction permit";
 - b. In section 1 of the proposed initiative, subsection (2)(b), the word "IS" between "shall be" and "deemed"; and
 - c. In section 3 of the proposed initiative, subsection (1)(j), the word "AND."
13. In section 1 of the proposed initiative, subsection (1)(a), the letter "w" in "APPENDIX W" is correctly in small capital letters but needs to be in **uppercase**, rather than lowercase, small capital letters.
14. In section 2 of the proposed initiative, subsection (2)(c)(I), the roman numeral "II" in "SUBSECTION (2)(a)(II)" is formatted in small capital letters; however, it should be formatted as normal, **uppercase** type (i.e. "II").