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Colorado General Assembly

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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 #281, concerning Oil and Gas Permitting

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 amendment to the Colorado Revised Statutes appear to be:

1. To ensure that the energy and carbon management commission (commission), on or before July 1, 2027, adopts rules, under specified criteria, to reduce and, before January 1, 2030, cease the issuance of new permits for oil and gas wells;

2. To expand the type of conduct resulting in a significant adverse environmental impact for which the commission requires a responsible party to perform mitigation from conduct pertaining to oil and gas operations to conduct pertaining to any activity regulated by the commission;
3. To amend the definition of "responsible party," in relation to the criteria under which the commission determines the party responsible for performance of mitigation of a significant adverse environmental impact, to include any person that conducts any activity regulated by the commission and, in certain instances, a prior owner or operator of an operation involving such activity; and
4. To require the office of future of work, in January 2028, to provide certain legislative committees with recommendations related to the rules adopted by the commission pursuant to the proposed initiative during the department of labor and employment's "SMART Act" hearing held pursuant to part 2 of article 7 of title 2, C.R.S.

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 will be the effective date of the proposed initiative?
3. Subsection (1)(b) of section 34-60-106.5 of the proposed initiative defines "oil and gas well" to specify what the phrase does not include. Do you want to add to the definition information about what the phrase does include?
4. Subsection (1)(c)(I) of section 34-60-106.5 of the proposed initiative defines "permit" in part to include "[a] permit or other approval issued by the commission..." Do you intend that the definition would also apply to permits or other approvals *renewed* by the commission?
5. What is meant by the phrase "a consistent reduction in the amount of new permits issued" in subsection (2)(a) of section 34-60-106.5 of the proposed initiative? What would qualify a reduction as being "consistent"?
6. Subsection (3) of section 34-60-106.5 of the proposed initiative requires that, in reducing the number of permits issued in 2028 and 2029 pursuant to subsection

- (2)(a) of that section, the commission prioritize reductions in disproportionately impacted communities. What criteria should the commission use to prioritize between permit applications that concern oil and gas wells that are not in disproportionately impacted communities?
- a. Should the commission simply prioritize applications based on when the applications were filed?
 - b. Should the commission try to spread out the approved applications geographically so that reductions are made as equally as possible throughout geographic areas of the state that are not disproportionately impacted communities?
7. If oil and gas permitting ceases by January 1, 2030, a number of mineral rights owners will be deprived of the property right to their mineral rights in the event that a new permit from the commission is required to extract those minerals. Restricting the mineral rights owner's property right might constitute a taking requiring just compensation under the Fifth Amendment of the U.S. Constitution and article II, section 15 of the Colorado Constitution. From what state fund would mineral rights owners be justly compensated?
8. To effectuate ceasing the issuance of permits by January 1, 2030, pursuant to section 34-60-106.5 (2) of the proposed amendment, you might consider adding conforming amendments in article 60 of title 34, C.R.S., to remove existing references to the drilling of oil and gas wells. For example, section 34-60-106 (3.5), (11)(a)(I)(A), and (14), C.R.S., reference the drilling of oil and gas wells which, on and after January 1, 2030, would not be permitted under the proposed initiative. Despite the "notwithstanding" language added in subsection (2) of section 34-60-106.5 of the proposed initiative, it might not be clear how to reconcile the commission's rules ceasing the permitting for oil and gas wells by 2030 with the remaining references in the statutes authorizing the drilling of oil and gas wells.
9. Both severance taxes pursuant to article 29 of title 39, C.R.S., and property taxes pursuant to article 7 of title 39, C.R.S., are collected for oil and gas activity in the state and provide millions of dollars statewide for local governments and for use in funding programs related to water projects, parks and wildlife, and energy costs. By ceasing the issuance of permits by 2030, it would drastically reduce the severance taxes and property taxes collected in the state from oil and gas operations. How would the local governments and

various statewide programs that depend on such severance and property taxes make up the lost revenue?

10. With respect to the requirement in subsection (4) of section 34-60-106.5 of the proposed initiative that, for any permit issued after July 1, 2024, a condition be added requiring that any drilling, deepening, reentering, or recompletion operations commence by December 31, 2032:

- a. The July 1, 2024, date should be changed because that date will be before the proposed initiative would be considered at the election in November 2024.
- b. For permits issued as late as 2029, is the timeline to commence operations by 2032 a reasonable one?

11. Article II, section 11 of the Colorado Constitution prohibits laws that are retrospective in their operation or that impose a new liability with respect to transactions or considerations already past.

- a. How does the requirement in subsection (8)(b)(I)(C) of section 34-60-124 of the proposed initiative to include a prior owner or operator as a "responsible party" who could be found liable for adverse impacts comply with the constitutional prohibition against retrospective laws?
- b. Similarly, how does the applicability clause in section 5 of the proposed initiative, which states that the measure "applies to conduct occurring before the effective date of this measure," comply with the constitutional prohibition against retrospective laws?

12. Subsection (8)(b)(I)(D) of section 34-60-124 of the proposed initiative references "... before the effective date of voter adoption of this measure in 2024." Section 1-40-123 (1), C.R.S., provides that ballot measures take effect "from and after the date of the official declaration of the vote by proclamation of the governor." The governor's proclamation might not occur until early 2025. You might consider removing the reference to "in 2024" from the language in subsection (8)(b)(I)(D).

13. With respect to the new language in subsection (9) of section 34-60-124 of the proposed initiative that responsible parties may be held jointly and severally liable:

- a. Do you intend this to be an exception to the general law set forth in section 13-21-111.5 (1), C.R.S., that, in tort claims with multiple

defendants, defendants are liable only to the "degree or percentage of the negligence of fault attributable to such defendant"? If so, you might consider adding to the proposed initiative an amendment to section 13-21-111.5 (1), C.R.S., setting forth that exception.

- b. Responsible parties may have entered into existing contracts that include provisions for pro rata liability between the parties for any civil action arising from their conduct. Application of the joint and several liability requirement could be determined to impair these existing contracts in violation of article 1, section 10 (1) of the U.S. Constitution and of article II, section 11 of the Colorado Constitution.

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. Although the text of new language in the proposed initiative should be in small capital letters, 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—in section 34-60-124 (9), C.R.S., the final sentence, in small capital letters, should begin with the word "RESPONSIBLE" capitalized rather than lowercased.
 - 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—in section 34-60-124 (8)(b)(I)(D), the word "people" is not a proper name and should not be capitalized.
2. In section 5 of the proposed initiative, the language refers to section 34-60-124 (7), (8)(b), and (9), C.R.S., "as amended in section 3 of this measure"; however, the applicable provisions are amended in **section 2** of the proposed initiative.