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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 #289, concerning strict liability for damages from 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.

Purpose

The major purpose of the proposed amendment to the Colorado Revised Statutes appears to be:

1. To hold any oil and gas operator, owner, or producer strictly liable for any damages that result from oil and gas operations, with "strict liability" defined as acting with gross negligence or willful misconduct.

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. Subsection (1)(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 (2)(b) of the proposed initiative.
3. Subsection (3) of the proposed initiative holds operators, owners, and producers "strictly liable" for any damages resulting from oil and gas operations.
 - a. Merriam-Webster Dictionary defines strict liability as "liability imposed without regard to fault." In addition, section 18-1-502, C.R.S., states that "if an offense or some material element thereof does not require a culpable mental state on the part of the actor, the offense is one of 'strict liability.'" Subsections (2)(e) and (3)(b) of the proposed initiative appear to define strict liability as acting with gross negligence, which is defined in Black's Law Dictionary as "a severe degree of negligence taken as reckless disregard," or willful misconduct, which is defined in Black's Law Dictionary as "intention[al] disregard to safety of others." To avoid confusion and inconsistency in the Colorado Revised Statutes and with other legal concepts, the proponents should consider using a term other than "strict liability" to describe the levels of liability in the proposed initiative.
 - b. Subsection (2)(e) of the proposed initiative provides a definition for "**strict liability**." Subsection (3)(a) of the proposed initiative states that "Any operator, owner, or producer shall be **strictly liable**...." The proponents should consider changing subsection (2)(e) of the proposed initiative to state "'Strict liability' or '**strictly liable**' means..." to provide added clarity to the proposed initiative.
 - c. Section 34-60-121, C.R.S., states that any operator that violates article 60 of title 34, C.R.S.; any rule or order of the commission; or any permit is subject to a penalty of no more than fifteen thousand dollars. Do the proponents intend for operators to only be liable for a penalty for a violation that results from gross negligence or willful misconduct and not liable for any violation that results from negligence or a lesser

standard? If so, the proponents should consider adding "Notwithstanding any provision of law to the contrary..." to the beginning of subsection (3)(a) of the proposed initiative or should consider making amendments to section 34-60-121, C.R.S., to reconcile the proposed initiative with that statute.

- d. Do the proponents intend for the standards of liability in the proposed initiative 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.
4. 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 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 is phrased incorrectly and should read as follows:

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

2. In section headnotes and subheadings, only the first word of the headnote, other than proper nouns, should begin with a capital letter.

3. When referring to the statutory section being added or amended, it is standard drafting practice to specify the subdivision—e.g. "this section," "this subsection (3)," "this subsection (3)(a)," etc.—rather than say "this Act."

In proposed section 34-60-114.1, "this Act" should be changed to "this section" in subsections (1)(a) and (3)(b).

4. In the introductory portion of subsection (2) of the proposed initiative, the word "the" is missing between "unless" and "context." Per standard drafting practice, the phrase should read "As used in this section, unless **the** context otherwise requires:".
5. The introductory portion to the definitions in section 34-60-103, C.R.S., states "As used in this article 60, unless the context otherwise requires:", which means that the definitions apply to all of the sections in article 60 of title 34. Therefore, it is not necessary to restate the definitions in section 34-60-103, C.R.S., within proposed section 34-60-114.1 of the proposed initiative, unless you intend for them to have a different meaning than that given in section 34-60-103, C.R.S. For that reason, subsections (2)(a) through (2)(d) of the proposed initiative can be removed from the proposed initiative; if this change is made, the definition for "strict liability" can be combined with the introductory portion so that subsection (2) of the proposed initiative becomes a single subdivision as follows:

(2) **Definition.** AS USED IN THIS SECTION, UNLESS [THE] CONTEXT OTHERWISE REQUIRES, "STRICT LIABILITY" MEANS... GROSS NEGLIGENCE OR WILLFUL MISCONDUCT.

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."

Given these definitions, please consider changing the word "shall" in subsections (3)(a) and (3)(b) of the proposed initiative. For example, in subsection (3)(a), instead of "Any operator, owner, or producer *shall be* strictly liable...", consider rephrasing as "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 (3)(b), instead of "Strict liability under this act *shall apply* where...", consider rephrasing as "Strict liability under this [section] *applies* where...."

7. When a provision other than a definitional section begins with an introductory portion, it is standard drafting practice for the following lower-level subdivisions of the same type to end, if they are only one sentence and are not themselves an introductory portion, with a semicolon; except that the penultimate lower-level subdivision also includes either "and" or "or" after the semicolon.

Therefore, subsection (1)(a) of the proposed initiative should end:

...EARTHQUAKES; AND

Note that this rule does not apply to subsection (2), a definitional section, or subsection (3) of the proposed initiative, which does not feature an introductory portion.

8. In subsection (1)(b) of the proposed initiative, the comma between "oil and gas operations" and "and to promote" is unnecessary and should be removed.