

STATE OF COLORADO

Colorado General Assembly

Natalie Castle, Director
Legislative Council Staff

Colorado Legislative Council
200 E. Colfax Ave., Room 029
Denver, Colorado 80203-1716
Telephone 303-866-3521
Facsimile 303-866-3855
Email: lcs.ga@coleg.gov



Ed DeCecco, Director
Office of Legislative Legal Services

Office of Legislative Legal Services
200 E. Colfax Ave., Room 091
Denver, Colorado 80203-1716
Telephone 303-866-2045
Email: olls.ga@coleg.gov

MEMORANDUM

TO: Steven Ward and Suzanne Taheri

FROM: Legislative Council Staff and Office of Legislative Legal Services

DATE: April 2, 2024

SUBJECT: Proposed initiative measure 2023-2024 #290, concerning preserving specific air quality control commission rules

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 to prohibit the Air Pollution Control Division (division) and the Energy and Carbon Management Commission from implementing any air quality control program or regulatory program that is inconsistent with certain rules passed by the air quality control commission on December 15, 2023, unless the division makes a formal,

written finding that the 2030 nitrogen oxide reduction targets set by Governor Polis on March 16, 2023, have not been or will not be met.

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. In subsection (2.5) of section 2 of the proposed initiative, the Air Pollution Control Division (division) and the Energy and Carbon Management Commission are prohibited from implementing their regulatory programs until the division "makes a formal, written finding" concerning whether oil and gas operators in the ozone nonattainment area will meet nitrogen oxide reduction targets. Please consider including where and to whom the "formal, written finding" should be submitted.
4. The proposed initiative begins with the phrase "Notwithstanding any other provision of law." It is a best practice to not use a generic notwithstanding phrase. If there is a concern about conflicts with existing law, the better practice is to determine what provisions would conflict and then use the specific provision in the notwithstanding phrase. What happens when two statutes begin this way? How does a court determine which controls? Also, this attempt to create a kind of super-statute does not really work because all statutes are of equal dignity. Do the proponents have specific statutes in mind that would conflict with the proposed initiative? Would the proponents consider deleting the phrase or narrowing it to apply to statutes that may conflict?
5. The word "division" is already defined, in section 25-7-103 (9), C.R.S., for article 7 of title 25, and this includes the proposed initiative. The word "division" is defined to mean the Division of Administration of the Department of Public Health and Environment. Therefore, the use of the word "division" as a shorthand for the Air Pollution Control Division conflicts with current law. Would the proponents consider using the full name or otherwise addressing this conflict? Another option is to define the word "division" for the provision and then create an exception in section 25-7-103 (9), C.R.S., for the proposed initiative.

6. The proposed initiative defines terms in a nonstatutory legislative declaration, e.g., "nitrogen oxides ("NOx")," that appear to subsequently apply to the statutory provision. When the statutes are published, the statutory provision will be included but the nonstatutory legislative declaration will not, so these definitions will not actually apply to the statutory provisions. Would the proponents consider one of the following changes?
 - a. Spelling out the terms;
 - b. Adding the phrase "referred to in this subsection (2.5) as the 'division,'" or
 - c. Including a definitions section in the statutory provision. For the definition of "NOx" specifically, the provision would look something like this:

(2.5) (a) As used in this subsection (2.5):

(I) "NOx" means nitrogen oxide.
7. According to the proposed initiative, the Energy and Carbon Management Commission may change rules only if the Air Pollution Control Division makes a finding described in the provision. This means the commission's authority would be dependent on the findings of another agency. Is this the proponent's intention?
8. The proposed initiative requires, to change the policy, the Air Pollution Control Division to make a "formal" finding. What makes a finding "formal"? Would the proponents consider replacing the word "formal" with a more concrete statement of the requirement?
9. The proposed initiative references a letter that establishes a nitrogen oxide reduction target. This reference would require a statute user to find and read the letter to understand the requirement of the proposed initiative. It appears that the relevant part of the letter references a target of "upstream oil and gas operators in the ozone nonattainment area to achieve at least a 50% in 2030 from a 2017 baseline as used in the current SIP." Would the proponents consider replacing the current language with "upstream oil and gas operators in the ozone nonattainment area, have not or will not meet the 2030 target of a fifty percent nitrogen oxide reduction from the 2017 baseline used in the state implementation plan" or something similar?

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 the nonstatutory legislative declaration in section 1 of the proposed initiative:
 - a. Per the structure of the statutes, the introductory portion, which reads "The [p]eople of Colorado hereby find and declare that" should be labeled as subsection (1), and the paragraphs that are currently numbered should be lettered, as shown in part below:

Section 1. Declaration of the People of Colorado. (1) The People ... declare that:
(a) In December ...
 - b. In subsection (1), the two parentheticals back to back, "(May to September) ("the NOx Reduction Rules")," could be confusing for readers. Please consider moving "May to September" outside of the parentheses, as a descriptor for the phrase "ozone season." See below for an example:

"during 'ozone season', which lasts from May to September (NOx Reduction Rules)."
 - c. In section 1 of the proposed initiative, subsection (1) creates the abbreviated term "the NOx Reduction Rules." While the term uses the plural "rules," subsections (4) and (5) refer to a singular "rule." In addition, while the abbreviated term is created in subsection (1), there is also reference to the passage of a "regulation" in that subsection, which is another word for "rule." To avoid confusion, please consider using the terms, including the defined term, consistently.
 - d. The way the first sentence of subsection (2) is structured, it reads like the directive from the governor established the rule. If the directive from the governor established the targets, while the commission promulgated the rule or rules, the sentence should be slightly rephrased, as shown below:

The Commission's rule was in response to a directive from the Governor in March 2023 *to establish* "the most ambitious rule in Colorado's history."

- e. Per drafting convention, a provision following an introductory portion that contains two complete sentences should end in a period. Subsection (2) should end in a period.
2. In section 2 of the proposed initiative, which amends section 25-7-111, C.R.S., to add a new subsection (2.5):
- a. The headnote to the section is missing. It should read:

25-7-111. Administration of air quality control programs - directive - prescribed fire - review. (2.5) NOTWITHSTANDING ...

Please consider if it would be helpful to add anything to the headnote that relates to the new language added in 25-7-111 (2.5), C.R.S.

- b. It is standard drafting practice to use SMALL CAPITAL LETTERS to show the language being added to the Colorado Revised Statutes. All of the new language added in the new subsection (2.5) should be written in SMALL CAPITAL LETTERS.
- c. It is not standard drafting practice to capitalize the first letters of the names of state departments, divisions, or commissions or to abbreviate their names in parentheses. Please consider adding the phrase "referred to in this subsection (2.5) as the 'division,'" instead of using parentheses. And please put in lowercase the names "air pollution control division," "energy and carbon management commission," and "air quality control commission."
- d. Section 25-7-103 (7), C.R.S., defines the term "commission" to mean the air quality control commission. Therefore, it is not necessary to use the proper name in the proposed section 25-7-111 (2.5) of the proposed initiative. The term "commission" works and is more elegant. Would the proponents consider replacing the phrase "air quality control commission" with the phrase "commission"?
- e. In the phrase "2030 50% NO_x reduction target established by Governor Polis in the March 16, 2023 Executive Letter":

- (A) Because NOx is not a defined term in section 25-7-111, C.R.S., or in article 7 of title 25, C.R.S., please change "NOx reduction target" to read "nitrogen oxide reduction target."
- (B) Numbers are spelled out in statute. Please spell out "50%" as "fifty percent."
- (C) Because it could be hard for readers to parse "2030 fifty percent nitrogen oxide reduction target," please consider rephrasing. For example, "... or will not meet the 2030 target to reduce nitrogen oxides from oil and gas operations by fifty percent established by..."
- (D) Consider deleting the reference to the letter as described in the ninth substantive question, but if it is kept, the reference to the executive letter should read "March 16, 2023, executive letter."
- (E) Please consider adding a bit more context; for example, "in the March 16, 2023, executive letter to the department of public health and environment and the oil and gas conservation commission."

f. When referring to the Code of Colorado Regulations:

- (A) Instead of using the section symbol (§), please use the abbreviated word "sec."
- (B) Please consider using the unofficial titles of the rules referenced in subsection (2.5), which can provide helpful context for readers:

codified at 5 CCR 1001-9, part B, sec. VI.E, "Use and Operational Restrictions for Drilling, Pre-Production, and Production Operations"

and

5 CCR 1001-30, part B, sec. I.D.6, "(State Only) Additional Requirements for Internal Combustion Engines"

- g. Subsection (2.5) of the proposed initiative references the air pollution control division's "air quality control program." Please consider that it could be helpful to include a cross-reference to the program or programs to direct readers to further information. This could be as simple as

adding "described in this section" or "created in this article 7." Please consider doing the same for the "regulatory program" of the energy and carbon management commission.

- h. In the phrase that currently reads "unless and until the [d]ivision makes a formal, written finding that collectively, upstream oil and gas operators in the ozone nonattainment area, have not or will not meet..."

- (A) A comma is missing before the word "collectively";

- (B) There is an incorrect comma after the word "area"; and

- (C) The portion of the phrase that reads "have not or will not meet" should be rewritten as "have not met or will not meet."

To make this portion of the sentence grammatically correct, it should read "until the [d]ivision makes a formal, written finding that, collectively, upstream oil and gas operators in the ozone nonattainment area have not met or will not meet..."