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Colorado General Assembly

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MEMORANDUM

TO: Paul Culnan and Patricia Nelson
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: April 28, 2023
SUBJECT: Proposed initiative measure 2023-2024 #46, concerning oil and gas permits that incorporate the use of fracking.

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 the Colorado 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 another initiative addressing the same topic, proposed initiative 2023-2024 #47. The comments and questions raised in this memorandum will not include comments and questions that were addressed in the memorandum for proposed initiative 2023-2024 #47, except as necessary to fully understand the issues raised by the proposed initiative. Comments and questions addressed in that memorandum may also be relevant, and those questions and comments are hereby incorporated by reference in this memorandum.

Earlier versions of this proposed initiative, proposed initiatives 2023-2024 #44 and #45, were the subject of memoranda dated April 18, 2023, which were discussed at a public meeting on April 18, 2023. The substantive and technical comments and questions raised in this memorandum will not include comments and questions that were addressed at the earlier meeting, except as necessary to fully understand the issues raised by the revised proposed initiative. However, the prior comments and questions that are not restated here continue to be relevant and are hereby incorporated by reference in this memorandum.

Purposes

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

1. The Colorado oil and gas conservation commission (commission), by January 1, 2026, to promulgate rules discontinuing the issuance of new oil and gas permits that incorporate the use of fracking by December 31, 2030;
2. The commission to amend rules in order to prohibit the modification and require the expiration of all previously issued oil and gas permits that incorporate the use of fracking by December 31, 2033, if drilling operations have not commenced by that date;
3. The commission to transition its duties to primarily monitoring, plugging, and remediating oil and gas facilities that were permitted prior to December 31, 2030; and
4. The office of future work to create a program by June 1, 2025, to identify and explore transition strategies for oil and gas workers.

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 proponents may want to consider using the term "hydraulic fracturing" instead of "fracking." "Hydraulic fracturing" is the preferred term in statute while "fracking" does not appear anywhere in existing Colorado statutes. (see Technical Comments #3)

3. In section 3 of the proposed initiative, section 34-60-106 (1)(f)(IV) accounts for section 34-60-106 (1)(f) to be repealed on December 31, 2030. That section of statute applies to permits for drilling a well for oil and gas and is not limited to operations that incorporate fracking. Accordingly, by repealing the statute on December 31, 2030, the requirement for an operator to obtain a permit before commencing the drilling of a well, whether or not fracking takes place, would be repealed on that date. Is that the proponents' intent?
4. Have the proponents considered whether the definition of "disproportionately impacted communities" in section 24-4-109 (2)(b)(II), Colorado Revised Statutes, would apply to the same communities that are impacted more by oil and gas developments that utilize hydraulic fracturing? Would additional metrics for determining which communities are disproportionately impacted by hydraulic fracturing be needed so that those communities are the ones that benefit from the proposed initiative?
5. The proponents seek to amend section 29-20-104 (1)(h), Colorado Revised Statutes, which gives local governments permitting authority regarding the location and siting of new oil and gas facilities. The proposed amendment repeals that authority once new oil and gas permits that include fracking are no longer permitted after December 31, 2030. A local government may still need authority to regulate the use of land for oil and gas operations, since such operations may continue after 2030. Should this authority under section 29-20-104 (1)(h) be amended accordingly rather than repealed, considering that oil and gas operations may continue and that impacts to the use of land for those operations will still occur after new oil and gas permits that incorporate the use of fracking are no longer issued?
6. Hydraulic fracturing operations require the use of fluids and chemicals to extract oil and gas. Section 34-60-132, Colorado Revised Statutes, requires operators to disclose and report the chemicals used during hydraulic fracturing operations. Should this requirement be repealed after December 31, 2030?

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. For purposes of this statutory initiative, the word "shall" is defined in section 2-4-401 (13.7), Colorado Revised Statutes, and it means "that a person has a duty." The related word "must," which is defined in section 2-4-401 (6.5), Colorado Revised Statutes, 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." The proponents might consider:
 - a. Changing the "shall" in the final sentence of section 3 of the proposed initiative, subsection (20.5) introductory portion, to read "AT A MINIMUM, THE RULES *MUST* ADDRESS:" (Emphasis added); and
 - b. Changing the "shall" in the final sentence of section 5 of the proposed initiative to read "THE PROGRAM *MUST* ..." (Emphasis added).

2. In section 2 of the proposed initiative, the introductory portion to the definitions section is missing. It should read, including the headnote:

34-60-103. Definitions. As used in this article 60, unless the context otherwise requires:

3. In section 2 of the proposed initiative, the amending clause states, in part, to "**add** (4.1) and (5.1)" to section 34-60-103, Colorado Revised Statutes; however, the proposed initiative adds subsections (4.1) and (4.7) to the section. To resolve the discrepancy, and in order to maintain alphabetical order of definitions in section 34-60-103, Colorado Revised Statutes:
 - a. "Fracking" could be added as subsection (4.7), which would require the proponents to update the amending clause as follows:

SECTION 2. In Colorado Revised Statutes, 34-60-103, **add** (4.1) and (4.7) as follows: ...; or
 - b. "Hydraulic fracturing" (see Substantive Comments and Questions #2) could be added as subsection (5.1), which would require the proponents to change the second definition to read as follows (but also see Technical Comments #4):

(5.1) "HYDRAULIC FRACTURING" OTHERWISE KNOWN AS "FRACKING" MEANS AN OIL AND GAS EXTRACTION PROCESS ...

4. It is standard drafting practice to set off nonessential clauses with commas. In the second definition in section 2 of the proposed initiative, would the proponents consider setting off "otherwise known as ['fracking'/'hydraulic fracturing']" (see Technical Comments #3) with commas as shown below:

(4.7) ["FRACKING"/"HYDRAULIC FRACTURING"], OTHERWISE KNOWN AS ["HYDRAULIC FRACTURING"/"FRACKING"], MEANS ...

5. The amending clause in section 3 of the proposed initiative should read, in part, "**amend** (2.5)(b); and **add** ..." (Emphasis added).
6. In section 3 of the proposed initiative, in subsection (2.5)(b), the reference to subsection (20.5) should read "SUBSECTION (20.5) OF THIS SECTION" (Emphasis added).
7. It is standard drafting practice that language being added to the Colorado Revised Statutes, shown in small capital letters, follow language being stricken from the Colorado Revised Statutes, shown in stricken type. In section 3 of the proposed initiative, in subsection (2.5)(b), there is stricken language interrupting language being added in small caps. Subsection (2.5)(b) should read:

(2.5)(b) The nonproduction of oil and gas resulting from a conditional approval or denial authorized by this subsection (2.5), ~~does~~ AND THE PHASING OUT AND DISCONTINUATION OF NEW OIL AND GAS OPERATION PERMITS REQUIRED BY SUBSECTION (20.5) OF THIS SECTION, DO not constitute waste.

8. Because terms defined in section 34-60-103, such as those added in section 2 of the proposed initiative, apply to article 60 of title 34, Colorado Revised Statutes, the phrase "AS DEFINED IN SECTION 34-60-103 (7.5)" is not required in section 3 of the proposed initiative, in section 34-60-106 (20.5)(b). If the proponents retain the phrase, please consider that, since the reference is to the definition of "permit," it would be clearer to move the phrase to follow the term "PERMITS" as follows:

"... PERMITS, AS DEFINED IN SECTION 34-60-103 (7.5), THAT INCORPORATE ..."

9. In section 3 of the proposed initiative, in subsection (20.5)(e), in the phrase "MONITORING, PLUGGING, AND REMEDIATING OF FACILITIES PERMITTED PRIOR TO ...," do the words "monitoring," "plugging," and "remediating" all apply to "facilities"? For example, if "plugging" instead applies more specifically to only wells, and not facilities, please consider rephrasing.
10. Should the reference to "facilities" in section 3 of the proposed initiative, in subsection (20.5)(e), instead refer to the defined term "oil and gas facilities," which is defined for article 60 of title 34, Colorado Revised Statutes?
11. The amending clause in section 4 of the proposed initiative should read:

SECTION 4. In Colorado Revised Statutes, 29-20-104, **amend** (1)(h)(II) as follows:

12. It is standard drafting practice to set off nonessential clauses with commas. In section 4 of the proposed initiative, in subsection (1)(h)(II), would the proponents consider adding a comma after "(6.4)" in order to set off the phrase "as those terms are defined in section 34-60-103 (6.2) and (6.4)" with commas?
13. In section 5 of the proposed initiative, the headnote for section 8-83-604 includes "office of future work." In S.B. 23-051, which was passed by the General Assembly and signed by the governor on March 23, 2023, the name of the office was changed to the "office of future of work." Please consider updating the headnote.
14. The section number and headnote for section 6 of the proposed initiative should read "**SECTION 6. Effective date.**"