TITLE SETTING REVIEW BOARD
STATE OF COLORADO

IN THE MATTER OF THE TITLE AND BALLOT AND TITLE SUBMISSION CLAUSE FOR INITIATIVE 2007-2008 #83

MOTION FOR REHEARING

On behalf of Terrance G. Ross, a registered elector of the State of Colorado, the undersigned hereby files this Motion for Rehearing in connection with the Proposed Initiative 2007-2008 #83 ("Fees on Energy Emissions", hereinafter described as the "Initiative") which the Title Board (the "Board") heard on April 2, 2008 (the "Hearing").

1. **INTRODUCTION**

At the Hearing, the Initiative was the subject of a more than two-hour discussion by the Board regarding whether the Initiative proposes more than one subject, and whether the complex proposals contained within the Initiative can be accurately reflected in the title. Much effort was spent by Proponents and the Board to redraft the title to avoid and minimize the concerns expressed by the Board regarding the intent of the Initiative and whether more than one subject is expressed. Despite the considerable discussion and consideration of the concerns raised regarding the Initiative's proposals, the Board failed to conclude that the Initiative contains more than one subject. Further, the title as adopted by the Board, and only released to the public on April 7th, fails to accurately reflect the intent of the Initiative.

2. THE BOARD LACKS JURISDICTION TO SET A TITLE FOR THIS INITIATIVE AS IT CONTAINS MULTIPLE, UNRELATED SUBJECTS IN VIOLATION OF COLO. CONST. ART. V,§ 1(5.5) AND COLO. REV. STAT. § 1-40-106.5.

Initiatives that have more than one subject and contain more than one separate and individually distinct subject that are not necessarily related to or dependent upon each other, violate the single subject requirement. *In re Proposed Ballot Initiative on Parental Rights,* 913 P.2d 1127, 1130 (Colo. 1996). While on its face an initiative may appear to meet the single subject requirement, "an initiative with multiple subjects may be improperly offered as a single subject by stating the subject in broad terms." *In the Matter of the Title, Ballot Title and Submission Clause, for 2007-2008 #17,* 172 P.3d 871, 873-874 (Colo. 2007) (citing *In re Title, Ballot Title & Submission Clause, & Summary 2005-2006 #55,* 138 P.3d 273, 274 (Colo. 2006)).

Under the broad and ubiquitous banner of "global warming", the Initiative joins multiple subjects that contain more than one distinct and separate purpose, which are otherwise not dependant upon or connected to the other. "The People recognize that efforts to advance the new energy economy will lead to...the reduction of global warming pollution." *See Section 1 of the Initiative.* The fee that the Initiative will impose is to be assessed on the "production of global warming pollution from natural gas consumption and electricity production." *See Section 3(a) of the Initiative.* It is clear that the Initiative is proposing to use the fee as a means to reduce global warming pollution through the implementation of separate and distinct programs. This concept was confirmed by Board member Mr. Hobbs' statement at the Hearing that the Initiative is about global warming. "Grouping the provisions of a proposed initiative under a broad concept that potentially misleads voters will not satisfy the single subject requirement." *In re Proposed Initiative, 1996-4,* 916 P.2d 528, 532 (Colo.1996) (citing *In re Title, Ballot Title and Submission*

Clause, and Summary with Regard to a Proposed Petition for an Amendment to the Constitution to the State of Colorado Adding Subsection (10) to Section 20 of Article X (Amend Tabor 25), 900 P.2d 121, 125 (Colo. 1995)). While the Initiative proposes to impose a carbon tax on consumers, the revenues from which would be used to purportedly advance the "new energy economy", it also proposes to regulate carbon dioxide ("CO2"), implement carbon sequestration and with it a new regulatory scheme, and repeal the established doctrine that legislatures may not be prohibited from acting in subsequent legislative sessions. *See Sections 1, 4 and 6(c) of the Initiative.*

By its very nature, the topic of global warming entails the intersection of economic, environmental, health, scientific, social and legal issues across borders and continents. It is unlike virtually any other public policy issue of the day. "The global nature of the problem...implies that the full breadth of human social structures is encompassed." Intergovernmental Panel on Climate Change, *Climate Change 2001: Mitigation ("IPCC 2001")*, at 607, *available at* http://www.ipcc.ch/. The Initiative reflects the wide breadth of the issues and subjects that global warming entails as it attempts to include several subjects, each of which is distinct and separate from the other, under what is claimed to be the single subject of global warming.

A. THE INITIATIVE CREATES A NEW REGULATORY SCHEME THROUGH ITS IMPOSITION OF A CARBON SEQUESTRATION PROGRAM IN THE STATE.

The Initiative mandates that a minimum of five percent of the revenues collected from the tax imposed on carbon emissions "shall be used annually to implement carbon sequestration in Colorado." *See Section 6(c) of the Initiative.* Of this five percent, "[n]o more than two percent of the revenues shall be used for **geologic sequestration** of carbon." (emphasis added.) *See*

Section 6(c) of the Initiative. "Geologic sequestration" is defined in the Initiative as the storage of CO2 "for at least one thousand years at a depth of at least one thousand feet below the surface of the earth." *See Section 2(g) of the Initiative.* The Initiative defines carbon sequestration to include "but is not limited to, the use of natural carbon sinks, such as in soils or forests." *See Section 2(c) of the Initiative.* Despite statements made by proponents of the Initiative at the Hearing that they do not intend for the Initiative to include geologic sequestration, their statement of intent does not negate the Initiative's plain language. Nowhere in the Initiative is the carbon sequestration program restricted to just terrestrial sequestration.

Terrestrial sequestration involves the removal of CO2 from the atmosphere through plants and microorganisms in the soil. *See* **National Energy Technology Laboratory**, http://www.netl.doe.gov/technologies/carbon_seq/FAQs/carbon-seq.html. Geologic sequestration is accomplished through first capturing the CO2 and then injecting it into underground reservoirs where it is stored. *Id.* It is important to note that the challenging elector supports sequestration programs, and desires that they be implemented correctly with the full and active participation of the proper regulatory authorities, scientific community and industry. However, carbon sequestration is a separate subject from whether or not consumers should be taxed on their electricity and natural gas usage that result in CO2 emissions.

As discussed in more detail below, geologic sequestration programs typically will apply to sources that are regulated under federal environmental law. Geologic sequestration will require these regulated sources to equip their facilities with technologies to capture the CO2, and to construct pipelines to transport the CO2 to its ultimate geologic storage site. Before CO2 can be sequestered, it must be captured and transported to its sequestration destination. *See* **National Energy Technology Laboratory**,

http://www.netl.doe.gov/technologies/carbon_seq/FAQs/carbon-seq.html.

Beyond the financial costs that will be incurred under a geologic sequestration program, designing and implementing such a program will require substantial consideration of legal and policy issues. Issues of liability; conformance with existing state and federal emission control programs; and the impact that such a program may have under federal environmental laws are but a few of the legal and policy issues that must be and will be considered when implementing the Initiative's carbon sequestration program.

B. THE INITIATIVE WILL AUTHORIZE THE REGULATION OF CO2

CO2 is a clear, odorless gas that appears naturally in the earth's atmosphere and is a fundamental component of life on earth. All animals (including human beings) inhale oxygen and exhale CO2, and plants take in CO2 from the atmosphere as a part of photosynthesis and return oxygen to the atmosphere as a byproduct of the same process. CO2 is also a naturally occurring "greenhouse gas." The earth has a natural "greenhouse effect" in which heat from the sun is trapped below the earth's atmosphere and is partially prevented from re-radiating back into space. The greenhouse gases that cause this effect appear in trace amounts in the atmosphere and include water vapor (by far the most significant greenhouse gas), CO2 methane, nitrous oxides and stratospheric ozone. Without the naturally occurring greenhouse effect, the earth's climate would be far too cold to sustain life as we know it.

CO2 is not a regulated "pollutant" under federal or Colorado law. In light of the 2007 decision by the Supreme Court of the United States in *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), EPA is now considering the complexities and ramifications of regulating greenhouse gas emissions (GHG) - including CO2. In *Massachusetts v. EPA*, the Court found that GHG emissions are "pollutants under the Clean Air Act;" but that EPA must first determine whether

GHGs emitted from new motor vehicles do or do not endanger public health or welfare, or supply a reason for not making this determination; and that, if EPA makes an "endangerment finding", it must issue regulations. Although the Court decision is technically limited to new motor vehicles, the precedent extends throughout the Clean Air Act. "[A]ny regulation of greenhouse gases – even from mobile sources – could automatically result in other regulations applying to stationary sources and extend to small sources including many not previously regulated under the Clean Air Act." "If greenhouse gases were to become regulated...the number of Clean Air Act permits could increase significantly and the nature of the sources requiring permits could expand to include many smaller sources not previously regulated under the Clean Air Act." *See March 27, 2008 Letter of EPA Administrator Johnson attached hereto as Exhibit A.* Clearly any regulation of a greenhouse gas, whether at the state or federal level will have far reaching legal, social, economic and policy consequences.

Through the Initiative's proposal to implement a carbon sequestration program, the voters of Colorado are being asked (but not being clearly told) whether or not carbon should be a regulated pollutant. Further, to implement a carbon sequestration program requires the regulation of carbon. A sequestration program which allows for geologic sequestration cannot exist unless there are regulations which set the amounts of carbon that may be emitted and what amounts must be sequestered. In so doing, carbon will become a regulated pollutant under Colorado law. The question of whether carbon should be a regulated pollutant in Colorado is a subject completely separate from whether or not a consumption fee should be assessed on carbon emissions.

C. THE INITIATIVE WILL REPEAL THE COLORADO DEPARTMENT OF HEALTH AND ENVIRONMENT'S AUTHORITY TO PROMULGATE EMISSION CONTROL REGULATIONS CONSISTENT WITH THE CLEAN AIR ACT (42 U.S.C. 7401).

Under its mandate to implement a carbon sequestration program, the Initiative reassigns authority granted to the Commission to promulgate certain emission control regulations in compliance with the federal Clean Air Act. *See CRS §25-7-105(12) and (15) and §25-7-103(11).*

The Commission does not have the authority to adopt regulations or standards covering regulated sources that are contrary to or "otherwise more stringent than" the requirements of Part C, Part D or Title V of the Clean Air Act. *See CRS §25-7-105.1.* A regulated source under the Clean Air Act is one that emits or has the potential to emit regulated air pollutants, which include hazardous air pollutants. Under the Clean Air Act, regulated sources must obtain permits which among other things, place restrictions on what air emission limits must be met. Under Parts C and D and Title V of the Clean Air Act, states and the federal government shall implement regulations that are designed to reduce or prevent the emissions of regulated air pollutants by regulated sources.

Regulated air pollutants are established under the Clean Air Act and through regulations adopted by the EPA. Under the authority granted to the Commission by the General Assembly, the Commission may adopt and enforce emission control regulations that cover regulated sources. These emission control regulations must be consistent with emission standards promulgated under section 112 of the Clean Air Act. *See CRS §25-7-103(11) and CRS §25-7-109.3.* Section 112 of the Clean Air Act lists all regulated pollutants that have been determined to be hazardous air pollutants. CO2 is not included in section 112, nor has it been included in subsequent lists of regulated air pollutants promulgated by the EPA. Through the proposed

carbon sequestration program, the Initiative will mandate an emission control standard that will apply to regulated sources under the Clean Air Act. As currently provided under CRS §25-7-105.1 the Commission could not implement such a program since it would "otherwise be more stringent" than the requirements of the Clean Air Act.

However, to avoid this intersection of state and federal law, the Initiative stealthily delegates to the Colorado Departments of Agriculture and Natural Resources and the Governor's Office of Energy the authority to implement a carbon sequestration program, and consequently the authority to promulgate emission control standards concerning CO2 emissions. *See Section 6(c) of the Initiative*. When considered in the context of the central theme of the Initiative, it is unclear as to how delegating a portion of the Commission's authority to the Departments of Agriculture and Natural Resources and the Governor's Office of Energy is directly tied to the imposition of a consumer tax on CO2. When one considers that the Commission would be prohibited from promulgating regulations that regulate CO2 it becomes clear that the purpose behind reassigning authority from the Commission to the Departments of Agriculture and Natural Resources and the Governor's Office of Energy is to hide this fact from the voters.

The Initiative is seeking to hide significant policy changes under the broad banner of global warming. Nowhere in the Initiative does it allude to the fact that the Commission would be prohibited from otherwise implementing a carbon sequestration program because CO2 is not a regulated pollutant under section 112 of the Clean Air Act, or that CO2 is currently not a regulated pollutant in Colorado. Instead, the Initiative seeks to avoid informing voters of these material facts. While the proponents made statements at the Hearing that confirmed the understanding of the Board that the carbon sequestration program would only involve the "planting of a few trees", clearly the plain meaning of the Initiative demonstrates otherwise.

While undoubtedly a complex issue of federal and state law, the Initiative hides from voters the true and complete ramifications of Section 6(c).

D. THE INITIATIVE SEEKS TO REPEAL THE ESTABLISHED DOCTRINE THAT FUTURE LEGISLATURES MAY NOT BE PROHIBITED FROM ACTING TO AMEND OR REPEAL LEGISLATION.

It is expressly recognized that "[t]he general rule is that one legislature cannot bind the hands of its successors." *Hessick, et al. v. Moynihan, et al.* 262 P. 907, 915 (1927); *See also People v. Hull*, 8 Colo. 485, 496 (Colo. 1885). The Initiative seeks to preempt this doctrine and forbid future legislatures from acting to repeal or reduce spending on "any other programs to support jobs creation, economic development, energy security, energy ratepayer relief, and global warming pollution reduction." *See Section (4) of the Initiative.* The Initiative does not specify that the General Assembly shall be restricted from reducing spending for a certain period of time on the above programs, but instead clearly prohibits the General Assembly from ever reducing or repealing spending on these programs. "Such existing programs **shall not be** repealed or reduced by the General Assembly in consideration of this section." (emphasis added.) *See Section (4) of the Initiative*. The plain meaning of Section 4 of the Initiative is to prohibit the General Assembly from taking any action to reduce or repeal funding to programs that support job creation, economic development, energy security, energy ratepayer relief, or global warming pollution reduction. Despite statements made by proponents at the Hearing that it is not their intent to restrict the legislature, the Initiative clearly does just that.

Further, it is not clear how a prohibition on repealing or reducing spending on all programs that support job creation or economic development can be tied to the Initiative's central focus of implementing a CO2 tax on consumers that will advance a new energy economy. There are multiple programs across various departments and agencies of State government that

promote job creation and economic development across all sectors of the economy, not just in what could be considered the "new energy economy". To purportedly tie the hands of future General Assemblies by prohibiting them from reducing funding for or eliminating certain job creation or economic development programs in areas well outside the theme of the Initiative, is a separate and distinct subject that will considerably alter the longstanding doctrine that future legislatures cannot be bound by the hands of its predecessors.

The Initiative is proposing four subjects, each of which are distinct and separate from each other. First, should consumers be taxed on CO2 emissions which result from their consumption of electricity and natural gas? Second, should CO2 be a regulated pollutant? Third, if CO2 is to be a regulated pollutant, shall the Departments of Agriculture and Natural Resources and the Governor's Energy Office, but not the Commission, implement a carbon sequestration plan that includes geologic sequestration? Fourth, should future General Assemblies be prohibited from repealing or reducing funding to certain programs? "The prohibition against multiple subjects serves to defeat voter surprise by prohibiting proponents from hiding effects in the body of an initiative." *In the Matter of the Title and Ballot Title and Submission Clause fir 2005-2006 #55*, 138 P.3d 273, 282 (Colo.2006). "An initiative that joins multiple subjects poses the danger of voter surprise and fraud occasioned by the inadvertent passage of a surreptitious provision coiled up in the folds of a complex initiative." *In re Title, Ballot Title and Submission Clause 2007-2008, #17*, 172 P.3d 875. The Initiative fails to meet one of the basic requirements under the single subject requirement which is to "apprise voters of the subject of each measure". *Id.* Clearly, voters would be surprised to learn that by voting "yes" or "no" to the Initiative will result in all four of these subjects being passed or rejected.

3. THE BALLOT TITLE AND SUBMISSION CLAUSE IS CONFUSING AND MISLEADING.

The Board must set forth titles that are "sufficiently clear and brief for the voters to understand the principal features of what is being proposed; a material omission can create misleading titles." *In re Ballot Title 1999-2000 #258(A),* 4 P.3d 1094, 1098 (Colo. 2000). It is the duty of the Board to set a title that enables voter choice. *In re Ballot Title 1999-2000 #258(A),* 4 P.3d 1098. When setting title, the Board "shall consider public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general understanding of the effect of a "yes" or "no" vote will be unclear." *CRS § 1-40-106(3)(b).* Further, to eliminate a key feature of the initiative from the title will be considered a fatal defect if it results in voter confusion as to what the initiative actually proposes. *In the Matter of the Title, Ballot Title and Submission Clause for Proposed Initiative 2001-02 #43,* 46 P.3d 438, 442 (Colo. 2002). The Initiative's ballot title and submission clause fail to meet this standard.

A. THE TITLE FAILS TO INFORM VOTERS SUFFICIENTLY OF WHO THE CONSUMER IS AND WHAT ACTIVITY WILL RESULT IN THE ASSESSMENT OF THE FEE.

The first portion of the title and submission clause state that the Initiative will impose a fee "on the consumption of electricity or natural gas based on carbon dioxide emissions." Further within the opening sentence, the title states that the fee is "based upon the amount of carbon dioxide emissions resulting from natural gas consumption and electricity production." This language fails to answer these questions: is the fee assessed on production or consumption? Or both? Who exactly pays the fee? No voter would consider him or herself to be an "electricity producer". Nor would many voters identify their use of natural gas as resulting in CO2 emissions. The above language used in the title would indicate that the fee is to be assessed on

energy producers not on consumers. It certainly would create confusion within the minds of voters as to who is exactly subject to the fee. By stating in the title that the fee is assessed on electricity production, many voters would think that the Initiative applies to electricity producers such, as utilities – not themselves.

Additionally, the title fails to inform voters what the rate of the fee is and that the General Assembly has the authority to increase the rate of the fee. Knowing what the rate of the fee is and that this rate can be increased by the General Assembly is important information that voters must have to make an informed decision regarding the fee. Some voters may support a CO2 fee, but find the rate of the fee to be too high and vote against it for that reason.

The Initiative is proposing a consumption tax on CO2 emissions resulting from the individual use of electricity and natural gas. As it is currently written, voters are left to imagine precisely who may be subject to this fee, at what point and how exactly it will be imposed, what the rate of the fee is and whether or not the rate can be increased.

B. THE PURPORTED 'FEE' IS IN FACT A TAX.

As noted at the very beginning of the title the "fee" proposed by the Initiative is in fact a tax. "State taxes shall be increased $209 million annually." However, throughout the rest of the title, the term "tax" is not used, but rather the term "fee" is. As noted above, the title already results in voter confusion regarding who is subject to the fee and at what point the fee will be assessed. Failing to correctly identify that the Initiative will raise taxes on all consumers of electricity and natural gas, further adds to the confusion as to who will exactly be subject to the Initiative.

"A fee is a charge imposed on persons or property to defray costs of a particular government service. A tax is a means of distributing the general burden of the cost of

government, rather than an assessment of benefits." *Bruce v. City of Colorado Springs*, 131 P.3d 1187, 1190 (Colo. 2005), citing *E-470 Pub. Highway Auth.* 455 Co., 3 P.3d 18 (Colo. 2000), and *Thorpe v. State*, 107 P.3d 1064 (Colo.App.2004). Nowhere in the Initiative is there a discussion of a government service or benefit that the voter is being asked to pay for in connection with the use of electricity or natural gas. The activity that is resulting in revenue generation under the Initiative is CO2 emissions produced from the consumption of electricity and natural gas. Every time a voter uses electricity and natural gas the resulting CO2 emission is taxed. To term the "tax" as a "fee" misleads the voter to believe that in exchange for the fee a government service is to be received, but that is not the case. "The distinction between a fee and a tax depends on the nature and function of the charge, not on its label." *Bruce v. City of Colorado Springs*, 131 P.3d 1190, citing *Westrac, Inc. v. Walker Field*, 812 P.2d 714 (Colo.App.1991).

C. THE BALLOT TITLE FAILS TO INFORM VOTERS OF THE BREADTH OF THE STATUTORY AND POLICY CHANGES IT WILL RESULT IN.

The title makes reference that the Initiative will devote revenues generated from the tax to carbon sequestration and work force training, and that "the fee is in addition to certain existing programs." However, it fails to explain to voters that each of these activities will result in substantial statutory and policy changes. As noted above, the Initiative will implement a carbon sequestration program. Currently CO2 emissions are not regulated under federal environmental law or by the State of Colorado. The Initiative seeks to regulate CO2, and in so doing the Initiative stealthily assigns to the Departments of Agriculture and Natural Resources and the Governor's Energy Office the authority to implement an emission control program. These are separate subjects that are not in anyway addressed or explained to the voters in the title.

As noted by the Colorado Supreme Court definitions should be included in the title where there is an adoption of "a new or controversial legal standard." *In re Ballot Title for 1999-2000*

#255, 4 P.3d 485, 497 (Colo. 2000). As discussed earlier, the Initiative will result in the implementation of a carbon sequestration program, a new legal standard that will be applied to emission sources in the State. However, nowhere in the title are the definitions for "carbon sequestration" or "geological sequestration" provided. Yet, each of these concepts is defined within the Initiative.

Further, the Initiative seeks to prohibit the General Assembly from reducing funding to or repealing programs in connection with jobs creation, economic development, energy security, energy ratepayer relief, and global warming pollution reduction. This is a radical limitation of the General Assembly's authority to legislate: one that is contrary to longstanding doctrine that future legislatures shall not be bound by the acts of their predecessors. The only vague reference to this concept is introduced in the title where it states that "the fee is in addition to certain existing programs." This vague reference in no way alerts the voter to the concept that is being introduced by the Initiative.

The Initiative's title fails to inform voters that it would change the substantive law of Colorado with respect to environmental statues. The title misleads voters by stating the purpose of the Initiative is to impose a fee on the consumption of electricity and natural gas with the revenues used in part for the purpose of carbon sequestration, without mentioning the substantive changes to current law and doctrine.

D. THE TITLE FAILS TO INFORM VOTERS WHAT FORMS OF POLLUTION WILL BE REDUCED AND WHO WILL OVERSEE THE SPENDING OF THE MONIES RAISED BY THE FEE.

The title fails to provide voters with any specificity as to what forms of pollution are proposed to be reduced. The title merely states that "revenues [] are to be spent on the following purposes: ...(4) pollution reduction." Voters are not told what form or forms of pollution are to

be reduced. The Initiative provides that a minimum of five percent of the revenues from the fee will be used to reduce emissions from global warming pollution in the transportation sector. *See Section 6(d).* Seeking to reduce emissions from the transportation sector could entail significant policy and program initiatives that would affect a majority of voters. Despite its potential wide reaching effects on it, the title fails to include any reference to the transportation sector.

Nor does the title inform voters as to what entity will be in charge of spending the revenues collected from the fee. It is left to the voter to determine what entity will be spending the revenues. From the text of the title, a voter's most logical conclusion would be to assume that the newly created clean energy task force will determine how exactly the revenues are spent but this would be incorrect. Voters need to know who shall have the authority to spend the revenues generated. A voter may or may not want an official in the Office of the Governor to be responsible for determining how these substantial revenues are spent. As the title is currently drafted, the entity that has the authority to spend these revenues is left to the imagination of the voter.

4. **THE TITLE, BALLOT AND SUBMISSION CLAUSE CONTAIN THE IMPERMISSIBLE CATCH PHRASES "POLLUTION" AND "CLIMATE CHANGE."**

The title includes the phrases "pollution" and "climate change", each of which is a catch phrase that fails to convey to the voters what the Initiative's imposition of a consumption tax on CO2 will result in. "Catch phrases" are words that work to a proposal's favor without contributing to voter understanding." *In re Ballot Title 1999-2000 #258(A),* 4 P.3d 1100. "It is well established that the use of catch phrases or slogans in the title, ballot title and submission clause, and summary should be carefully avoided by the Board." *In re Ballot Title 1999-2000 #258(A),* 4 P.3d 1100 (*citing In re Amend Tabor No.* 32, 908 P.2d 125, 130 (Colo. 1995)). Catch

phrases can be used to form a slogan by those who desire to campaign for or against an initiative, ultimately prejudicing further voters understanding of the issues contained in the initiative. *In re Ballot Title 1999-2000 #258(A),* 4 P.3d 1100 (*citing In re Ballot Title 1999-2000 §227 & 228, 3* P.3d at 6-7).

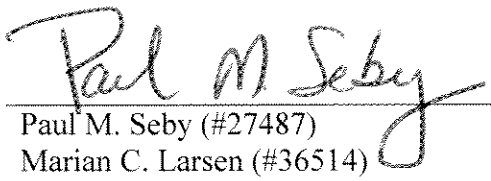
Contemporary political debate is the basis for determining whether a catch phrase or slogan exists. *See In re Ballot Title 1999-2000 #227 & 228,* 3 P.3d 1, 7 (Colo. 2000). The phrase climate change is shorthand for the issue of global warming. It is important to note that the elector does not challenge the validity of the science behind global warming, or the policy issues that global warming raise. The issue of global warming though is still a topic of heated political and social discussion. *See A Shift in the Debate Over Global Warming by Andrew C. Revkin*, April 6, 2008, The New York Times. Regardless of one's opinion on the subject of global warming, it is clear that the subject is emotional and contentious, one that "provokes political emotion". *In re Ballot Title 1999-2000 #258(A),* 4 P.3d 1100. The use of the phrase "climate change" in the title is one that will "impede voter understanding", and will surely result in it being used as a slogan. *Id.*

As with the catch phrase "global warming" the term "pollution" "provoke[s] political emotion". *Id.* Pollution is defined as "the action of polluting especially by environmental contamination with man-made waste." *Merriam-Webster's Collegiate Dictionary (Tenth Edition 1999).* As the definition of pollution indicates, few voters would immediately view themselves as polluters. The term "pollution" will provoke incorrect assumptions that the Initiative seeks to impose a CO2 fee on industry polluters. It will certainly result in impeding voter understanding as to the true meaning of the Initiative and its effect upon voters.

For the reasons outlined herein, the Board is respectfully requested to set a rehearing in

this matter for the next Title Board Meeting.

MOYE WHITE LLP



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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of April, 2008, a true and correct copy of the foregoing **MOTION FOR REHEARING** was mailed by U.S. mail, postage prepaid, to the person(s) named below:

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

EXHIBIT
A

THE ADMINISTRATOR

March 27, 2008

The Honorable John Dingell
Chairman
Committee on Energy and Commerce
U. S. House of Representatives
Washington, D.C. 20515

The Honorable Joe Barton
Ranking Member
Committee on Energy and Commerce
U. S. House of Representatives
Washington, D.C. 20515

Dear Chairman Dingell and Ranking Member Barton:

Knowing of your continued interest in the issues involving greenhouse gas emissions, I am writing to inform you of action I have taken today to move the Agency forward to examine these critical issues.

In the time since the Supreme Court's *Massachusetts v. EPA* decision I have benefited from extensive briefings by EPA staff as they worked to develop an initial response to that decision and I carefully considered how EPA should best move forward.

As we were working on this response, Congress passed and the President signed the Energy Independence and Security Act (EISA) which, among other things, expanded EPA's authority over renewable fuels and required the Department of Transportation to coordinate with EPA on its CAFE regulations. Thus, the EISA represents a statutory change that will have concrete effects upon the emissions of greenhouse gases though it does not change EPA's obligation to provide a response to the Supreme Court decision. In the weeks following the passage of this law, I considered a range of options for how to move forward.

In doing so, EPA has gone beyond the specific mandate of the Court under section 202 of the Clean Air Act and evaluated the broader ramifications of the decision throughout the Clean Air Act. This review has made it clear that implementing the Supreme Court's decision could affect many sources beyond just the cars and trucks considered by the Court, including schools, hospitals, factories, power plants, aircraft and ships. In fact, the Agency currently has many pending petitions, lawsuits, and deadlines that must be viewed in light of the Supreme Court's decision.

During this review, I considered the option of soliciting public input through an Advance Notice of Proposed Rulemaking (ANPR) as the Agency considers the specific effects of climate change and potential regulation of greenhouse gas emissions from stationary and mobile sources

under the Clean Air Act. I have concluded this is the best approach given the potential ramifications.

Such an approach makes sense because, as the Act is structured, any regulation of greenhouse gases – even from mobile sources – could automatically result in other regulations applying to stationary sources and extend to small sources including many not previously regulated under the Clean Air Act. Consequently, any individual decision on whether and how sources and gases should be regulated may dictate future regulatory actions to address climate change. My approach will allow EPA to solicit public input and relevant information regarding these interconnections and their possible regulatory requirements.

This approach gives the appropriate care and attention this complex issue demands. It will also allow us to use existing work. Rather than rushing to judgment on a single issue, this approach allows us to examine all the potential effects of a decision with the benefit of the public's insight. In short, this process will best serve the American public.

In the advance notice EPA will present and request comment on the best available science including specific and quantifiable effects of greenhouse gases relevant to making an endangerment finding and the implications of this finding with regard to the regulation of both mobile and stationary sources.

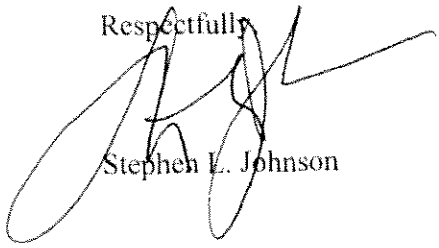
In addition, exploring the many relevant sections of the Clean Air Act, particularly those raised by groups requesting that we regulate greenhouse gases, we will highlight the complexity and interconnections within various sections of the Clean Air Act. EPA's advanced notice will also seek comment, relevant data, questions about and the implications of the possible regulation of stationary and mobile sources, particularly covering the various petitions, lawsuits and court deadlines before the Agency. These include the Agency response to the *Massachusetts v. EPA* decision, several mobile source petitions (on-road, non-road, marine, and aviation), and several stationary source rulemakings (petroleum refineries, Portland cement, and power plant and industrial boilers).

The advance notice will also raise potential issues in the New Source Review (NSR) program, including greenhouse gas thresholds and whether permitting authorities might need to define best available control technologies. If greenhouse gases were to become regulated under the NSR program, the number of Clean Air Act permits could increase significantly and the nature of the sources requiring permits could expand to include many smaller sources not previously regulated under the Clean Air Act. This notice will provide EPA an opportunity to hear from the public and from states on these issues.

In order to execute this plan, I have directed my staff to draft the ANPR to discuss and solicit public input on these interrelated issues. This advanced notice will be issued later this spring and will be followed by a public comment period. The Agency will then consider how to best respond to the Supreme Court decision and its implications under the Clean Air Act.

If you have additional questions or concerns, please contact me or EPA's Associate Administrator, Office of Congressional and Intergovernmental Relations, Chris Bliley, at 202-564-5200.

Respectfully,



Stephen L. Johnson

cc: Speaker Nancy Pelosi
Minority Leader John Boehner