

**RECEIVED**

By Steven Ward at 1:24 pm, Apr 22, 2020

COLORADO TITLE SETTING BOARD

IN THE MATTER OF THE BALLOT TITLE AND SUBMISSION CLAUSE FOR  
INITIATIVE 2019-2020 #308

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MOTION FOR REHEARING

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Tim Howard (“objector”), a registered elector of the State of Colorado, through undersigned counsel, hereby submits this Motion for Rehearing of Initiative 2019-2020 #308 pursuant to Section 1-40-107(I)(a)(I) C.R.S. As grounds therefore objector states the following:

**I. The Title Board lacks jurisdiction over Initiative #308 because it contains multiple separate and distinct subjects in violation of the Constitution’s single subject requirement.**

Initiative #308 contains multiple subjects and therefore the Title Board lacks jurisdiction to set title. Colorado law requires “that every constitutional amendment or law proposed by initiative ... be limited to a single subject, which shall be clearly expressed in its title.” C.R.S. § 1-40-106.5(1)(a); see also Colo. Const. art. V, § 1(5.5) (“No measure shall be proposed by petition containing more than one subject, which shall be clearly expressed in its title...”). A proposed initiative violates this rule if its text “relate[s] to more than one subject, and [has] at least two distinct and separate purposes not dependent upon or connected with each other.” *People ex rel. Elder v. Sours*, 74 P. 167, 177 (1903); see *In re Proposed Initiative 2001–02 No. 43*, 46 P.3d 438, 441 (Colo. 2002) (describing use of *Sours* test to analyze ballot initiatives). As such, the subject matter of an initiative must be “necessarily and properly connected” rather than “disconnected or incongruous.” *In re Title, Ballot Title, Submission Clause, and Summary Adopted April 5, 1995, by Title Bd. Pertaining to a Proposed Initiative “Pub. Rights in Waters II,”* 898 P.2d 1076, 1079 (Colo.1995). A proponent’s attempt to characterize a proposed initiative under “some overarching theme” will not save the measure if it contains separate and unconnected purposes. *In re Proposed Initiative 2001–02 No. 43*, 46 P.3d at 442.

In this case, the proponents attempt to use an overarching theme of “concerning the regulation of oil and gas operation” to fuse together separate and unconnected purposes. The central theme of the initiative is disbanding the Colorado Oil and Gas Conservation Commission (“COGCC”) and replacing it with the Independent Oil and Gas Board. However, the following subjects are “coiled up in the folds” of the initiative that either would not have passed on their own accord or were written with the intent of misleading voters to garner support from those with diverse interests, *In re Title, Ballot Title, Submission Clause for 2011-2012 No. 3*, 274 P.3d 562, 566 (Colo. 2012), including: (1) granting the new board veto authority over new rules promulgated by four other state agencies and creating a new rulemaking process that falls outside the state Administrative Procedures Act, (2) setting new minimum health, safety and environmental standards that all agencies must follow, and (3) limiting local government authority to regulate oil and gas regulation.

1. **Grants the new board veto authority over new rules promulgated by four other state agencies and creates a new rulemaking process that falls outside the state Administrative Procedures Act**

Initiative #308 grants the Independent Board veto authority over the rulemaking of the Air Quality Control Commission (“AQCC”), Water Quality Control Commission, Board of Health, and the Solid and Hazardous Waste Commission. This veto authority granted to the Independent Board is a separate subject. This “surreptitious provision ‘coiled up in the folds’ of a complex initiative,” *In re Proposed Initiative 2001–02 No. 43*, 46 P.3d at 442; *see* § 1–40–106.5(1)(e)(II), is unrelated to eliminating the COGCC and replacing it with the Independent Board.

Initiative #308, at proposed C.R.S. § 34-60-105(1)(b) states, in part:

BECAUSE THE FOLLOWING AREAS OF REGULATION ARE OF SUCH IMPORTANCE IN BALANCING THE PUBLIC HEALTH, SAFETY AND WELFARE OF CITIZENS WITH RESPONSIBLE DEVELOPMENT THAT REVIEW AND OVERSIGHT BY MORE THAN ONE AUTHORITY IS WARRANTED, THE FOLLOWING ENTITIES OR ANY SUCCESSOR ENTITIES HAVE THE AUTHORITY TO ADOPT RULES PURSUANT TO THE FOLLOWING STATUTES OR SUCCESSOR STATUTES, BUT SUCH RULES SHALL ONLY BECOME EFFECTIVE UPON APPROVAL OF THE INDEPENDENT BOARD:

- (I) The air quality control commission ~~to regulate, pursuant to~~ FOR RULES REGARDING article 7 of title 25, the emission of air pollutants from oil and gas operations;
- (II) The water quality control commission ~~to regulate, pursuant to~~ FOR RULES REGARDING article 8 of title 25, the discharge of water pollutants from oil and gas operations;
- (III) The state board of health ~~to regulate, pursuant to~~ FOR RULES REGARDING section 25-11-104, the disposal of naturally occurring radioactive materials and technologically enhanced naturally occurring radioactive materials from oil and gas operations; and
- (IV) The solid and hazardous waste commission ~~to~~ FOR RULES REGARDING:
  - (A) ~~Regulate, pursuant to~~ article 15 of title 25, the disposal of hazardous waste from oil and gas operations; or
  - (B) Regulate, pursuant to section 30-20-109(1.5), the disposal of exploration and production waste from oil and gas operations; and
- (V) ~~A local government to regulate oil and gas operations pursuant to section 29-20-104.~~

The initiative language does not state what form the “approval of the Independent Board” must take. Whether the Independent Board must take formal action to affirm the agencies’ rules or if it must undertake a separate independent rulemaking, the result is the same: No rule affecting oil and gas development passed by these four agencies may go into effect without the approval of the Independent Board.

As written, the Independent Board’s authority over the rulemaking of the AQCC, Water Quality Control Commission, Board of Health, and the Solid and Hazardous Waste Commission occurs despite the fact that the other state agencies have different missions and expertise. For example, the AQCC, acting on its authority pursuant to Article 7 of Title 25 of the Colorado Revised Statutes, would not be permitted to enact new oil and gas operation rules to address compliance with federal ozone standards without the explicit approval of the Independent Board. The considered judgment and expertise of the AQCC to accomplish its mission of achieving “the maximum practical degree of air purity in every portion of the state, to attain and maintain the national ambient air quality standards, and to prevent the significant deterioration of air quality in those portions of the state where the air quality is better than the national ambient air quality standards,” C.R.S. § 25-7-102(1), and its efforts to meet federal and state legislative air quality

mandates are made subservient to the expertise and judgment of the Independent Board that is charged with balancing public health safety and welfare with responsible oil and gas development.

The expertise, judgment, and missions of the Water Quality Control Commission, Board of Health, and the Solid and Hazardous Waste Commission also will be subservient to the Independent Board. The wholesale shift of authority from state agencies charged with protecting public health, air quality, drinking water quality, and radioactive and hazardous waste disposal to the Independent Board is an unlawful second subject.

Granting veto authority to one executive branch agency for rules promulgated by another executive branch agency also runs counter to the rules of all four impacted executive agencies and conflicts with the Colorado Administrative Procedures Act (“APA”). The Colorado APA only grants the General Assembly, the legislative branch, the legal authority to determine if a new or amended rule complies with statutes via the annual rule review bill, and the Governor, executive branch, has the power to veto the annual rule review bill. C.R.S. § 24-4-103 (8)(c) & (d). The Colorado APA process for adopting rules does not contemplate another agency also having to adopt the same rule.

An initiative violates the single subject rule when it proposes a shift in governmental powers that bear no necessary or proper connection to the central purpose of the initiative. *In re Title, Ballot Title, Submission Clause for 2009-2010 No. 91*, 235 P.3d 1071, 1077 (Colo. 2010) (citing *In re No. 29*, 972 P.2d at 262–65; *In re # 64*, 960 P.2d at 1197–1200.) Granting veto authority to the new board over four other agencies within the Executive Branch is a separate subject.

**2. Sets new minimum health, safety, and environmental standards that all agencies must follow**

In proposed C.R.S. § 34-60-104.7 (10)(g), the proposed initiative sets a baseline of health, safety, and environmental rules that are deemed to comply with the new mission to “REGULATE AND AUTHORIZE OIL AND GAS DEVELOPMENT IN A MANNER THAT BALANCES THE PROTECTION OF THE PUBLIC HEALTH, SAFETY AND WELFARE OF CITIZENS, THE PROTECTION OF THE ENVIRONMENT, AND RESPONSIBLE DEVELOPMENT OF OIL AND GAS RESOURCES IN THE STATE OF COLORADO.” This is an impermissible additional subject that will deceive voters into believing the initiative will not lead to weaker public health, safety, and environmental protections despite the fact the intent of changing the mission is to do just that. Moreover, voters would also be surprised that critically important rules for protecting public health and the environment have been omitted from the subsection, including how and where new oil and gas wells are located and how Colorado wildlife is protected (2 CCR 404-1, Rules 301-341 and 2 CCR 404-1, Rules 1201-1205).

As described above, the change to the mission statement is substantial and intends to require the balancing of public health and environmental concerns with allowing oil and gas development. The single subject requirement for ballot initiatives is meant to prevent proponents from engaging in this type of “log rolling” tactics of combining multiple subjects into a single initiative in the hope of attracting support from various factions that may have different or even conflicting interests. *In Matter of Title, Ballot Title*, 374 P.3d 460, 465 (Colo. 2016). More than one hundred pages of rules from the COGCC and AQCC about everything from tank labeling to

weed control standards have been added to the constitution by reference. The addition of hundreds of requirements to the Colorado Constitution is another subject and prevents the Title Board from having jurisdiction in this case.

### 3. Limits local government authority to regulate oil and gas development

The proposed initiative's elimination of a local government's ability to apply its statutory land use authority to oil and gas operations is a second subject that is unrelated to the subject of eliminating the COGCC and replacing it with an Independent Board. In proposed C.R.S. § 34-60-104.7 (11)(a), the proposed initiative states that subsections (11)(b) and (11)(c) "alter, impair, or negate the authority" of local governments to regulate oil and gas development pursuant to Colorado statutes at article 65.1 of title 24 and sections 29-20-104 and 34-60-131. The proposed initiative also strikes C.R.S. § 34-60-105(1)(b)(V), which says "...nothing...alters, impairs, or negates the authority of: (V) a local government to regulate oil and gas operations pursuant to section 29-20-104." The initiative limits local government authority by eliminating current laws that give local governments authority without limitation and replaces it with an enumerated list of regulatory powers in subsection (11)(c).

The construction of subsection (11)(c) specifically limits what regulatory powers are available to local governments, which results in rescinding all other local government planning for and regulating oil and gas development within its jurisdiction. Subsection (11)(c) is a limited list of activities that "each local government within its respective jurisdiction has the authority to plan for and regulate oil and gas development." The universe of activities that local governments can plan for and regulate is limited to five provisions: 1) creating a setback requirement, 2) requiring air quality monitoring at new oil and gas operations, 3) requiring safety at plugged and abandoned wells in areas of new production, 4) regulating flow lines, and 5) requiring health and safety training for oil and gas workers.

By declaring what regulatory authority a local government has over oil and gas development within its jurisdiction, everything not included in subsection (11)(c) is therefore excluded and beyond the regulation authority of the local government. In interpreting an initiative, the court will apply the general rules of statutory construction and accord the language of the measure its plain meaning. *In re Title, Ballot Title & Submission Clause, & Summary for 2005–2006 # 75*, 138 P.3d 267, 271 (Colo.2006). Under the rule of interpretation *expressio unius exclusio alterius*, the inclusion of certain items implies the exclusion of others. *Beeghly v. Mack*, 20 P.3d 610, 613 (Colo. 2001); *Cain v. People*, 327 P.3d 249, 253 (Colo. 2014). The phrase "expressio unius est exclusio alterius" (the express mention of one thing excludes all others) stands for the canon of construction that when a statute includes a list of specific items, the list is presumed to be exclusive. Therefore, the statute applies only to the listed items and not to others.

Subsection (11)(b) limits the ability of local governments to regulate oil and gas operations by requiring that they "regulate and authorize oil and gas development in a manner that balances" responsible oil and gas development with protections of public health, safety and welfare. Local governments are further required to ensure that its actions are "feasible and reasonable." The COGCC had a similar balancing requirement in its statute prior to SB19-181. In *COGCC v. Martinez*, 433 P.3d 22 (Colo. 2019), the Court addressed this exact balancing question and found

it had multiple objectives. The Court determined that the legislative intent of the statute was “to promote multiple policy objectives, including the continued development of oil and gas resources...” *COGCC v. Martinez*, 433 P.3d at 30. As discussed in *Martinez*, requiring local governments to “authorize oil and gas development in a manner that balances the protection of public health, safety, and welfare” and the environment places substantial new restrictions on local governments’ ability to protect public health, safety, welfare and the environment.

Voters would be surprised to learn that the initiative that abolishes the COGCC also severely curtails the ability of local governments to regulate oil and gas development within their jurisdictions. Reducing local government land use authority is “coiled within the folds” of this complex initiative and therefore represents a second subject. *In re Title, Ballot Title, Submission Clause for 2011-2012 No. 3*, 274 P.3d 562, 566 (Colo. 2012).

## **II. Even if the Title Board has jurisdiction, the Ballot Title and Submission Clause is incomplete and misleading.**

Several parts of the proposed initiative are not adequately described in the title. The title and submission clause should allow voters, whether or not they are familiar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose the proposal. *In re Title, Ballot Title & Submission Clause for 2013–2014 #90*, 328 P.3d 155, 162 (Colo. 2014). The Title Board’s language must “clearly and concisely reflect the central features of a proposed initiative.” *In re Proposed Initiated Constitutional Amendment Concerning Ltd. Gaming in the Town of Idaho Springs*, 830 P.2d 963, 970 (Colo. 1992). To accomplish this task, the Court has required an initiative’s title to provide enough information that a voter, “whether familiar or unfamiliar with the subject matter of a particular proposal, [can] determine intelligently whether to support or oppose such a proposal.” *In re 2013–2014 #90*, 328 P.3d at 162. In addition, the title must “correctly and fairly express the true intent and meaning” of the initiative. C.R.S. §1-40-106(3)(b).

The title inadequately describes the initiative in the following ways: (1) The title is inaccurate because the initiative would remove most local government land use authority over oil and gas rather than granting “additional authority;” (2) The addition of more than 100 pages of rules by reference to the Colorado Constitution must be adequately described; (3) Certain rules can be repealed or made less stringent even though the proposed initiative implies they cannot; and (4) Recent flowline rulemaking and air emission rules may be deemed impermissible.

### **1. The title is inaccurate because the initiative would remove most local government land use authority over oil and gas rather than granting “additional authority.”**

The ballot title incorrectly states that local governments are being granted additional authority to plan for and regulate oil and gas development, when actually local government authority is severely limited by the proposed initiative.

As described above, the construction of proposed C.R.S. § 34-60-104.7 (11)(a) & (11)(c) specifically limits what regulatory powers are available to local governments and rescinds all other current local government planning and regulating of oil and gas development within its

jurisdiction. Subsection (11)(c) enumerates a limited list of activities that “each local government within its respective jurisdiction has the authority to plan for and regulate oil and gas development.” By declaring what regulatory authority a local government has over oil and gas development within its jurisdiction, everything not included in subsection (11)(c) is therefore excluded and beyond the regulation authority of the local government.

Limiting setback distances to 1,000 feet is also a curtailment because local governments can and currently have setbacks greater than 1,000 feet. For example, Adams County and the Town of Superior have recently passed local land use regulations that provide setbacks that require oil and gas facilities to be located farther than 1,000 feet from homes and schools.

The universe of activities that local governments can plan for and regulate is therefore limited to five provisions: 1) creating a setback requirement of no greater than 1,000 feet, 2) requiring air quality monitoring at new oil and gas operations, 3) requiring safety at plugged and abandoned wells in areas of new production, 4) regulating flow lines, and 5) requiring health and safety training for oil and gas workers.

Therefore, an accurate ballot title would state the initiative is, “limiting local governments’ authority to plan for and regulate oil and gas development to the following areas:” and then list the five enumerated provisions. Language has been proposed in Exhibit A below.

**2. The addition of more than 100 pages of rules by reference to the Colorado Constitution must be adequately described.**

As discussed above, the proposed initiative adds more than 100 pages of COGCC and AQCC regulations to the Colorado Constitution by reference making it difficult or impossible for the average voter to understand the initiative and whether to support or oppose it. As written, the title states that the initiative would prohibit the Independent Board from “repealing or making less stringent certain environmental and public safety rules...” The description of “certain environmental rules and public safety rules” is not adequate to educate the voter.

The initiative states that the rules are deemed to satisfy the requirement to “balance” public health, safety, welfare and the environment with responsible development of oil and gas resources in the state of Colorado. Section 34-60-104.7 (10)(g), C.R.S. states that the “Independent Board may not repeal or amend the rules to make them less stringent.” Voters should have the ability to understand how the initiative ties the hands of both state agencies and describe the numerous rules that are now a floor for oil and gas development in the state of Colorado. This was not adequately accomplished by the ballot title and will lead to voter surprise.

**3. Certain rules can be repealed or made less stringent even though the proposed initiative implies they cannot.**

Although the proposed initiative states the new board is prohibited from repealing or making less stringent certain environmental and public safety rules and the new board is vested with all

regulatory power and jurisdiction over oil and gas development, at least 11 entities could repeal certain rules or make them less stringent.

Numerous organizations can repeal certain rules in the proposed C.R.S. § 34-60-104.7 (10)(g) or make them less stringent because many of the COGCC rules referenced in the proposed initiative require compliance with statutes, rules, and national codes and standards beyond the control of the new board. The entities are the United States Congress, Occupational Safety and Health Administration, Bureau of Land Management, Colorado General Assembly, Colorado Water Quality Control Commission, Colorado Air Quality Control Commission, Colorado Geological Survey, Colorado Division of Reclamation, Mining, and Safety, Colorado Hazardous Materials and Waste Management Division, National Fire Protection Association Code, and the American Petroleum Institute.

The new board would be prohibited from such actions, but entities such as the American Petroleum Institute, a national oil and gas trade association, would have the ability to repeal certain rules or make them less stringent. Colorado voters would be surprised to learn that the new board is ceding power to a national oil and gas lobbyist association and ten other entities. It is inaccurate and misleading to state that certain environmental and public safety rules cannot be repealed or made less stringent. All entities with the ability to repeal certain rules or make them less stringent should be included in the ballot title.

#### **4. Recent flowline rulemaking and air emission rules deemed impermissible**

The proposed initiative will lead to voter confusion because it deems all existing regulations to comply with the new mandate to balance public health and oil and gas development – except those adopted in 2020. As written, the Independent Board may deem the recent COGCC flowline rulemaking and AQCC air emission reduction and inventory rules as not complying with the new board’s mandate to “protect and minimize adverse impacts to public health, safety, and welfare, the environment, and wildlife resources, and protect against adverse environmental impacts on any air, water, soil, or biological resource in balance with responsible oil gas and development (sic)” because they went into effect after January 1, 2020. The only difference in the new board’s proposed mandate and the current mandate, C.R.S. § 34-60-106(2.5)(a), is the phrase “in balance with responsible oil gas and development (sic).”

It is unclear when reading the proposed initiative or ballot title that those recent rulemakings may be repealed or weakened because that information is hidden behind a wall of legal language in a complex initiative. However, because the ballot title fails to state that only rules effective as of January 1, 2020 are protected, a voter may think the recent flowline and air emission rules cannot be repealed or amended. But the recently promulgated COGCC flowline rules went into effect on January 14, 2020, and the AQCC air emission rules on February 14, 2020.

Furthermore, even if the ballot title included language about the January 1, 2020 effective date, because the flowline and air emission rulemakings occurred in 2019, it may cause confusion unless it expressly stated that the flowline and air emission rules could be repealed or amended. The flowline rules were promulgated on November 21, 2019 but went into effect on January 14,

2020. The air emission standards and inventory rules were promulgated on December 19, 2019 but did not go into effect until February 14, 2020.

In response to the Firestone tragedy in 2017, where two people were killed when their home exploded due to an unmapped and improperly abandoned natural gas flowline, the COGCC enacted three fundamental changes to the agency’s flowline and inactive well rules: (1) requiring mapping data for flowlines and a publicly available online map of the flowlines; (2) enabling inspections when an operator wanted to reactivate an inactive flowline or well; and (3) requiring third-party verification for flowlines abandoned underground.

Colorado voters would be surprised to learn that the proposed initiative, which purports to regulate oil and gas operators, could deem public health and safety rules recently implemented to protect Coloradans from abandoned flowlines not to comply because they are not “in balance with responsible oil gas and development (sic).”

The new air quality regulations that apply to the oil and gas industry were unanimously adopted by the AQCC. These regulations require: semi-annual leak detection and repair for low-producing wells statewide; stronger tank controls for low-producing wells; statewide expansion of the “find and fix” program for malfunctioning controllers and valves known as “pneumatic” devices; a performance-based standard to reduce emissions across the transmission segment of the oil and gas supply chain; more frequent leak detection and repair within 1,000 feet of homes, schools and other public areas; and a requirement that operators calculate and report all pollution, including methane emissions, to the state on an annual basis. These critical AQCC air emission rules went into effect on February 14, 2020 and therefore are not deemed by the initiative to comply with the proposed mission of the new board to balance public health safety, welfare, and the environment with oil and gas development.

We propose amending the ballot title language as shown in Exhibit A to correctly and fairly express the true intent and meaning of the initiative

### **III. Conclusion**

Accordingly, the objector respectfully requests that this Motion for Rehearing be granted and a hearing set pursuant to C.R.S. § 1-40-107(1).

Respectfully submitted this 22nd day of April, 2020.

By: /s/ Matt Samelson



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### **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing MOTION FOR REHEARING was served via US Mail or email to the proponents on 22nd day of April, 2020 to the following:

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## EXHIBIT A

### Proposed Initiative 2019-2020 #308

An change to the Colorado Revised Statutes concerning the regulation of oil and gas operation, and, in connection therewith, replacing the oil and gas conservation commission with a new independent oil and gas board; specifying the appointment process for and qualification of board members with the intent of ensuring the political independence of the board; vesting all regulatory power and jurisdiction over oil and gas development in the board except as otherwise specified; requiring the board and local governments to regulate and authorize oil and gas development in a manner that balances the protection of the public health, safety, and welfare of citizens, the protection of the environment, and the responsible development of oil and gas resources; requiring the board to establish a statewide minimum distance standard for new oil and gas development and to set a minimum financial assurance per well; prohibiting the board from repealing or making less stringent certain ~~air quality control commission rules and oil and gas conservation commission safety rules, aesthetic and noise rules, spill and reporting rules, reclamation rules, and flowline rules~~ ~~environmental and public safety rules~~ as they existed on January 1, 2020; specifying a requirement that rules pertaining to oil and gas operations promulgated by ~~the air quality control commission, water quality control commission, board of health, and the solid and hazardous waste commission~~ ~~certain other state rule-making entities~~ may become effective only upon approval of the board; and ~~granting local governments specified additional authority to plan for and regulate oil and gas development~~ limiting local governments' authority to plan for and regulate oil and gas development to the following areas: 1) creating a setback requirement of no greater than 1,000 feet, 2) requiring air quality monitoring at new oil and gas operations, 3) requiring safety at plugged and abandoned wells in areas of new production, 4) regulating flow lines, and 5) requiring health and safety training for oil and gas workers.