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MEMORANDUM

TO: David Davia and Cody Davis

FROM: Legislative Council Staff and Office of Legislative Legal Services

DATE: April 5, 2022

SUBJECT: Proposed initiative measure 2021-2022 #136, concerning the Colorado Independent Oil and Gas Commission

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 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 amendments to the Colorado Constitution and the Colorado Revised Statutes appear to be:

1. To replace the existing Colorado oil and gas conservation commission (hereinafter, "commission") with a newly established Colorado independent oil and gas commission (hereafter, "independent commission");
2. To remove the independent commission from partisan, political, and interest group pressure as far as is practicable;
3. To require that the independent commission:
 - a. In general, balance the protection of the public health, safety, and welfare of citizens with the responsible development of oil and gas resources;
 - b. Consist of members who satisfy certain qualifications and descriptions;
 - c. Regulate oil and gas operations in a reasonable manner to minimize adverse impacts to public health, safety, and welfare; the environment; and wildlife resources and to protect against adverse environmental impacts on any air, water, soil, or biological resource; and
 - d. Adopt rules and regulations for the issuance, denial, and administration of permits by the director of the independent commission; and
4. To designate the independent commission as the final authority concerning oil and gas development in the state, superseding prior statutory grants of authority, and to require the air quality control commission, the water quality control commission, the state board of health, and the solid and hazardous waste commission, in promulgating certain rules relating to oil and gas operations, to obtain the approval of the independent commission for such rules.

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. In several subsections of section 17 of article XVIII, including specifically subsection (1)(a), a new regulatory paradigm is stated: The independent commission is directed to ensure that its regulation of oil and gas development is balanced between protection of the public health, safety, and welfare of citizens and the responsible development of oil and gas resources. Existing statute already states an overall regulatory paradigm. In particular, section 34-60-102 (1)(a)(I) and (1)(a)(IV), C.R.S., directs the commission to:

Regulate the development and production of the natural resources of oil and gas in the state of Colorado in a manner that protects public health, safety, and welfare, including protection of the environment and wildlife resources; [and p]lan and manage oil and gas operations in a manner that balances development with wildlife conservation. . .

And section 34-60-106 (2.5)(a), C.R.S., directs the commission to:

Regulate oil and gas operations in a reasonable manner 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 resulting from oil and gas operations.

The proposed initiative amends numerous statutes that are apparently inconsistent with the proposed initiative but does not amend these statutory directives to the commission. If the proposed initiative were adopted, is it the proponents' intent that these statutory directives would become void as being inconsistent with the proposed initiative? Or is it the proponents' intent that the independent commission would have to construe the existing statutory directives in line with the new constitutional requirements? Would the proponents consider clarifying this issue?

3. Regarding the reference in section 17 (3)(b) of article XVIII to the Republican and Democratic political parties: The proponents may consider changing this reference to the "two major political parties" to be consistent with other references in the proposed initiative and because the two major political parties could change over time.
4. With regard to the process for filling a vacancy pursuant to section 17 (4)(b) of article XVIII, where it mentions that the three nominees should have the same political affiliation as the member that created or will create the vacancy, would the proponents consider changing the reference from "the same political affiliation" to "the same political affiliation or nonaffiliation" because two of the seats are filled by members who are unaffiliated with any political party pursuant to section 17 (3)(b) of article XVIII?
5. With regard to the appointment of the panels pursuant to section 17 (4)(d)(I) of article XVIII, does the judicial department require retired justices or judges to report their political affiliations or otherwise keep records on this information? If not, how would the chief justice determine retired justices' and judges' political affiliations?

6. With regard to the decisions of the panels pursuant to section 17 (4)(d)(II) of article XVIII:
 - a. Would a panel's meetings be subject to the open meetings law, part 4 of article 6 of title 24, C.R.S.?
 - b. The judicial branch is not currently subject to the "Colorado Open Records Act," part 2 of article 72 of title 24, C.R.S. Here, however, it could be argued that a panel is not acting in a judicial capacity, but performing more of an executive function. Do the proponents intend that a panel's records be open records subject to inspection?
7. Section 17 (4)(d)(I) of article XVIII directs a panel, which is a judicial branch entity, to appoint members to fill any vacancy on the independent commission, which is an executive branch entity. Under the separation of powers doctrine, article III of the Colorado Constitution, and as stated in the case *People v. Herrera*, 516 P.2d 626, 628 (Colo. 1973), "it seems obvious that the legislature is . . . powerless to confer executive powers upon the judiciary." By granting members of the judicial branch the power to appoint independent commission members within the executive branch, does this measure comply with separation of powers principles?
8. Section 17 (5)(c), (8), and (9)(e) of article XVIII mention a vote of two-thirds of the commission:
 - a. The proponents should consider changing the references to "at least two-thirds".
 - b. How is the commission's ability to vote on those matters requiring a two-thirds vote affected if there are two or more vacancies on the commission? Can the commission make a decision by a vote of two-thirds of the members present?
9. Section 17 (7) of article XVIII requires the members of the independent commission to "devote their entire time to the duties of their offices to the exclusion of any other employment . . ." The term "entire time" is ambiguous because it certainly cannot be read literally. The proponents may consider substituting more precise language, such as "entire professional time" or something similar.

10. Section 17 (9)(a) of article XVIII vests "[a]ll regulatory authority over oil and gas development . . . in the commission . . ." This language appears to explicitly restrict and perhaps even prohibit the general assembly itself from enacting laws concerning oil and gas development. The proponents may consider adding language to clarify what will remain of the general assembly's ability to enact law concerning oil and gas development if section 17 of article XVIII is enacted.
11. Section 17 (9)(d) of article XVIII requires the independent commission to adopt as its initial rules and policies the commission's rules and policies as they existed on the effective date of the proposed initiative. Would the independent commission need to conduct full rule-making processes to adopt the rules?
12. Section 17 (9)(e) of article XVIII concerns the procedure for approval and denial of permit applications by the director of the independent commission and allows the independent commission itself to overrule a decision by the director. The section states that a "commission decision is final", but there is no mention of judicial review. (For example, as described under section 24-4-106, C.R.S. of the "State Administrative Procedure Act", article 4 of title 24, C.R.S.) Do the proponents intend to preclude judicial review of decisions of the director pursuant to section 17 (9)(e)? If not, the proponents may consider adding language concerning judicial review.
13. Section 17 (10) of article XVIII states that the "commission's authority supersedes prior grants of authority concerning oil and gas development in the state":
 - a. Is this provision intended to invalidate existing rules of the air quality control commission, water quality control commission, state board of health, and solid and hazardous waste commission concerning oil and gas development? If so, how would that affect the regulated community and the communities surrounding oil and gas development that have acted in reliance on those rules?
 - b. What is the process for other state agencies to have the independent commission review their rules? What is the timeline for that review?
 - c. Pursuant to section 24-4-103 (6)(a), C.R.S., state agencies are authorized to adopt temporary or emergency rules when "imperatively necessary ... for the preservation of public health, safety, or welfare". Do the proponents intend that such emergency rules adopted by the air quality control commission, water quality control commission, state board of health, and solid and hazardous waste commission be subject to the independent commission's approval to become effective?

- d. Do the proponents intend that an existing permit, through which an oil and gas operator was given a prior grant of authority to engage in oil and gas development, would be superseded and therefore invalidated under this provision? If not, the proponents might consider specifying that section 17 (10) does not apply to a permit issued before the effective date of section 17 (10).
14. Section 17 (11) of article XVIII specifies that nothing in section 17 "alters, impairs, or negates the authority of a local government to regulate oil and gas development pursuant to article 65.1 of title 24 and sections 29-20-104 and 34-60-131, Colorado Revised Statutes." The proposed initiative does not define "local government." Would the existing statutory definition of that term in section 34-60-103 (5.3), C.R.S, apply or would it need to be amended?
 15. Section 13 of the proposed initiative states that sections 1, 2, and 12 of the proposed initiative take effect upon proclamation of the governor and the rest of the proposed initiative takes effect on July 1, 2023. That means that section 13 would not take effect until July 1, 2023, but because it establishes an earlier effective date for certain sections in the proposed initiative, section 13 must be effective before July 1, 2023. Would the proponents consider making section 13 effective upon proclamation of the governor?

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. It is standard drafting practice to end a paragraph with either a period or a semi-colon. A paragraph should end with a period if it has a complete sentence or has more than one sentence and is not an introductory portion. It should end with a semi-colon if it follows an introductory portion and is not a complete sentence or if it is the last paragraph following an introductory portion. Therefore, section 17 (1)(c) of article XVIII should end with "action." instead of "action; and" because it contains a complete sentence, and section 17 (1)(d) should end with a period instead of a semi-colon.
2. The first letter of the first word of each subsection, paragraph, subparagraph, and sub-subparagraph should be capitalized. For example, in section 17 (2) of article XVIII, "there" should be "There". There are multiple places in the proposed

initiative where the same change can be made. Also, the first letter of the first word of the last sentence in section 17 (9)(e) of article XVIII should be capitalized.

3. To conform to standard drafting practices, the following changes to references in the proposed initiative should be made:
 - a. In section 17 (4)(c)(I)(A) and (4)(c)(I)(B) of article XVIII, "C.R.S.," should be changed to "Colorado Revised Statutes,";
 - b. In section 17 (4)(c)(II) of article XVIII, "section (c)(I)" should be changed to "subsection (4)(c)(I)" and "subsections (4)(a) and (b)" should be changed to "subsections (4)(a) and (4)(b)";
 - c. In section 34-60-132 (2)(b), change "part 1" to "part 2" for the correct cite;
 - d. In section 34-60-132 (2)(c), add "section" before "24-6-301 (1.7)(b)"; and
 - e. In section 11, change "34-60-104 and 104.3, C.R.S.," to "34-60-104 and 34-60-104.3, Colorado Revised Statutes,".
4. Section 17 (4)(d)(II) of article XVIII requires the panel to consider "nominees' qualifications". The proponents may consider amending this language to read "nominees' *or applicants'* qualifications".
5. Section 17 (4)(d)(II)(C) of article XVIII refers to "the selection of applicants pursuant to this section". The proponents may consider changing this reference to read "the selection of applicants pursuant to *subsection (4)(c)(II) of this section*".
6. Regarding section 17 (4)(d)(II)(C), that subsection (4)(d)(II)(C) does not seem to flow with the introductory portion in subsection (4)(d)(II) like subsection (4)(d)(II)(A) and (4)(d)(II)(B) do. Therefore, the proponents may want to renumber subsection (4)(d)(II)(C) as (4)(d)(III) instead.
7. In section 17 (9)(a) of article XVIII, the verb "are" should be changed to "is" to agree with the subject "regulatory authority".
8. Section 17 (9)(e) refers to "this article". Do the proponents mean "this section"?
9. Section 17 (9)(e) of article XVIII refers to "regulations" but the term "rules" is used throughout that section. The proponents may want to change "regulations" to "rules" for consistency.
10. It is standard drafting practice to show the introductory portion that precedes the language being amended, if one exists, for ease of reading. For example, section 24-1-124 (3) has an introductory portion that should be included.

11. In section 24-4-124 (3)(f), in the last sentence "Commission" should be "commission".
12. In section 39-29-109.3 (1), the phrase "For fiscal years commencing on and after July 1, 1997," does not exist in that provision and should be deleted. Likewise, there are two references to "moneys" in the last sentence in that provision that should be changed to "money".
13. Section 13 of the proposed initiative refers to "this act" but that should be changed to "this initiative".

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