

# STATE OF COLORADO

## Colorado General Assembly

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## MEMORANDUM

TO: John Brackney and Barbara Kirkmeyer

FROM: Legislative Council Staff and Office of Legislative Legal Services

DATE: April 2, 2019

SUBJECT: Proposed initiative measure 2019-2020 #64, concerning Oil and Gas Regulation

Section 1-40-105 (1), Colorado Revised Statutes, requires the directors of the Colorado Legislative Council and the Office of Legislative Legal Services to "review and comment" on initiative petitions for proposed laws and amendments to the Colorado constitution. We hereby submit our comments to you regarding the appended proposed initiative.

The purpose of this statutory requirement of the directors of Legislative Council and the Office of Legislative Legal Services is to provide comments intended to aid proponents in determining the language of their proposal and to avail the public of knowledge of the contents of the proposal. Our first objective is to be sure we understand your intent and your objective in proposing the amendment. We hope that the statements and questions contained in this memorandum will provide a basis for discussion and understanding of the proposal.

This initiative was submitted with a series of initiatives including proposed initiatives 2019-2020 #65 to #67. The comments and questions raised in this memorandum will not include comments and questions that were addressed in the memoranda for proposed initiatives 2019-2020 #65 to #67, except as necessary to fully understand the issues raised by the revised proposed initiative. Comments and questions addressed in those other memoranda may also be relevant, and those questions and comments 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:

1. Restructure and rename the oil and gas regulatory body from the oil and gas conservation commission to the independent oil and gas regulatory commission;
2. Change the purpose of the oil and gas regulatory body;
3. Create a modern, robust, and independent regulatory structure to foster and regulate responsible oil and gas production in Colorado;
4. Reasonably and in a fact-based manner balance the protection of private property rights, both surface and mineral; local input and priorities, including mitigation of impacts on local communities; and the protection of public health, safety, and the environment;
5. Replace the current regulatory structure with a structure that protects critical decisions about the regulation of oil and gas from undue political influence by any one political party, special interest, elected official, or appointees;
6. End the political appointment of oil and gas regulators and create a mechanism by which appointments are made by a selection panel composed of retired justices and judges based on nominations made by a group of high-ranking state public officials representing different major political parties;
7. Ensure that oil and gas development that supports the state economy and creates jobs across the state can continue in a way that balances protecting the public health and the environment;
8. Create a commission that will independently monitor, foster, and regulate oil and gas development in this state through impartial and balanced professional experts managed and overseen by the independent commission;
9. Ensure local governments have direct input in the commission's oil and gas development decisions in local communities;
10. Give the commission independent control over use of mill levy funds and exempt commission funding from the state revenue and spending limits under section 20 of article X of the state constitution;
11. Repeal Senate Bill 19-181 if that bill is enacted; and

12. Create a framework and authority for comprehensive regulation of oil and gas development in the state and to preempt any statutory or regulatory provisions in conflict or inconsistent with amended statutes.

## **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 effective date of the proposed initiative is January 1, 2020. Since an initiative takes effect on the later of the stated effective date or upon the proclamation of the governor, consider adding the phrase "or upon the proclamation of the governor, whichever is later" to the end of the effective date.
3. Under section 1-40-105.5, Colorado Revised Statutes (C.R.S.), the director of research of the legislative council is required to prepare an initial fiscal impact statement, which includes an abstract that appears on petition sections, for each initiative that is submitted to the Title Board. In preparing the statement, the director is required to consider any fiscal impact estimate prepared by the proponents.
  - a. Will you submit the initiative to the Title Board? If so, when do you intend to do so?
  - b. Are you submitting a fiscal impact estimate today? If not, do you plan to submit an estimate in the future, and, if so, when do you intend to do so?
  - c. To ensure that there is time for consideration, you are strongly encouraged to submit your estimate, if any, at least 12 days before the measure is scheduled for a Title Board hearing. The estimate should be submitted to the legislative council staff at [BallotImpactEstimates.ga@state.co.us](mailto:BallotImpactEstimates.ga@state.co.us).
4. Section 34-60-102 (3)(a) references the "protection of public health and safety and minimizing environmental impacts". For consistency, the proponents might consider also mentioning welfare and wildlife resources here as they are mentioned in section (1)(a)(I) of this section.

5. Section 34-60-102 (3)(b) references protecting regulatory decisions from undue political interest of "... any one special interest, or any one elected official". The proponents might consider adding "or more" after "one" in these contexts. It's possible that no one special interest or elected official exerts undue political interest, but that, in collaboration, two or more could.
6. How do the commissioner qualifications listed in section 34-60-102 (3)(c) guarantee against an appointment "influenced by special interest groups"? Is that what the term "balanced" is supposed to convey?
7. Section 34-60-102 (3)(d):
  - a. Includes the phrase "that balances protecting the public health and the environment". The phrase implies that protecting the public health will be balanced against protecting the environment, instead of implying that those two interests will be collectively balanced against the economic and job-creating interests first mentioned in the paragraph. The proponents might consider restating the paragraph to clarify that the balance is between the economic considerations and the public health and environmental considerations, if that is their intent.
  - b. References public health and the environment. For consistency, the proponents might consider also mentioning safety, welfare, and wildlife resources here as they are mentioned in subsection (1)(a)(I) of this section.
8. Section 34-60-102 (3)(e) references "impartial and balanced professional experts managed and overseen by the independent commission". What does "balanced professional experts" mean?
9. Section 34-60-102 (3)(f):
  - a. References "local governments". There is not a definition of "local government" in article 60 of title 34, C.R.S.; however, it is a term defined elsewhere in the statutes. The proponents might consider adding a definition of "local government".
  - b. References "oil and gas development decisions in local communities". It is unclear what this phrase means. Do the proponents mean oil and gas development decisions affecting local communities? If so, the proponents might consider replacing the word "in" with the word "affecting".

10. Section 34-60-102 (3)(g) mentions exempting commission funding from "the state revenue and spending limits under section 20 of article X of the constitution".
- a. This reference should specify the state constitution instead of "the constitution".
  - b. The proponents might consider restating this phrase as "exempt commission funding from state revenue and the spending limits ...". By placing "the" before "state revenue", it implies that there is a "state revenue" limit under section 20 of article X of the Colorado constitution. There is a requirement that if the state revenue exceeds a cap, the money exceeding the cap must be refunded to taxpayers from the general fund; however, it does not place a limit on state revenue.
11. In section 34-60-102 (4), it appears that the proponents intend to prevent other agencies, such as the air quality control commission, the water quality control commission, and the solid and hazardous waste commission, from regulating oil and gas operations to the extent that they are currently authorized to do so under statute.
- a. Is that correct?
  - b. If so, the proponents should amend the statutes authorizing those other agencies to regulate portions of oil and gas operations to clarify that those agencies' regulatory authority does not extend to oil and gas operations.
12. In repealing section 34-60-104, C.R.S., the proponents have repealed the requirement in subsection (3) that the commission report to the executive director at the times and on matters as the executive director requires.
- a. Did the proponents intend to repeal that provision? If so, why?
  - b. If not, the proponents should add a provision in new section 34-60-104.1 adding that requirement.
13. In repealing section 34-60-104, C.R.S., the proponents have repealed the requirement that publications of the commission circulated outside the executive branch are subject to the approval of the executive director.
- a. Did the proponents intend to repeal that provision? If so, why?

- b. If not, the proponents should include a provision in new section 34-60-104.1 that adds that requirement.

14. In section 34-60-104.1 (1)(b):

- a. What does it mean to foster and regulate oil and gas development in a "fact-based manner"? How would that affect the commission's decisions?
- b. It references "local input and priorities" and "impacts on local communities" in a way that implies that every local community would be consulted on every issue before the commission, regardless of whether the local community is affected by the issue. Elsewhere, the proponents have added the word "affected" before "local" to clarify that only affected local communities would be consulted on an issue.
- c. It references "the protection of public health and safety and minimizing environmental impacts". For consistency, the proponents might consider also mentioning welfare and wildlife resources here as they are mentioned in section 34-60-102 (1)(a)(I), C.R.S.

15. In section 34-60-104.1 (2):

- a. The words "balance" and "balanced" are used in multiple places. What do those terms mean with regard to a person's qualifications or their decision-making?
- b. Many of the terms used to describe the qualifications of a commissioner are subjective words such as "sound", "responsible", and "balanced". How will the selection panel created in section 34-60-104.3 (1)(b) determine if nominees fit these subjective criteria?

16. With regard to section 34-60-104.1 (2)(d):

- a. It does not fit under the introductory portion of subsection (2), meaning that it does not list a qualification that a member of the commission must possess. The proponents could identify this paragraph as new subsection (3) and renumber subsequent subsections accordingly.
- b. In subsection (2)(d)(I), the phrase "has a conflict of interest with oil and gas development" could be interpreted to mean a person opposed to oil and gas development instead of meaning a person with a personal or pecuniary interest in a particular oil and gas development. The proponents might instead state: "has a personal or pecuniary interest in

oil and gas development that would create a conflict of interest, such as a person who:".

- c. In subsection (2)(d)(I)(A), what does "official relation" mean? The proponents might consider instead referencing specific individuals such as directors, partners, owners, operators, and shareholders of a corporation.
  - d. The disqualification of a person in subsection (2)(d)(I)(A) who owns "stocks or bonds of any such corporation or is in any manner pecuniarily interested therein" is very broad and could encompass someone whose varied stock portfolio happens to include one share in any company that in part relates to oil and gas operations. The proponents might consider narrowing this exclusion by adding a minimum ownership requirement, for example, a minimum 5% stock ownership in any such company.
  - e. Subsection (2)(d)(I)(C) does not fit under the introductory portion of subsection (2)(d)(I), meaning that it does not list a type of conflict of interest. The proponents could identify this sub-subparagraph as a new paragraph or subsection and renumber subsequent subdivisions accordingly.
  - f. In subsection (2)(d)(II), do the proponents want to add to the list of disqualified lobbyists a person who was registered to lobby in another state in the 5 years prior to their appointment?
  - g. In subsection (2)(d)(III), do the proponents want to add to the list of disqualified public officials recent members of a city council, county commission, or Congress?
17. With regard to section 34-60-104.1 (3), where it references that the commissioners shall be state employees, do the proponents intend that the commissioners be part of the state personnel system or that they be at-will employees?
- a. Section 13 of article XII of the state constitution provides certain requirements for the appointment of employees in the state personnel system. If the proponents intend the commissioners to be at-will employees, how does that comply with section 13(2)(a) of article XII of the state constitution, which states that the state personnel system is comprised of all appointive public officers and employees of the state

except for those employees that fall under one of 12 enumerated exemptions? The commissioners are not members of one of the 5 commissions or boards listed in the exemption provided in section 13(2)(a)(I) and are not uncompensated commissioners provided only a per diem allowance and reimbursement of expenses, as described in section 13(2)(a)(II). As such, which exemption under the state constitution would the commissioners fall within?

- b. Would the commissioners be employees of the department of natural resources?

18. With regard to section 34-60-104.1 (6):

- a. The subsection sets forth that rules adopted between January 1, 2019, and January 1, 2020, "shall be repealed" and that the initial rules of the commission are the rules "as they existed on December 31, 2018". Under section 24-4-103 (8)(d) of the "State Administrative Procedure Act", article 4 of title 24, C.R.S., however, "[p]assage of a bill repealing a rule does not result in revival of the predecessor rule." As with a bill of the legislature, this measure cannot revive former rules of an executive agency by repeal of later rules. Rather, the agency itself would have to engage in a rulemaking hearing to conform with the passage of the measure. You should consider amending this provision to require the commission to adopt rules as they existed on December 31, 2018. Similarly, the reference in section 34-60-106 (18), regarding a systematic evaluation of the commission's rules, "which are the Colorado oil and gas conservation commission rules as they existed on December 31, 2018", does not effectuate a revival of those rules. The commission itself would have to conduct a rule-making proceeding to adopt the December 31, 2018, rules as its current rules.
- b. The subsection includes an effective date of January 1, 2020. Since initiatives become effective on the later of the effective date specified in the initiative or upon proclamation of the governor, consider changing the date to "the effective date of this section", which would be the later of the two dates. Likewise, with the January 1, 2020, references in section 34-60-104.1 (7) and in section 34-60-104.3 (2)(b), consider changing those dates to "the effective date of this section".

19. Section 34-60-104.1 (9) states that "the obsolete references to the Colorado oil and gas conservation commission and [to] section 34-60-104 ... shall be



removed and replaced with references to the Colorado independent oil and gas regulatory commission and section 34-60-104.1...". The language should authorize the revisor of statutes to make such changes. Sections 8-45-123 and 8-47-101, C.R.S., provide examples of how the language can be written.

20. Section 34-60-104.1 (10) appears to assert that, if this initiative passes, the general assembly would be prohibited from removing "the commission's authority to foster and regulate oil and gas development".
- a. Do the proponents intend for this provision to have this effect?
  - b. As stated in section 2-4-215, C.R.S., "each general assembly is a separate entity, and the acts of one general assembly are not binding on future general assemblies." If the legislature cannot bind future legislatures from enacting specific statutes, under what authority can future legislatures be bound through an initiative that amends the statutes?
  - c. To prohibit the legislature from enacting future legislation, this initiative would have to amend the state constitution and not the statutes. Do the proponents intend to resubmit this initiative as a constitutional amendment?
21. Section 34-60-104.1 (10) also appears to assert that, if this initiative passes, the commission is prohibited from delegating its authority to foster and regulate oil and gas development. As written, this would prohibit the commission from delegating its authority to the director and staff.
- a. Is that the proponents' intent with the provision?
  - b. If that is the proponents' intent:
    - i. They might consider amending section 34-60-104.5 (2)(e), C.R.S., which authorizes the director to "perform such other functions as may be assigned to him by the commission ..." because that provision directly conflicts with this provision.
    - ii. How will the director serve the commission if the commission cannot delegate portions of its authority to the director?

- c. If that is not the proponents' intent, they might consider amending this language to clarify that the commission may delegate its authority to the director and staff.

22. With regard to section 34-60-104.3 (1)(a):

- a. Article III of the Colorado constitution provides that "the powers of the government ... are divided into three distinct departments, the legislative, executive, and judicial; and no person ... charged with the exercise of powers properly belonging to one of the departments shall exercise any power properly belonging to either of the other...". With respect to elected officials of the legislative branch nominating people to serve as commissioners for the executive branch, does this comply with separation of powers principles?
- b. What if the nominating officials cannot reach a "mutual agreement" on a list of qualified individuals to nominate within the 30- or 60-day window afforded them? Do they get more time to decide in that situation?

23. With regard to section 34-60-104.3 (1)(b)(I):

- a. 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 commissioners within the executive branch, does this measure comply with separation of powers principles?
- b. If a member of the selection panel decided a case in which a nominee was a party, would there be a mechanism by which the panelist could recuse himself or herself from the panel and another panelist be appointed? If so, under this measure, how would that work?
- c. Is the selection panel required to meet in person?
- d. Would the selection panel's meetings be subject to open meetings law, part 4 of article 6 of title 24, C.R.S.?

- e. The judicial branch is not subject to the Colorado Open Records Act, article 72 of title 24, C.R.S. Here, however, it could be argued that the selection panel is not acting in a judicial capacity, but performing more of an executive function. Do the proponents intend that the selection panel's records be open records subject to inspection?
- f. How will the chief justice learn about a vacancy on the commission? The proponents might consider adding language that the director of the commission or the director's designee shall notify the chief justice of a vacancy within a certain number of days before a commissioner's term is scheduled to end or within a certain number of days after a vacancy otherwise occurs.
- g. Justices and judges, including retired justices and judges, are subject to the Colorado Code of Judicial Conduct. Service on the selection panel, in which justices and judges would choose commissioners to oversee and regulate oil and gas development throughout the state, could increase a justice's or judge's risk of violating Canon 3 of the Colorado Code of Judicial Conduct. Canon 3 states: "A judge shall conduct the judge's personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office". Rule 3.1 clarifies that this requires a justice or judge to refrain from participating in activities that will lead to frequent disqualification of the judge or that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality.
  - i. In light of Canon 3 and Rule 3.1, should a justice or judge who serves on a selection panel recuse himself or herself from hearing a case involving the commission or otherwise involving oil and gas development?
  - ii. If a justice or judge appointed one or more of the commissioners, would a reasonable person question the judge's impartiality to preside over a case involving the commission?

24. With regard to section 34-60-104.3 (1)(b)(II), 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?

25. With regard to section 34-60-104.3 (1)(c), what if the selection panel cannot reach a unanimous decision on the appointment of a commissioner?

- a. Are the nominating authorities then required to establish a new list of nominees? Does the initiative authorize the creation of a new list of nominees?
- b. Is a new selection panel created to consider a new list of nominees?
- c. If there are two or more vacancies on the commission, the commission would not be able to transact its business under section 34-60-104.1 (5) if the selection committee cannot reach a unanimous decision because there would not be a quorum of commissioners present. The proponents might consider adding language to section 34-60-104.3 (2)(b) that the executive director could also act as the sole interim commissioner during the pendency of the appointment of additional commissioners if the remaining commissioners do not constitute a quorum of the commission.

26. Section 34-60-104.3 (1)(d) provides that the legislature shall determine a per diem allowance for the retired justices and judges comprising a selection panel. Section 5 (3) of article VI of the Colorado constitution requires that, when the chief justice assigns a retired judge to temporarily perform judicial business, the chief justice determines the retired judge's compensation. Does this subsection comply with that section of the Colorado constitution?

27. Section 34-60-104.3 (1)(e) requires nonpartisan staff of Legislative Council and the Office of Legislative Legal Services to assist a selection panel in carrying out its duties.

- a. By having legislative employees assist judicial officials in their duties, does this provision comply with separation of powers principles?
- b. Most of the staff members of the Office of Legislative Legal Services are attorneys. The attorneys in the office serve their legal client, the general assembly, and its constituents, the legislators. If an attorney staffing the

selection panel provides the selection panel with legal advice, e.g., advising on how to interpret the commissioner qualifications under the measure:

- i. Could that create a conflict for the attorney's role as counsel for the general assembly, which is sometimes a party in cases before the judicial branch?
- ii. Could that violate separation of powers principles?
- c. Do the proponents intend that staff assisting the panel is eligible for a per diem allowance and for any reimbursement of actual expenses as well? If so, the proponents should include language to this effect.
- d. If the selection panel, made up of judicial officers, is staffed by nonpartisan legislative agencies, will money to staff the selection panel come out of the judicial branch budget or the legislative branch budget or a combination thereof? If a combination, how should the budgeting be determined?

28. With regard to section 34-60-104.3 (2)(a):

- a. Do the proponents want to include a limit on how many terms a commissioner may serve?
- b. What if a selection panel cannot reach a unanimous decision pursuant to subsection (1)(a) of this section by April 1, 2020? If chosen later, would the commissioner's terms still be considered to have started on April 1, 2020, under this section?
- c. Stating that the commissioners are "appointed for staggered terms of four years each beginning April 1, 2020" is internally contradictory in that it states that the commissioners all have 4-year terms that start on April 1, 2020, but also that their terms are staggered. How can both of these things be true?
- d. The second sentence implies that for each commissioner appointed, and not only the initial commissioners, a selection panel will determine the length of the commissioner's first term to allow for staggering of terms.

If this is done for the first appointees, terms will continue to be staggered for subsequent appointees. The proponents might consider removing that requirement with respect to subsequent appointees.

29. For section 34-60-104.3 (2)(b), the executive director of the department of natural resources shall serve as the sole commissioner until commissioners are appointed on April 1, 2020.
- a. In case the initial selection panel cannot unanimously agree on commissioners to appoint pursuant to section (1)(c) before April 1, 2020, the proponents might consider amending this language to read "until the appointment of the initial commissioners or April 1, 2020, whichever comes later".
  - b. As drafted, various requirements in section 34-60-104.1 governing the commission would apply to the executive director as sole commissioner. Certain such requirements would not make sense with regard to the executive director as sole commissioner, including the conflict of interest provisions, the quorum requirement, and the prohibition against engaging in other employment. The proponents should clarify that these portions of section 34-60-104.1 do not apply to the executive director while serving as sole commissioner of the commission.
30. With regard to section 34-60-104.5, the requirement that the executive director "pursuant to section 13 of article XII of the state constitution" appoint a director of the commission is stricken, and the initiative instead requires that the commission appoint a director. Section 13 (7) of article XII of the Colorado constitution requires that the head of each principal department be the appointing authority for employees and for the heads of each division of that principal department. How does this portion of the initiative comply with that constitutional requirement?
31. Section 34-60-104.5 (2)(d) requires the director of the commission to obtain commission approval in making appointments. Section 13 (7) of article XII of the state constitution requires that heads of divisions make appointments for all positions in the state personnel system within their respective divisions. Does the requirement that the director obtain the commission's approval regarding appointments comply with that constitutional provision?

32. For section 34-60-106 (18):

- a. The comments and questions stated in question #11 also apply here.
- b. Do the proponents intend that the commission would regulate the disposal of hazardous waste arising from oil and gas operations and the disposal of exploration and production waste? Under current law, the solid and hazardous waste commission has authority to regulate these aspects of oil and gas operations pursuant to article 15 of title 25 and part 1 of article 20 of title 30, C.R.S. If the proponents intend the commission to regulate these aspects of oil and gas operations and to do so exclusively, they should add to the commission's regulatory authority in this section regulations regarding disposal of hazardous waste and exploration and production waste related to oil and gas operations. The proponents should also amend the relevant portions of titles 25 and 30, C.R.S., to remove the solid and hazardous waste commission's regulatory authority over those activities.

33. With regard to section 34-60-106.5, where it states that "[i]f passed by the general assembly, senate bill 19-181 is hereby repealed":

- a. As stated in section 2-4-302, C.R.S., the "repeal of a repealing statute does not revive the statute originally repealed". Without properly reviving language repealed in Senate Bill 19-181, the stated repeal in this measure would result in what we refer to as broken law. To effectuate this initiative, the revisor of statutes would strip new language that was added to statutes by Senate Bill 19-181; however, the revisor of statutes would not have authority to revive repealed or stricken language. As such, the 13 statutes amended or repealed in Senate Bill 19-181 would likely become ambiguous statutes that might not be capable of reasonable interpretation and implementation. Is that the proponents' intent?
- b. As an example of the ambiguous effects of repealing Senate Bill 19-181 without properly reviving prior law, Senate Bill 19-181 amends section 34-60-106 (1) from "[t]he commission also has authority to require:" to "[t]he commission also ~~has authority to~~ SHALL require:". If this measure passes, the revisor of statutes would remove "shall" from that sentence.

However, as indicated in section 2-4-302, C.R.S., the revisor of statutes would not have the authority to revive the "has authority to" language. Therefore, after passage of this measure, that portion of section 34-60-106 (1) would read "[t]he commission also require:". This sentence is ambiguous. It lacks any authority verb to indicate whether the commission's power to require certain activities is permissive or mandatory. The original language was permissive wherein it stated that the commission "has authority" to require. The language as amended in Senate Bill 19-181 was mandatory wherein it stated the commission "shall require". With the omission of any authority verb, it would be uncertain whether the sentence is permissive or mandatory.

- c. To revive language that is repealed in Senate Bill 19-181, the proponents must do so expressly in this measure. For example, Senate Bill 19-181 repeals the portion of the definition of "minimize adverse impacts" in section 34-60-103 (5.5) that requires the commission to "[t]ake into consideration cost-effectiveness and technical feasibility with regard to actions and decisions taken to minimize adverse impacts to wildlife resources." To revive that language would require adding the following language in this initiative: "In Colorado Revised Statutes, 34-60-103, **recreate and reenact, as repealed by Senate Bill 19-181 (5.5)(d).**"
- d. With regard to the statement that statutes or regulations in conflict or inconsistent with article 60 of title 34, C.R.S., "are hereby declared to be preempted by this article", the proponents should consider specifically listing those statutes that are deemed in conflict or inconsistent to avoid ambiguity.

34. With regard to sections 12, 14, 15, and 16 of the initiative generally:

- a. Is this initiative a state matter arising under article X, section 20 of the Colorado constitution as defined in section 1-41-102, C.R.S., which the proponents intend to be referred to voters at the November 2019 election?
- b. Is it the proponents' intent that this initiative satisfies the definition of "state matters arising under section 20 of article X of the state constitution" in that it requires approval of revenue changes pursuant to section 20 (7) of article X of the state constitution, as provided in section



1-41-102 (4)(d), C.R.S.? If so, what revenue changes does the initiative implement?

35. With regard to sections 34-60-122 (5)(e), 39-29-109 (3)(b), and 39-29-109.3 (1.3)(b):

- a. Section 24-77-103.6 establishes the authority of the general assembly to retain and expend a portion of state revenues in excess of the limitation on state fiscal year spending imposed by section 20 of article X of the state constitution. It appears that the proponents' intent is to effectuate a voter-approved revenue change that would exempt the money in these three funds from being included as "state revenues", which is defined in section 24-77-103.6 (6)(c), C.R.S., as those "state revenues not excluded from state fiscal year spending, as defined in section 24-77-102 (17)". Is that correct?
  - i. What does the second sentence in those provisions add to the first sentence?
  - ii. Section 39-28.8-204, C.R.S., is an example of language effectuating a voter-approved revenue change that exempts the revenue from state revenue under section 20 of article X of the state constitution. The proponents might consider using the language in section 39-28.8-204, C.R.S., in these three sections of the measure.
- b. What if in future legislative sessions other revenue is added to the funds, for example, if a future general assembly appropriates money from the general fund into one of the funds? Is it the proponents' understanding that the revenue appropriated would also be exempt from state revenue under section 20 of article X of the state constitution? The proponents might consider clarifying their intent with how an additional appropriation of money would be treated.

36. In section 34-60-122, the proponents have changed the name of the fund from the oil and gas conservation and environmental response fund to the oil and gas regulation and environmental response fund, but have not changed all of the statutory references to the fund. In subsection (1) of section 34-60-122, C.R.S., and in seven other statutes, there are 20 additional references to the fund that

either should be changed within the text of this initiative or for which this initiative should expressly authorize the revisor of statutes to make the changes. Sections 8-45-123 and 8-47-101, C.R.S., provide examples of how the language can be written to authorize the revisor of statutes to make the changes.

37. With regard to section 34-60-131 (2)(a), section 24-6-402 (2)(a) of the "Colorado Sunshine Act of 1972", C.R.S., requires that all meetings of two or more members of a state public body at which public business will be discussed or any formal action will be taken must be open to the public. In stating that the commission and commissioners are subject to the open meetings requirements, do the proponents also intend to require that any meetings held by the executive director of the department of natural resources, when acting as the sole commissioner pursuant to section 34-60-104.3 (2)(b), would be subject to open meetings requirements? If so, the proponents should expressly state that in the initiative.
38. With regard to section 39-29-109 (2)(b)(I), a state fund only has one authority, such as a principal department, that administers the fund, even if various divisions, agencies, boards, or commissions within that principal department will use portions of the money in the fund. Here, even though the commission falls within the department of natural resources, the provision has been amended to state that the department of natural resources administers the severance tax operational fund "with the exception of funds allocated to the independent oil and gas regulatory commission pursuant to section 39-29-109.3 (1.3)".
- a. What is the purpose of this language? Would the proponents' intent be better effectuated by creating a separate fund into which money allocated for use by the commission would be transferred and for which the director of the commission is given express authority to administer?
  - b. If the department of natural resources does not have the authority to administer that portion of the money, how will the money then be allocated to the commission?
  - c. This section states that the money will be "allocated" to the commission; however, section 39-29-109.3 (1.3) states that the general assembly will "appropriate" up to 35% of the total money in the operational fund to the commission. Why are both terms used? Do the proponents intend

that they mean different things? If so, how should the two provisions be read together?

## 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. The heading at the beginning of the proposed initiative, which says "**Conservation and Regulation ARTICLE 60 Oil and Gas Conservation**", restates the title division and article heading for Article 60 of title 34. This material should not be included in the proposed initiative and should be removed.
2. The section symbols that appear before each statutory section in the proposed initiative are not part of the statutory law and should be removed.
3. Each section in the C.R.S. has a headnote. Headnotes briefly describe the content of the section. Headnotes follow the section number, which ends with a period. Headnotes should be in bold-faced type, contain single dashes with a space on either side of the dash, and end with a period. See the example in number 4, below.
4. The C.R.S. are divided into sections, and each section may contain subsections, paragraphs, subparagraphs, and sub-subparagraphs as follows:

**24-65.5-102. Definitions – legislative declaration.** (1) Subsection.

(a) Paragraph

(I) Subparagraph

(A) Sub-subparagraph

(B) Sub-subparagraph

(II) Subparagraph

(b) Paragraph

(2) Subsection

### (3) Subsection

5. In order to provide context for the reader, introductory portions should be included before subsections, paragraphs, subparagraphs, and sub-subparagraphs when they are in the C.R.S. In sections 24-65.5-102, 34-60-103, and 39-29-109 (2), the introductory portions should be added.
6. Names and titles should be used consistently. In section 24-65.5-102, the "independent oil and gas regulatory commission" is referenced. In sections 34-60-103 and 34-60-104.1, it is referred to as the "independent oil and gas regulatory commission of the state of Colorado." The words "of the state of Colorado" should either be added to section 24-65.5-102 or deleted from 34-60-103 and 34-60-104.1. Additionally, references to the "oil and gas conservation commission of the state of Colorado" and the "oil and gas local regulatory fund" are inconsistent.
7. Each statutory section being amended, repealed, or added is preceded by a separate amending clause explaining how the law is being changed. For example, if the proponents intend to add a new section to the C.R.S., they should include the following amending clause:

**SECTION 1.** In Colorado Revised Statutes, **add** 34-60-104.1 as follows:

To make multiple changes to a section, such as amending, repealing, and adding, each instruction word (**amend**, **repeal**, **add**) should be in bold-faced type and each group of instructions should be separated with a semicolon:

**SECTION 3.** In Colorado Revised Statutes, 34-60-102, **amend** (1)(a)(I) and (2); and **add** (3) and (4) as follows:

8. In section 34-60-102 (1)(a)(I), a comma should be inserted in the first line after "balanced development" to reflect current law.
9. It is standard drafting practice to use SMALL CAPITAL LETTERS [rather than ALL CAPS] to show the language being added to and stricken type, which appears as ~~stricken type~~, to show language being removed from the C.R.S.
10. Although new language in a proposed initiative should be in small capital letters, use an uppercase letter to indicate capitalization where appropriate. The following should be large-capitalized:
  - a. The first letter of the first word of each sentence;

- b. The first letter of the first word of each entry of an enumeration paragraphed after a colon, for example, in section 34-60-102 (3)(a), capitalize "CREATE"; and
  - c. The first letter of proper names. The first letter of words that are not proper nouns should not be capitalized. For example, in section 34-60-102 (3)(a), "local" should not be capitalized and in in (3)(c), "commission" should not be capitalized.
11. When a new subsection, paragraph, subparagraph, or sub-subparagraph is started, it should begin on a new line. In sections 34-60-102 (3)(a) and 34-60-104.1 (1)(b), the subparagraphs numbered "(I)," "(II)," and "(III)" should each begin on a new line.

**12. Guidelines for statutory citations:**

- a. When referencing the section you are currently in, the section number should not be referenced. For example:

**1-1-105.5. District elections.** (1) (b) Except when a contestor to elector qualifications has been timely initiated as described in *this section*, this section validates ... [*emphasis added*]

- b. The number or letter of what you're referencing needs to be specified for every other level of reference, even when you're referring to a provision within the same:
  - i. Title: "this title 1"
  - ii. Article: "this article 1"
  - iii. Part: "this part 1"
  - iv. Subsection: "this subsection (2)"
  - v. Paragraph: "this subsection (2)(a)"
  - vi. Subparagraph: "this subsection (2)(a)(I)"
  - vii. Sub-subparagraph: "this subsection (2)(a)(I)(b)"

13. In section 34-60-102 (4), the extra word "PROVISIONS" before the word "STATUTORY" doesn't make sense.

14. When repealing an entire section, the section subdivision numbers and letters should also be shown in stricken type.

15. In section 34-60-104 (2)(a)(III), additional language has been added. In current law, subparagraph (III) only says "Repealed." The remaining language should be deleted.
16. When subdividing a statutory provision, if there is an introductory portion, all of the subdivisions under that introductory portions should follow it so that, read together, the introductory portion and the subdivision make a complete sentence. In section 34-60-104.1 (2), paragraph (d) does not follow the introduction portion in subsection (2) to make a complete sentence. Consider relettering and renumbering as follows:
- (2) (a) THE COMMISSION CONSISTS OF THREE MEMBERS WHO HAVE THE FOLLOWING QUALIFICATIONS:
- (I) A DEMONSTRATED BALANCE OF TECHNICAL ...
- (II) A DEMONSTRATED PERSONAL AND PROFESSIONAL ...
- (III) A PROFESSIONAL BACKGROUND DEMONSTRATING ...
- (b) NO PERSON MAY BE APPOINTED ...
17. The introductory portion in section 34-60-104.1 (2)(d)(I) is incomplete. Consider adding the words "if the person" before the colon.
18. When the proponents include a list, the entire list should be repeated with each use unless the proponents intend that some of the items in the list will not apply when listed subsequently. See example in number 19 below.
19. Adjectives should be written in the same tense within a paragraph. In section 34-60-104.1 (2)(d)(I)(A), rather than saying "in the employ of", "holding", and "owning", the sentence could be rewritten as follows: "In the three years prior to appointment, was employed by or held any official relation to any corporation, business entity, or person subject in whole or in part to regulation by the commission, or owned stocks or bonds of any such corporation, business entity, or person ..."
20. When the words "except that" precede an "if/then" statement, a comma should follow "that".
21. It is helpful to the reader if the same terms are used when referring to specific people. In section 34-60-104.1 (2)(d)(I)(A), the words "person" and "commissioner" seem to be used interchangeably. If the person referred to is a

commissioner, it would be clearer to consistently use that word. See example in number 22 below.

22. Consider writing in active voice. In section 34-60-104.1 (2)(d)(I)(A), the end of the sentence would be clearer if written in active voice, as follows: "except that, if any such commissioner becomes the owner of such stocks or bonds or becomes pecuniarily interested in such corporation otherwise than voluntarily, that commissioner shall divest such ownership or interest within six months. If the commissioner fail to do so, that commissioner's office becomes vacant; or"
23. Ordinarily, prefixes are not hyphenated in the C.R.S., especially words beginning with "non". In section 24-60-104.1 (2)(d)(I)(B), "nonprofit" and "nongovernmental" should not be hyphenated.
24. In section 34-60-104.1, subsection (2)(d)(I)(C) does not follow the introductory portions in subsections (2)(d) and (2)(d)(I). Consider rewriting (2)(d)(I)(C) or relocating the provision.
25. When a provision is subdivided into an introductory portion followed by several incomplete sentences, the incomplete sentences should end with a semicolon. Only the last incomplete sentence should end with a period. Section 24-60-104.1 (2)(d)(II) and 34-60-106 (18)(a), (18)(c), (18)(d), (18)(e), (18)(f), and (18)(g) should end with semicolons.
26. When writing a date that includes the month, day, and year, the year should be set off with commas as follows: "January 1, 2020,".
27. A fiscal year is normally stated as "2019-20".
28. The correct way to refer to the C.R.S. is "Colorado Revised Statutes" and the correct way to refer to the Colorado constitution is either the "Colorado constitution" or the "state constitution", not simply "the Colorado statutes" or "the constitution".
29. In section 34-60-104.5 (1), a period should be inserted after "commission" at the end of the sentence, and the period following "~~board~~" should be shown in stricken type.
30. In section 34-60-104.5 (2)(d), a semicolon was added following "operation of the commission". It is grammatically unnecessary.
31. In section 34-60-106 (18)(b), where it states "or other action on the part of local government", an "a" should be inserted before "local".

32. In section 34-60-106 (18)(f), the second instance of the word "rules" appears to be redundant, and the words "flowline" and "well" should probably be used.
33. In section 34-60-106 (18)(h)(II), the subparagraph is further subdivided using numbers that are not used in the C.R.S. The subdivision available is the sub-subparagraph (see number 4 above for an example). In this case, subparagraph (II) can be renumbered by striking the "(A)" following "(II)" and changing "(i)," "(ii)," and "(iii)" to "(A)," "(B)," and "(C)."
34. In section 34-60-106.5:
- a. In the first sentence, the reference should be to "rules", not "regulations".
  - b. In the second sentence, the word "oil" should be added before "and".
35. In the C.R.S., punctuation is not shown within quotation marks unless a sentence is being quoted. Otherwise it is shown outside the quotation marks. In section 34-60-122 (5)(a), the comma within the quoted phrase "FUND," should follow the quotation marks.
36. The word "money" instead of "moneys" is now used in the C.R.S. Please consider changing "moneys" to "money" in section 34-60-122 (5)(c), along with the coordinating verbs.
37. Every year, amendments to the C.R.S. are incorporated into the current version of the statutes and the entire law is reenacted and republished as the current and only version of the C.R.S. In section 34-60-131, it is unnecessary to use the phrase "as amended, or any successor statute", because the current law will always include any amendments and if a section is succeeded by a new section, the bill is drafted the change internal references to include the new section numbers.
38. It is standard drafting practice when referencing statutory sections to include the word "section" before the number. For example, "section 24-6-301 (1.7)(b)".
39. For purposes of this statutory initiative, the word "shall" is defined in section 2-4-401 (13.7), C.R.S., and it means that "a person has a duty". The related word "must," which is defined in section 2-4-401 (6.5), C.R.S., 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." Please use these terms throughout the proposed initiative consistent with these definitions.



40. Section 39-29-109 creates two different funds: The severance tax trust fund and the oil and gas local regulatory fund. Both funds should be listed in the headnote for the section.
41. In section 39-29-109 (3)(a), the reference to section 39-29-108 (a) is incomplete. The entire subsection number should be included.
42. In section 39-29-109 (3)(a), the internal reference at the end of the paragraph says "this paragraph (3)". The correct reference should be "this subsection (3)".
43. Section 17 of the proposed initiative says "Effective dates." The word "dates" should be singular.