

COLORADO TITLE SETTING BOARD

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IN THE MATTER OF THE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE  
FOR INITIATIVE 2023-2024 #47

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MOTION FOR REHEARING

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On behalf of Steven Ward, registered elector in the State of Colorado, the undersigned counsel hereby submits this Motion for Rehearing of the Title Board's ("Board") May 17, 2023, decision related to Initiative 2023-2024 #47 ("Measure").

On May 17, 2023, the Board conducted a hearing on Proposed Initiative 2023-2024 #47. The Board found a single subject and proceeded to set title as follows:

“A change to the Colorado Revised Statutes concerning discontinuing the issuance of new oil and gas operation permits that utilize fracking by December 31, 2030, and, in connection therewith, requiring the phase-out of new oil and gas operating permits that utilize fracking while allowing permitted oil and gas operation that utilize fracking to continue.”

As demonstrated below, the Measure is in direct violation of the Colorado Constitution and unequivocally conflicts with established legal precedent related to single subject and clear title. The Board lacks jurisdiction to set title as the Measure contains multiple subjects. Petitioner additionally asserts the title is not clear, contains a catch phrase and omits important features of the Measure.

**I. Single Subject: The Title Board Lacks Jurisdiction Over #47 Because the Measure Does Not Contain a Single Subject.**

The purpose of the Measure is to require the Colorado Oil and Gas Conservation Commission (the "Commission") to discontinue issuance of oil and gas permits by December 31, 2030. However, the Measure strays far from this subject and contains multiple provisions that are disconnected from the purpose.

As set forth in the Colorado Constitution and affirmed by the Colorado Supreme Court, the single subject requirement guards against a measure confusing voters in two separate ways. First, combining subjects with no necessary or proper connection for the purpose of garnering support for the initiative from various factions that may have different or even conflicting interests could lead to the enactment of Measures that would fail on their own merits. *In re Title, Ballot Title and Submission Clause for Proposed Initiative 2001-02 No. 43*, 46 P.3d 438, 442 (Colo. 2002). Second, the single subject requirement prevents “voter surprise and fraud occasioned by the inadvertent passage of a surreptitious provision ‘coiled up in the folds’ of a complex initiative.” *Id. see also In re Title, Ballot Title and Submission Clause for Proposed Initiative for 2011-12 No. 3*, 274 P.3d 562, 566 (Colo. 2012).

**A. The Measure Vaguely Invalidates Certain Rules and Preserves Other Rules Rendering Impact of Measure Incomprehensible and Creating Separate and Distinct Subjects.**

The Measure requires the continuation of a subset of Commission Agency Rules that ensure the “protection of public health, safety, welfare, the environment, and wildlife for all existing oil and gas operations.” (“continued rules”)<sup>1</sup> The Commission’s current rules define their scope and application:

The Commission’s Rules are promulgated to regulate Oil and Gas Operations in a manner to *protect and minimize adverse impacts to public health, safety, welfare, the environment, and wildlife resources*, and to protect against adverse environmental impacts on any air, water, soil, or biological resource resulting from Oil and Gas Operations. (2 CCR § 404-1, Rule 201 a.) (emphasis added)

Logically, this means that *all* the rules must be codified. However, the Measure doesn’t allow for this result. While the Measure requires the continued rules, it also requires the repeal of existing Commission rules related to new permits (“repealed rules”).

To add to the confusion, the Measure does not identify with any specificity which rules should be continued, or which rules should be repealed. The Measure also does not provide for a solution when the purpose of a continued rule is intertwined with the purpose of the same rule that must be repealed. In this regard, people voting on this Measure will not even know which rules they are voting on repealing. The Measure’s impact on eliminating certain rules and preserving other rules is incomprehensible.

Furthermore, SB19-181 specifically changed the statutory mission of the Commission to regulate Oil and Gas Operations in a manner “to protect public safety, health, welfare, the environment and wildlife resources”. Suggesting now that banning oil and gas is *necessary* “**in order to protect public health, safety, welfare, the environment , and wildlife**” directly conflicts with the existing statute that requires regulations that protect these same categories. The measure surreptitiously changes the mission of the Commission and forces it to operate in conflict with the statute.

References to public health and safety are found throughout the regulations. It is difficult to comprehend how the Commission could continue rules ensuring protection of public health and safety without eviscerating much of the commission’s rules. The mandate to protect public health and safety is integral to other commission duties.<sup>2</sup>

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<sup>1</sup> **SECTION 3.** 34-60-106 (20.5)(d) THE CONTINUATION OF COMMISSION RULES ENSURING THE PROTECTION OF PUBLIC HEALTH, SAFETY, WELFARE, THE ENVIRONMENT, AND WILDLIFE FOR ALL EXISTING OIL AND GAS OPERATIONS.

<sup>2</sup> 2 CCR § 404-1, 301. GENERAL REQUIREMENTS FOR APPROVAL, CHANGES TO OPERATIONS, AND FILING FEES FOR OIL AND GAS OPERATIONS a. Approval. All operations governed by any regulation in this Series require written approval of the Commission, or Director where applicable. The Commission or Director, where applicable, will approve operations only if they protect and minimize adverse impacts to public health, safety, welfare, the environment, and wildlife

If the Board cannot comprehend the actual effect of the initiative, the initiative cannot be forwarded to the voters and must, instead, be returned to the proponent." *In re Proposed Initiative for 1999-2000 No. 25*, 974 P.2d 458, 469, (Colo. 1999).

**B. Rule Mandates Combined with a Materially Changing Authority/Jurisdiction of the Commission are Separate and Distinct Subjects.**

The Measure operates to remove the discretion the Commission would otherwise have over rulemaking provided under Colorado Administrative Procedures Act. C.R.S. § 24-4-103 and § 34-60-108.

While the Measure directs the actions of the Board, it does not factor for the Commission's inability to codify these rules without oversight. The board's actions in adopting the rules are not a *fait accompli* to banning permits. Under the Colorado Constitution, the General Assembly and Governor ultimately maintain authority over rulemaking through the annual rule review bill and power to veto. This interference in the rulemaking process by an administrative agency has no

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resources, and protect against adverse environmental impacts on any air, water, soil, or biological resource resulting from Oil and Gas Operations. Operators will obtain the Commission's or Director's, where applicable, approval through the procedures provided in this and such other applicable Commission Rules. The Commission, or Director, where applicable, may require any conditions of approval that are determined to be necessary and reasonable to protect and minimize adverse impacts to public health, safety, welfare, the environment, and wildlife resources, or to protect against adverse environmental impacts on any air, water, soil, or biological resource resulting from Oil and Gas Operations.

2 CCR § 404-1, 303. PROCEDURAL REQUIREMENTS FOR OIL AND GAS DEVELOPMENT PLANS

a. **Components of an Oil and Gas Development Plan Application.** Prior to commencing Oil and Gas Operations at an Oil and Gas Location that meets the criteria of Rule 304.a, an Operator will have an approved Oil and Gas Development Plan. An Operator will submit to the Commission the following:

....

(4) Any other relevant information that the Director determines is **necessary and reasonable** to determine whether the proposed operation meets the Commission's Rules **and protects and minimizes adverse impacts to public health, safety, welfare, the environment, and wildlife resources**. The Director will provide the Operator with the reason for the request in writing.

2 CCR § 404-1, 201. EFFECTIVE SCOPE OF RULES AND REGULATIONS

a. The Commission's Rules are promulgated to regulate Oil and Gas Operations in a manner to protect and minimize adverse impacts to public health, safety, welfare, the environment, and wildlife resources, and to protect against adverse environmental impacts on any air, water, soil, or biological resource resulting from Oil and Gas Operations. Except as set forth in Rule 201.d, the Commission's Rules are effective throughout the State of Colorado, and are in force in all pools and fields, unless the Commission amends, modifies, alters, or enlarges them through orders or Rules that apply to specific individual Pools or Fields...

d. These rules will not apply to:

(1) Indian trust Lands and minerals; or

(2) The Southern Ute Indian Tribe within the exterior boundaries of the Southern Ute Indian Reservation. The Commission's Rules will apply to non-Indians conducting Oil and Gas Operations on lands within the exterior boundaries of the Southern Ute Indian Reservation where both the surface and oil and gas estates are owned in fee by persons or entities other than the Southern Ute Indian Tribe, regardless of whether such lands are communitized or pooled.

2 CCR § 404-1, 901. GENERAL STANDARDS

**a. Addressing Impacts and Potential Impacts to Public Health, Safety, Welfare, the Environment, and Wildlife Resources.**

Whenever the Director has reasonable cause to determine that an Operator, in the conduct of any Oil and Gas Operations, is impacting or threatening to impact public health, safety, welfare, the environment, or wildlife resources, the Director may require the Operator to take action to avoid, minimize, or mitigate the potential impacts to public health, safety, welfare, the environment, or wildlife resources, including but not limited to...

proper or necessary connection to the discontinuance of permits. Nor is there any connection between the mandate on continued rules and the discontinuance of permits.

Furthermore, SB19-181 specifically changed the statutory mission of the Commission to regulate Oil and Gas Operations in a manner “to protect public safety, health, welfare, the environment and wildlife resources”. Suggesting now that banning oil and gas is *necessary* “**in order to protect land, air, and water**” directly conflicts with the existing statute that requires regulations that protect land, air and water. The board cannot change its mission and operate in conflict with the statute.

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.)

This codification of existing rules, combined with the establishment of a new independent oil and gas board, was a basis for the board’s rejection of jurisdiction in 2019-2020 Initiatives #307-#310, *Establish the Independent Oil and Gas Board*. The same principle applies here where the Measure operates to codify existing rules and change the jurisdiction of an administrative agency.

### **C. Discontinuance of Permits that Incorporate Fracking is Vague and Applies to Matters Unrelated to the Initial Permitting Process**

The Commission rules and permit application processes for new oil and gas production do not incorporate a method to determine if oil and gas production incorporates “fracking”. An operator cannot simply check a box. The COGCC’s 300 series rules (2 CCR § 404-1) cover the permitting process. Rule 303 provides for the extensive documentation operators must provide to get a permit to drill. It includes a cumulative impacts data evaluation repository (air resources, public health, water resources, terrestrial and aquatic wildlife resources and ecosystems, etc). The commission would be required to develop a parallel permitting system that somehow phases out permitting over several years. <https://cogcc.state.co.us/documents/reg/Rules/LATEST/300%20Series%20-%20Permitting%20Process.pdf>

C.R.S. § 34-60-103(7.5) defines “Permits” broadly to include “any permit, sundry notice, notice of intention, or other approval, including any conditions of approval, which is granted, issued, or approved by the commission.” Repealing all rules related to new “permits” would leave the commission without the tools to do much of its work. For example, operators submit sundry notices for a wide range of purposes. These purposes are disconnected from the proponent’s stated intent and create distinct and separate subjects.

### **D. The Repeal of Permits Creates Another Separate and Distinct Subject.**

The discontinuance of permits is a subject separate from the revocation of existing permits. One is a change to future applications and the other is the revocation of an existing right. It is further unclear whether this revocation of existing permits would apply to the common practice of refracking.

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. *Johnson v. Curry (In re Title, Ballot Title, & Submission Clause for 2015-2016 #132)*, 374 P.3d 460, 465 (Colo. 2016). Voters who want to discontinue permits but not affect existing property rights will have to choose between these competing interests. There is no reason to presume that voters who may support the former would support the later.

A voter who supports the Measure’s provision related to discontinuance of permits may not even be aware that the Measure will result in the revocation of existing permits. This subject is buried in the Measure. Combining different subjects creates the risk of surprising voters with a surreptitious' change, because voters will focus on the discontinuance of permits and overlook the revocation.

### **E. Changing COGCC’s Duties to Monitoring, Plugging and Remediating is Another Separate and Distinct Subject.**

The Measure transitions the jurisdiction of the GOGCC to “primarily monitoring, plugging, and remediating of facilities permitted prior to December 31, 2030.” Currently, under C.R.S. § 34-60-106 the Commission has broad powers over oil and gas production in Colorado. These include several powers that are unrelated to monitoring, plugging, and remediating facilities, including:

- Issuance of certificates of clearance in connection with the transportation and delivery of oil and gas;
- Limit the production of oil or gas, or both, from any pool or field for the prevention of waste;
- Power to make determinations, execute waivers and agreements, grant consent to delegations, and take other actions required or authorized for state agencies by those law and regulation of the United States which affect the price and allocation of natural gas and crude oil;
- Prescribe special rules and regulations governing the exercise of function delegated to or specified for it under the federal “Natural Gas Policy Act of 1978”;
- As to class II injection wells classified in 40 CFR 144.6, may perform all acts for the purpose of protecting underground sources of drinking water in accordance with state programs authorized by 42 U.S.C. sec. 300f et seq., and regulations under those sections, as amended. Regulating venting and flaring;
- Communitizing and unitizing leases to maximize resource recovery;
- Review MIT (mechanical integrity tests) and Bradenhead tests to ensure well integrity;
- Regulate transportation of exploration and production waste.

These functions are not necessarily related to the permitting process. Yet, the Measure, without explicitly repealing the responsibilities, requires that the Commission no longer work on these issues as a “primary” function. In this regard, the Measure is now allocating time management of a state agency.

As stated above, 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, supra.*

#### **F. The Addition of the New Definition of “Fracking” Creates a Separate and Distinct Subject.**

The Commission currently has a number of promulgated rules and regulations to related to fracking.<sup>3</sup> The definition used by the proponents change that definition, not just in the permitting process, but throughout the rules. This is a clear violation of single subject.

In a recent Supreme Court single subject case this precise type of change to a definition caused the Board to lose jurisdiction to set title. *See In re Title, Ballot Title and Submission Clause for 2021-2022 #16 (In re # 16)*, 489 P.3d 1217 (2021) In that case, the purpose of the measure was to extend the state’s animal cruelty laws to livestock. In doing so the Court found the proponents added a second subject: a redefinition of “sexual act with an animal” that applied to all animals. The Court held that this was impermissible, holding: “Initiative 16 fails to satisfy the single-subject requirement because expanding the definition of ‘sexual act with an animal’ isn’t necessarily and properly connected to the measure’s central focus of incorporating livestock into the animal cruelty statutes.” *Id.* ¶ 41.

The same conclusion holds true here. By redefining fracking throughout the rules, the proponents change regulations in matters unrelated to the initial permitting. This change is not necessarily connected to the purpose and is a violation of single subject.

Adding to the confusion, the proponent’s definition conflicts with other industry definitions. For example, the USGS definition of hydraulic fracturing, is the process of injecting water, sand, and/or chemicals into a well to break up underground bedrock to free up oil or gas reserves. <https://www.usgs.gov/mission-areas/water-resources/science/hydraulic-fracturing#overview>

#### **G. The Measure Will Operate to Remove the Regulatory Power of the State.**

By discontinuing fracking in Colorado, the measure operates to prohibit oil and gas activity on federal land as well as private property. While states have authority to regulate oil and gas operations on federal land, they may not prohibit the practice absent express preemption.

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<sup>3</sup> Base fluid, hydraulic fracturing additive, hydraulic fracturing fluid, hydraulic fracturing treatment, and proppant. Dep’t of Nat. Res. Reg. 100 Series, 2 Colo. Code Regs. 404-1 (2015) Fracking process, Rule 205a of the Department of Natural Resources’ Regulations, 2 Colo. Code Regs. 404-1 (2015), which is titled, "Hydraulic Fracturing Chemical Disclosure," requires operators to disclose substantial information about wells that they have fracked, including the chemicals used. Dep’t of Nat. Res. Regs. 305.c(1)(C)(iii), 308B, 316C.a, 2 Colo. Code Regs. 404-1 (2015) provides for additional reporting and notice of an intent to conduct fracking activities. Other rules and regulations govern the disposal of exploration and production waste, including waste associated with the fracking process.

In *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987), the U.S. Supreme Court ruled federal land use statutes and regulations don't preempt state assertions of authority on federal lands but only when the state regulates, not when the state prohibits.

## **II. The Ballot Title and Submission is Incomplete, Misleading and Contains a Catch Phrase.**

### **A. Catch Phrase: The use of the term “fracking” is a catch phrase.**

The current title includes reference to “fracking”. It is improper to include this term in the question for several reasons. First, the practice of fracking applies to the vast majority of oil and gas production in Colorado. *See City of Longmont Colo. v. Colo. Oil & Gas Ass'n*, 369 P.3d 573, 576 (2016). Folding the term into the question only serves to confuse voters that may be led to believe this is a subset of production, when in fact operates as a full ban. The Supreme Court has said as much finding that it is “undisputed that fracking is now the standard for virtually all oil and gas wells in Colorado.” *Id.*, at 581.

Additionally, “Catch phrases” and words that could form the basis of a slogan should be carefully avoided in writing a ballot title and submission clause. *Splets v. Klausling*, 649 P.2d 303 (Colo.1982). “Catch phrases” are words that work to a proposal's favor without contributing to voter understanding. By drawing attention to themselves and triggering a favorable response, catch phrases generate support for a proposal that hinges not on the content of the proposal itself, but merely on the wording of the catch phrase. *Garcia v. Chavez (In re Title, Ballot Title & Submission Clause)*, 4 P.3d 1094, 1100 (Colo. 2000).

The Court determines the existence of a catch phrase or slogan in the context of contemporary political debate. *See In re Ballot Title 1999-2000 # # 227 & 228*, 3 P.3d 1, 6; *In re Workers Comp Initiative*, 850 P.2d 144, 147 (Colo. 1993). In setting the titles, the Board must “correctly and fairly express the *true* intent and meaning” of the proposed initiative and must “consider the public confusion that might be caused by misleading titles.” § 1-40-106(3)(b), C.R.S. (2023); *In re Ballot Title 1999-2000 # # 245(f) & 245(g)*, 1 P.3d 739, 743 (Colo. 2000).

The Court found the words operate as both a catch phrase and a slogan. They mask the policy question regarding whether the most rapid and effective way to teach English to non-English speaking children is through an English immersion program, a question of great public debate. The Court further found that the “as rapidly and effectively as possible” language in the titles tipped the substantive debate on an issue to be submitted to the electorate. Even though the initiative contained this language, the Title Board was not permitted to include the wording where it is constituted a catch phrase. *Citing See In re Proposed Initiative on "Obscenity,"* 877 P.2d 848, 850-51 (Colo. 1994).

By custom and practice, the board has used the scientific term of “hydraulic fracturing”. The use of the term “fracking” by the proponents is clearly intending to evoke a reaction in the voters and will no doubt serves as a basis for their campaign.

**B. Misleading: The Title is Misleading and Fails to Inform Voters of Measures' Central Features.**

In fixing a title and a summary, the Board's duty is "to capture, in short form, the proposal in plain, understandable, accurate language enabling informed voter choice . . . ." In re Proposed Initiative for 1999-2000 No. 29, 972 P.2d 257, 266 (Colo. 1999) (quoting *In re Ballot Title "1997-1998 # 62"*, 961 P.2d 1077, 1083 (Colo. 1998)). Here, because the original text of the proposed initiative is difficult to comprehend, the titles and summary are not clear.

The title does not even inform voters of substantial and material changes in state law resulting from this Measure. The title fails to inform voters that this Measure will redefine fracking, transform the jurisdiction and duties of the Commission and serve to preempt federal law. The title does not inform voters that the Measure will eliminate certain Commission Rules and preserve other Commission Rules. And the title does not even mention the fact that the Measure would transform the Colorado Oil and Gas Conservation Commission into a minimized role of "primarily monitoring, plugging, and remediating of facilities permitted prior to December 31, 2030."

Further, the title is misleading in that it states it "allows for existing oil and gas operations" when, in fact, it does not allow for permit amendments and repeals existing permits if the well is not operational by 2033.

For the foregoing reasons, the Petitioner respectfully requests the Board grant the motion for rehearing and deny the title as set.

Respectfully submitted this 24th day of May 2023.

s/Suzanne Taheri

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