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By Steven Ward at 1:26 pm, Apr 22, 2020

COLORADO TITLE SETTING BOARD

IN THE MATTER OF THE BALLOT TITLE AND SUBMISSION CLAUSE FOR
INITIATIVE 2019-2020 #312

MOTION FOR REHEARING

Tim Howard (“objector”), a registered elector of the State of Colorado, through undersigned counsel, hereby submits this Motion for Rehearing of Initiative 2019-2020 #312 pursuant to Section 1-40-107(I)(a)(I) C.R.S. As grounds therefore objector states the following:

The Proposed Initiative 2019-2020 #312 states:

Shall there be an amendment to the Colorado constitution prohibiting the oil and gas conservation commission from repealing or amending to make less stringent: 1) specified oil and gas conservation commission rules related to oil and gas safety, aesthetic and noise control, spills, reclamation, and flowlines, and, 2) if otherwise given such authority, specified air quality control commission rules related to air emission reductions and inventory?

I. The Board lacks jurisdiction over Initiative #312 because it contains more than one separate and distinct subject in violation of the Constitution’s single subject requirement.

The Colorado Oil and Gas Conservation Commission (“COGCC”) does not have regulatory authority to approve or disapprove rules promulgated by the Colorado Air Quality Control Commission (“AQCC”). Furthermore, the proposed initiative does not give the COGCC such powers. The COGCC and AQCC are separate commissions residing within different departments of the executive branch. The proposed initiative creates a second subject by amending the Colorado Constitution in an effort to grant regulatory authority to the COGCC that it does not have in a manner that is beyond the scope of 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 the ability to approve or disapprove the same rule.

The proposed initiative expressly states that specific AQCC rules “shall not be repealed or amended by the oil and gas commission or its successor to make them less stringent.” The COGCC lacks that power, but by stating that a commission will not do something it does not have the authority to do, it has created a second subject in conflict with the APA.

The AQCC and COGCC are separate unique commissions within different departments because they were created with unique missions and duties.

The AQCC's legislative declaration, in part, states:

[I]t is declared to be the policy of this state to achieve 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)

The legislative declaration further declares: "Climate change adversely affects Colorado's economy, air quality and public health, ecosystems, natural resources, and quality of life," C.R.S. § 25-7-102(2)(a), and, "Colorado shall strive to increase renewable energy generation and eliminate statewide greenhouse gas pollution by the middle of the twenty-first century." C.R.S. § 25-7-102(2)(g).

Duties of the AQCC include promulgating rules consistent with the legislative declaration set forth in C.R.S. § 25-7-102 and necessary for the proper implementation and administration of this article 7. C.R.S. § 25-7-105(1).

While the AQCC appropriately focuses on air quality standards and eliminating greenhouse gas pollution, the COGCC is directed 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." C.R.S. § 34-60-102(1)(a)(I).

The COGCC and AQCC are separate commissions with separate missions, duties, and rulemaking authority. Because the proposed initiative attempts to give regulatory powers to the COGCC that are beyond the scope of the Colorado APA, there is a second subject.

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

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

Although the proposed initiative states the "Oil and Gas Commission" is prohibited from repealing or making less stringent certain environmental and public safety rules, at least 11 entities could repeal certain rules or make them less stringent.

Numerous organizations can repeal certain rules in the proposed initiative 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 COGCC. 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 AQCC, 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 COGCC 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 COGCC 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.

B. Fails to convey that the recent COGCC flowline rulemaking could be repealed or amended

The proposed initiative would allow the recent COGCC flowline rulemaking to be repealed or amended. However, it is unclear when reading the proposed initiative or ballot title that the flowline rulemaking could be repealed or amended because that information is coiled in the folds of a complex initiative.

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 rules cannot be repealed or amended. But the recently promulgated COGCC flowline rules, referred to as “Oil and Gas Conservation Commission flowline rules, 2 CCR 404-1, Rules 1101-1105” in the initiative went into effect on January 14, 2020.

Furthermore, even if the ballot title included language about the January 1, 2020 effective date, because the flowline rulemaking occurred in 2019, it may cause confusion unless it expressly stated that the flowline rules could be repealed or amended. The rules were noticed on October 8, 2019 and promulgated on November 21, 2019. The rules were printed in the Colorado Register, Vol. 42, No. 24, on December 25, 2019. But per C.R.S. § 24-4-103, the rules do not become effective until twenty days after publication in the Colorado Register.

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, would allow recently implemented rules to protect Coloradans from abandoned flowlines to be repealed or amended.

The ballot title needs to list the effective date provision and all of the flowline rules that could still be repealed or amended.

C. The ballot title insufficiently informs voters that the proposed initiative contemplates repealing or amending recent air emission rules.

Although the COGCC does not have the authority to repeal AQCC rules, the proposed initiative contemplates allowing recent air emission rules to be repealed or amended. The ballot title suffers from the same lack of clarity discussed in the previous section.

The AQCC air emission standards and inventory rules, referred to as 5 CCR 1001-9, Reg. No. 7, Part D § II.C and § V in the initiative, went into effect on February 14, 2020. Therefore, they are not protected from being repealed or amended. But the ballot title reads as if they are protected.

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.

The ballot title needs to list the effective date provision and all of the air emission standards and emission inventory rules that could still be repealed or amended.

D. The Title Board added clarifying language to the ballot title that is not reflected in the proposed initiative.

Unlike the ballot title, the proposed initiative has no caveat in the language stating “if otherwise given such authority.” This language was grafted on to the ballot title in an attempt to rectify the missing language from the proposed initiative because the COGCC has no legal authority to repeal or amend AQCC rules. While we commend the Title Board’s attention to detail, voters will be surprised to learn that that the new language in our state constitution provides no such limitation.

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.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing MOTION FOR REHEARING was served electronically, this 22nd day of April, 2020, to the following proponents' representatives:

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