

# STATE OF COLORADO

## Colorado General Assembly

Mike Mauer, Director  
Legislative Council Staff

**Colorado Legislative Council**  
029 State Capitol Building  
Denver, Colorado 80203-1784  
Telephone (303) 866-3521  
Facsimile (303) 866-3855  
TDD (303) 866-3472  
E-Mail: lcs.ga@state.co.us



Dan L. Cartin, Director  
Office of Legislative Legal Services

**Office of Legislative Legal Services**  
091 State Capitol Building  
Denver, Colorado 80203-1782  
Telephone (303) 866-2045  
Facsimile (303) 866-4157  
E-Mail: ols.ga@state.co.us

### MEMORANDUM

March 14, 2014

**TO:** Caitlin Leahy, Gregory Diamond, and Martha Tierney

**FROM:** Legislative Council Staff and Office of Legislative Legal Services

**SUBJECT:** Proposed initiative measure 2013-2014 #85, #86, #87, and #88 concerning Oil and Gas Operations

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 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.

These initiatives were submitted as a series of initiatives including proposed initiatives 2013-2014 #85 to #88. The comments and questions raised in this memorandum will address proposed initiatives 2013-2014 #85 to #88 cumulatively.

### Purposes

The major purposes of the proposed amendments to the Colorado constitution appear to be:

1. To minimize and mitigate any impacts on the public health, safety, and welfare from the conduct of oil and gas operations, including hydraulic fracturing; and
2. To require that new oil and gas wells be located away from occupied structures.

## Technical Comments

The following comments address technical issues raised by the form of proposed initiatives 85, 86, 87, and 88. 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 initiatives as suggested below.

1. Article V, section 1 (8) of the Colorado constitution requires that the following enacting clause be the style for all laws adopted by the initiative: "Be it Enacted by the People of the State of Colorado". To comply with this constitutional requirement, the proponents should capitalize the "e" in "enacted."
2. It is standard drafting practice to insert a left tab at the beginning of the first line of each new section, subsection, paragraph, or subparagraph, including amending clauses and section headings. Please see the example in technical comment 9.
3. It is standard drafting practice to number, before the amending clause, each section, part, etc. that is being amended or added with a section number (i.e., **SECTION 1.**, **SECTION 2.**). For example:

**SECTION 1.** In the constitution of the state of Colorado, add article XXX as follows:

4. Since the proposed initiative is to be added to the Colorado constitution as a new article, the amending clause should be shown in the standard format for amendments to the Colorado constitution. See the example in technical comment 3.
5. The proposed initiative should be revised to indicate the number of the article being added to the Colorado constitution. The constitution currently has 29 articles, so you should consider making the proposed initiative article XXX of the Colorado constitution. Alternatively, article XVI deals with mining; you could reformulate your initiative to add the four proposed new sections as sections 9 through 12 of article XVI. If you do so,

references in the proposal to "this article" would need to be changed to "sections 9 through 12 of this article."

6. If the proposed initiative is to be added to the Colorado constitution as a new article, it should include an article heading. For example, the article heading for article XXVIII of the Colorado constitution appears as follows:

**ARTICLE XXVIII**  
**Campaign and Political Finance**

7. The phrase "1500 FOOT STATEWIDE SETBACK FROM OCCUPIED STRUCTURES FOR NEW OIL AND GAS WELLS" appears to be a suggested ballot title. The title board will set the title for the proposed initiatives; therefore, this language is not a part of the proposed initiative and should be removed.
8. It is standard drafting practice to spell out numbers. The number in section 2 should be spelled out.
9. It is standard drafting practice to not small capitalize the language in a headnote and to initial cap only the first word in a headnote. Additionally, the text of the section should immediately follow the headnote. Please see the example in technical comment 9.
10. Constitutional provisions are often divided into subsections, paragraphs, subparagraphs, and sub-subparagraphs, for ease of reading. The proponents may want to consider breaking up the text of the proposed initiative into separate subsections, etc. For example, section 1 could be broken up as follows:

**Section 1. Purposes and findings.** (1) THE PEOPLE OF THE STATE OF COLORADO FIND AND DECLARE:

(a) THAT THE CONDUCT OF OIL AND GAS OPERATIONS, INCLUDING THE USE OF HYDRAULIC FRACTURING, MAY IMPACT PUBLIC HEALTH, SAFETY, WELFARE, AND THE ENVIRONMENT;

(b) THAT ANY IMPACTS ARE EXPERIENCED MOST DIRECTLY IN LOCAL COMMUNITIES;

(c) THAT SUCH IMPACTS ARE MINIMIZED AND MITIGATED BY LOCATING WELLS AWAY FROM OCCUPIED STRUCTURES; AND

(d) THAT TO PRESERVE THE PUBLIC'S HEALTH, SAFETY, WELFARE, AND THE ENVIRONMENT, THE PEOPLE DESIRE...

11. It is not necessary to state "but not limited to" after the word "including."
12. References to provisions of the Colorado constitution within the constitution should be in the following format: "sections 14 and 15 of article II of the Colorado constitution."
13. The word "shall" should be used to indicate that a person has a duty; it should not be used as a future tense verb. See section 2-4-401 (6.5) and (13.7), Colorado Revised Statutes, which define "must" and "shall." Simple present tense verbs should be used when possible. For example, in proposed section 2, write "[A]LL NEW OIL AND GAS WELLS, INCLUDING THOSE USING HYDRAULIC FRACTURING, MUST BE LOCATED...."

### **Substantive Comments and Questions**

The substance of the proposed initiatives raises the following comments and questions:

#### **Comments and Questions Common to All Four Initiatives**

##### Questions for the section entitled "Grant of Authority":

1. The constitution requires each initiative to contain only a single subject. What is the single subject of each of the four proposed initiatives?
2. Does the reconstruction of an existing oil and gas well constitute a "new" well? Would the determination depend on the reason for the reconstruction, such as federal or state compliance or damage caused by a disaster?
3. Are there structures accompanying oil and gas operations that would fall within the "occupied structure" definition? If so, you might consider expressly excluding them from the definition of "occupied structure."
4. Can a business owner, like a homeowner, waive the setback restriction with regard to the business owner's business premises?
5. If a homeowner waives the setback restriction with regard to the homeowner's home:
  - a. Would the waiver remain in effect if ownership of the home is transferred?

- b. Would a homeowner's waiver of a setback restriction become an encumbrance on the home that could negatively impact the alienability of the home?

Questions for the section entitled "Self Executing, Severability, Conflicting Provisions":

6. Because the proposed measure is a constitutional provision, it necessarily supersedes conflicting state and local laws and regulations. Therefore, you need not expressly state that it supersedes them.
7. Can the state or local governments enact more restrictive setback requirements? If so, you may consider restating the phrase "laws and regulations ... in no way shall [ ] limit or restrict the provisions of this article or the powers and rights herein granted" because it implies that the laws and regulations may not provide greater restrictions on oil and gas operations with respect to setbacks.

**Comments and Questions Common to Initiatives 85, 86, and 87**

Questions for the section entitled "Not a Taking":

8. If application of the statewide setback is not a taking under state law, what recourse, if any, would a mineral rights owner have if the statewide setback reduces the value of the mineral rights owned or renders them valueless?
9. If application of the statewide setback could still be considered a taking under application of federal law, then this section of the proposed initiative would be preempted by federal law because state laws, even constitutional provisions, cannot be less protective of private property rights than the fifth amendment of the United States constitution.