

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 5, 2014

TO: Laura Fronckiewicz, Kelly Giddens, and Suzanne Spiegel

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2013-2014 #82, concerning Local Control of Oil and Gas Development

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.

Purpose

The major purpose of the proposed amendment to the Colorado constitution appears to be to allow cities, counties, and towns to enact restrictions on the time, location, and methods used for oil and gas development.

Technical Comments

The following comments address technical issues raised by the form of the proposed initiative. These comments will be read aloud at the public meeting only if the proponents so request. You will have the opportunity to ask questions about these comments at the review and comment meeting. Please consider revising the proposed initiative as suggested below.

1. It is standard drafting practice to number, before the amending clause, each section, part, etc. that is being amended, added, or repealed with a section number (i.e., **SECTION 1.**, **SECTION 2.**). For example:

SECTION 1. In the constitution of the state of Colorado, add section 17 to article XVIII as follows:

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. Similarly, instead of indenting entire paragraphs (a) and (b) in subsection (1); (a) in subsection (2); and (a), (b), and (c) in subsection (3), the proponents should simply insert a left tab at the beginning of the first line of each paragraph. See the example in technical comment 9.
3. Refer to technical comment 1 for the correct format for an amending clause that amends the Colorado constitution.
4. Subsection numbers are not usually shown in bold-face type as in subsections (1) and (2).
5. It is standard drafting practice to place a period after the constitutional section number and at the end of each headnote. See the example in technical comment 7.
6. The phrase "oil and gas" should not be hyphenated.
7. It is standard drafting practice to capitalize the first letter in only the first word in headnotes. For example, the headnote for section 17 should read, "**Section 17. Local control of oil and gas development.**" Similarly, only the first word in the headnote for subsection (3) should be capitalized.
8. It is standard drafting practice for the first subsection to immediately follow the headnote on the same line instead of the first subsection appearing on a separate line from the headnote. Similarly, when the subsection has a headnote, followed by paragraphs, the first paragraph immediately follows the headnote

rather than appearing on a separate line. See the example in technical comment 9.

9. When adding a section to the Colorado constitution, it is standard drafting practice to use small caps to show new language rather than all caps. For example:

Section 17. Local control of oil and gas development. (1)
Purpose and findings. (a) THE COLORADO CONSTITUTION CONFERS
CERTAIN RIGHTS ON THE CITIZENS ...
(b) LOCAL GOVERNMENTS IN THE STATE OF COLORADO MAY
ENACT ...

10. It is standard drafting practice when referencing provisions in the Colorado constitution to refer to the smaller provision before the larger one, and the words "Colorado constitution" should follow the article number. In paragraph (a) of subsection (1), the reference should read, "SECTION 3 OF ARTICLE II OF THE COLORADO CONSTITUTION."
11. It is standard drafting practice to avoid using "and/or" when drafting new language. The word "or" is preferred because it can include one or more items but does not have to include all items.
12. The preferred method for separating a series in a list is to use a comma after the second to last item in the series. In paragraph (b) of subsection (1), a comma should be inserted after "ORDINANCES", and in paragraph (b) of subsection (3), a comma should be inserted after "RULES."
13. Because the phrase "local governments" in paragraph (b) of subsection (1) is plural, the pronoun at the end of that sentence should be "their" citizens.
14. In paragraph (a) of subsection (3):
 - a. The phrase "Notwithstanding" should be a single word, "Notwithstanding".
 - b. The phrase "in Colorado" is redundant because a "local government" is defined to be located in the state of Colorado.

Substantive Comments and Questions

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

1. What is the single subject of the proposed initiative?
2. Regarding paragraph (a) of subsection (1), are there other "rights [conferred] on the citizens" of Colorado and related to oil and gas development that are not enumerated in Article II, section 3 of the Colorado constitution? If so, what are those rights, and are they enumerated anywhere?
3. The heading of subsection (1) is "Purpose and findings", but paragraph (b) of subsection (1) appears to contain substantive law rather than a "purpose" or a "finding": "Local governments . . . may enact . . . regulations intended to protect the inalienable rights of its citizens."
 - a. Do the proponents intend this paragraph (b) to have substantive effect?
 - b. If so:
 - i. How is it determined whether a local charter amendment, law, ordinance, or regulation is "intended to protect the inalienable rights of its citizens"?
 - ii. How do the substantive provisions of subsection (3) relate to paragraph (b) of subsection (1)? For instance, are the restrictions authorized in paragraph (a) of subsection (3) valid only to the extent that they are "intended to protect the inalienable rights of its citizens"?
4. Under subsection (3), what does "oil and gas development" mean? Does it include oil and gas operations at every stage of the process, including exploration, production, storage, gathering, preliminary treatment, and waste disposal? Does it include so-called "downstream" activities associated with transmission and delivery pipelines, truck or rail transportation, and refining?
5. Regarding paragraph (a) of subsection (3), because each local government may place restrictions on the time, place, or method of oil and gas development:
 - a. What happens if local governments with jurisdiction over the same geographic area, e.g., a city and a county, place conflicting restrictions on the time, place, or method of oil and gas development?
 - b. What happens if one local government's restrictions on oil and gas development cause increased oil and gas development within the jurisdiction of a different local government?
 - c. If one local government's restriction negatively impacts another local government, would the impacted local government be able to litigate

whether the restriction weakens the protection of its communities and citizens?

6. Also regarding paragraph (a) of subsection (3), Colorado law currently vests local governments with land use authority over oil and gas operations, while the Colorado oil and gas conservation commission has authority to regulate oil and gas operations. The commission's authority includes both the technical aspects of operations and the protection of public health and the environment, and in promulgating its rules regarding the latter, the commission must consult with the department of public health and environment.
 - a. What role would the commission have if the proposed initiative were adopted?
 - b. Do local governments have the technical expertise to determine how best to regulate the technical and public health aspects of oil and gas operations?
 - c. How is it determined whether a restriction is "intended to protect their communities and citizens"? Who makes that determination?
 - d. Would an oil and gas operator be able to litigate whether a local government restriction is not cost-effective, not technically feasible, or not more protective of the applicable community and citizens than a corresponding requirement imposed by the commission?
 - e. By authorizing restrictions on the "method" of oil and gas development, do you intend that a local government could prohibit an oil and gas practice, such as hydraulic fracturing, that state law, including the commission's rules, allows operators to conduct? If not, you might consider using the word "manner" instead, which is often used in conjunction with time and place restrictions.
 - f. Could a local government prohibit all oil and gas operations within a designated area? If so:
 - i. Could the prohibition amount to a taking of the mineral owner's property rights, thereby creating a claim for just compensation?
 - ii. Who would be liable for paying the claim—the local government?
 - g. Could noise be a threat to an inalienable right? Are unsightly oil and gas facilities a threat to an inalienable right? Is there an inalienable right to live without risk from an environmental hazard? If so, which rights are

