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<p>SUPREME COURT, STATE OF COLORADO</p> <p>Court Address: Two East 14<sup>th</sup> Avenue Denver, Colorado 80203</p> <p>Phone Number: 303.861.1111</p>	<p>FILED IN THE SUPREME COURT AFR 27 2008 OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK</p> <p>▲ COURT USE ONLY ▲</p> <p>Case No. <b>08SA138</b></p>
<p>ORIGINAL PROCEEDING PURSUANT TO §1-40-107(2), C.R.S. 2007 Appeal from the Ballot Title Setting Board</p>	
<p>Petitioner: TERRANCE G. ROSS,</p> <p>v.</p> <p>Respondents: J. THOMAS MCKINNON AND SAMUEL P. WEAVER, and</p> <p>Title Board: WILLIAM A. HOBBS, SHARON EUBANKS, and DANIEL D. DOMENICO</p>	
<p>Attorneys for: Petitioner Name: Paul M. Seby Marian C. Larsen Moye White LLP Address: 16 Market Square, 6th Floor 1400 16th Street Denver, CO 80202-1486 Phone No.: 303 292 2900 Fax No.: 303 292 4510 E-Mail: paul.seby@moyewhite.com Atty. Reg. # Paul M. Seby (#27487) Marian C. Larsen (#36514)</p>	
<p><b>PETITION FOR REVIEW OF FINAL ACTION OF BALLOT TITLE SETTING BOARD CONCERNING PROPOSED INITIATIVE 2007-2008 #83 ("FEES ON ENERGY EMISSIONS")</b></p>	

Petitioner Terrance G. Ross (hereinafter "Petitioner"), a registered elector of the State of Colorado, through his undersigned counsel, Moye White LLP, respectfully petitions this Court

pursuant to C.R.S. § 1-40-107(2), to review the actions of the Ballot Title Setting Board (“Title Board”) with respect to the setting of the title, ballot title and submission clause for Proposed Initiative 2007-2008 #83 (“Fees on Energy Emissions”).

### **I. Actions of the Ballot Title Setting Board**

The Title Board conducted its initial public meeting and set title for Proposed Initiative 2007-2008 #83 on April 2, 2008. Petitioner timely filed a Motion for Rehearing, pursuant to C.R.S. § 1-40-107(1), on April 9, 2008. The Motion for Rehearing was heard at the next meeting of the Title Board on April 16, 2008. At the rehearing, the Title Board granted in part the Motion for Rehearing to the extent the Title Board amended the title, and denied the Motion in all other respects. Petitioner hereby seeks a review of the final action of the Title Board with regard to Proposed Initiative 2007-2008 #83.

### **II. Issues Presented**

A. Whether the Title Board incorrectly determined that Proposed Initiative #83 is limited to a single subject, as required by Article V, Section 1(5.5) of the Colorado Constitution and Colo. Rev. Stat. § 1-40-106.5, in light of the multiple objectives of this initiative to:

1. tax carbon dioxide emissions resulting from the consumption of electricity and natural gas;
2. regulate carbon dioxide as a pollutant;

3. authorize the Departments of Agriculture and Natural Resources and the Governor's Energy Office to implement a carbon sequestration program, and
4. prohibit future General Assemblies from repealing or reducing funding to programs that support job creation, economic development, energy security, energy ratepayer relief and global warming pollution reduction which are in existence as of the effective date of the Initiative.

B. Whether the Title Board incorrectly denied Petitioner's objection that the title and ballot and submission clause of Initiative 2007-2008 #83 is unfair and does not fairly express the true meaning and intent of the Initiative in light of the Title Board's:

1. failure to fully or accurately describe to voters:
  - (a) that the proposed fee is a tax, and the use of both terms in the title is inconsistent and confusing to voters. The title fails to make voters aware of the significant legal differences between a tax and a fee;
  - (b) the manner in which the Initiative proposes to make carbon dioxide a regulated pollutant and the substantial regulatory scheme that will result from the implementation of a carbon sequestration program.
2. use of biased catch-phrases that will appeal to the voters' emotions without providing any additional explanation as to the purposes or meaning of the Initiative.

### III. Supporting Documentation

Pursuant to C.R.S. § 1-40-107(2), a certified copy of Initiative 2007-2008 #83 with the corresponding title and submission clause, together with a certified copy of the Motion for Rehearing and the rulings thereon, are submitted with this Petition.

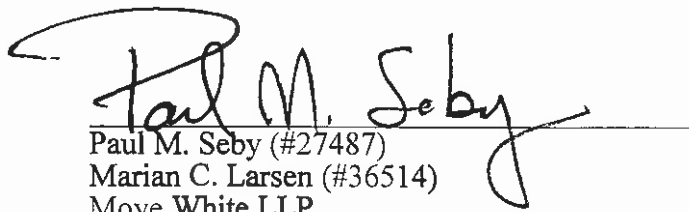
### IV. Relief Requested

Petitioner requests this Court to review the action of the Title Board, set a briefing schedule, allow oral argument, and to find that the Title Board lacked jurisdiction to set the title and submission clause because the Initiative contains multiple subjects or, in the alternative, order the Title Board to revise the titles and submission clause as specified above to reflect the true meaning and intent of Initiative #83.

DATED this 22<sup>nd</sup> day of April, 2008.

Respectfully submitted,

MOYE WHITE LLP

A handwritten signature in black ink that reads "Paul M. Seby". The signature is written in a cursive style with a large, sweeping initial "P".

Paul M. Seby (#27487)  
Marian C. Larsen (#36514)  
Moye White LLP  
16 Market Square, 6th Floor  
1400 16th Street  
Denver, CO 80202-1486

Address for Petitioner:  
10780 Heidemann Road  
Franktown, CO 80116

**CERTIFICATE OF SERVICE**

I hereby certify that on the 22<sup>nd</sup> day of April, 2008, a true and correct copy of the foregoing **PETITION FOR REVIEW OF FINAL ACTION OF BALLOT TITLE SETTING BOARD CONCERNING PROPOSED INITIATIVE 2007-2008 #83 (“FEES ON ENERGY EMISSIONS”)** was placed in the United States mail, postage prepaid, to the following:

J. Thomas McKinnon  
2218 Mapleton Ave.  
Boulder, CO 80304

Samuel P. Weaver  
2423 23<sup>rd</sup> Street  
Boulder, CO 80304

Maurice G. Knazier, Esq.  
First Assistant Attorney General  
State Services Section  
1525 Sherman Street, 6<sup>th</sup> Floor  
Denver, CO 80203



---

Ruth Rouse



**STATE OF COLORADO**

**DEPARTMENT OF  
STATE  
CERTIFICATE**

I, **MIKE COFFMAN**, Secretary of State of the State of Colorado, do hereby certify that:

the attached are true and exact copies of the text, motion for rehearing, titles, and the rulings thereon of the Title Board on Proposed Initiative "2007-2008 #83".....

..... **IN TESTIMONY WHEREOF** I have unto set my hand .....  
and affixed the Great Seal of the State of Colorado, at the  
City of Denver this 21<sup>st</sup> day of April, 2008.

A handwritten signature in black ink that reads "Mike Coffman".

SECRETARY OF STATE

RECEIVED

MAR 20 2008

ELECTIONS/LICENSING SECRETARY OF STATE

Handwritten initials/signature

Be it Enacted by the People of the State of Colorado:

SECTION 1. Article 75 of title 24, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW PART to read:

PART 13 CLEAN ENERGY PROGRESS FUND

24-75-1301. Clean energy progress fund. (1) THE PEOPLE OF THE STATE OF COLORADO RECOGNIZE THAT IT IS IN THEIR INTEREST TO CREATE THE CLEAN ENERGY PROGRESS FUND FOR THE PURPOSE OF ADVANCING THE NEW ENERGY ECONOMY. THE PEOPLE RECOGNIZE THAT EFFORTS TO ADVANCE THE NEW ENERGY ECONOMY WILL LEAD TO JOBS CREATION, ECONOMIC DEVELOPMENT, ENERGY SECURITY, ENERGY RATEPAYER RELIEF, AND THE REDUCTION OF GLOBAL WARMING POLLUTION. IN FURTHERANCE OF THESE GOALS, A FUNDING MECHANISM FOR THE GOVERNOR'S ENERGY OFFICE, OR ANY SUCCESSOR OFFICE, SHALL BE CREATED TO ADVANCE THE DEVELOPMENT OF JOBS AND ECONOMIC DEVELOPMENT IN THE AREAS OF RENEWABLE ENERGY, ENERGY EFFICIENCY, GLOBAL WARMING POLLUTION REDUCTION, AND CARBON SEQUESTRATION. THE GOVERNOR'S ENERGY OFFICE, OR ANY SUCCESSOR OFFICE, SHALL BE AUTHORIZED TO SPEND THE REVENUES ON PROGRAMS TARGETED TO REDUCE ENERGY BILLS WITHIN COLORADO AND TO REDUCE GLOBAL WARMING POLLUTION WITHIN COLORADO AS SET FORTH IN SUBSECTION (6) OF THIS SECTION. ALL PROVISIONS OF THIS SECTION ARE SEVERABLE AND SUPERSEDE CONFLICTING STATE STATUTORY, CHARTER, OR OTHER STATE OR LOCAL PROVISIONS.

(2) AS USED IN THIS SECTION:

(a) "CARBON DIOXIDE EQUIVALENT" MEANS A MEASURE TO COMPARE THE EMISSIONS FROM THE SIX GLOBAL WARMING POLLUTION GASES BASED UPON THEIR GLOBAL WARMING POTENTIAL. THE CARBON DIOXIDE EQUIVALENT OF AN EMITTED GLOBAL WARMING GAS SHALL BE ITS TOTAL MASS EMITTED INTO THE ATMOSPHERE MULTIPLIED BY THE GLOBAL WARMING POTENTIAL OF THAT GAS.

(b) "CARBON INTENSITY" MEANS THE POUNDS OF GLOBAL WARMING POLLUTION EXPRESSED IN CARBON DIOXIDE EQUIVALENT EMITTED PER UNIT OF ENLURGY USED. IN THE CASE OF ELECTRICITY, THE GLOBAL WARMING POLLUTION MEASURED FOR DETERMINING CARBON INTENSITY SHALL BE THOSE EMISSIONS INVOLVED IN GENERATING THE ELECTRICITY, DETERMINED AT THE GENERATING STATION. FOR ELECTRICITY, THE ENERGY UNIT SHALL BE KILOWATT-HOURS. IN THE CASE OF NATURAL GAS, THE GLOBAL WARMING POLLUTION EMISSIONS MEASURED ARE THOSE GENERATED WHEN THE END USER OF ENERGY BURNS THE FUEL. FOR NATURAL GAS, THE ENERGY UNIT SHALL BE THERMS.

(c) "CARBON SEQUESTRATION" MEANS THE REMOVAL OF CARBON DIOXIDE FROM THE ATMOSPHERE. THIS TERM INCLUDES, BUT IS NOT LIMITED TO, THE USE OF NATURAL CARBON SINKS, SUCH AS IN SOILS OR FORESTS, IN THE FORM OF INCREASING PLANT BIOMASS.

(d) "CLEAN ENERGY PROGRESS FUND" MEANS A FUND MANAGED BY THE GOVLRNOR'S ENERGY OFFICE, OR ANY SUCCESSOR OFFICE. FOR THE PURPOSE OF MAXIMIZING THE REDUCTION OF GLOBAL WARMING POLLUTION.

1  
2 (e) "END USER OF ENERGY" MEANS ANY PERSON WHO OR ENTITY THAT OBTAINS  
3 ELECTRICITY OR NATURAL GAS AND DOES NOT INTEND TO SELL IT OR GIVE IT AWAY.

4  
5 (f) "ENERGY EFFICIENCY" MEANS PRODUCTS OR SYSTEMS DESIGNED TO USE LESS  
6 ENERGY FOR THE SAME OR HIGHER PERFORMANCE THAN CURRENTLY OR COMMONLY USED  
7 PRODUCTS OR SYSTEMS.

8  
9 (g) "GEOLOGIC SEQUESTRATION OF CARBON" MEANS CARBON STORAGE FOR A  
10 PERIOD OF AT LEAST ONE THOUSAND YEARS AT A DEPTH OF AT LEAST ONE THOUSAND FEET  
11 BELOW THE SURFACE OF THE EARTH.

12  
13 (h) "GLOBAL WARMING POLLUTION" MEANS THE EMISSION OF THE SIX HEAT-  
14 TRAPPING GASES: CARBON DIOXIDE, METHANE, NITROUS OXIDE, HYDROFLUOROCARBONS,  
15 PERFLUOROCARBONS, AND SULFUR HEXAFLUORIDE.

16  
17 (i) "GLOBAL WARMING POTENTIAL" MEANS HOW MUCH A GIVEN GLOBAL WARMING  
18 GAS, ON A MASS BASIS, CONTRIBUTES TO GLOBAL WARMING. THE GLOBAL WARMING  
19 POTENTIALS OF THE SIX GLOBAL WARMING GASES SHALL BE THOSE DEFINED IN THE FOURTH  
20 ASSESSMENT REPORT ISSUED BY THE UNITED NATIONS INTERGOVERNMENTAL PANEL ON  
21 CLIMATE CHANGE.

22  
23 (j) "LOW INCOME" MEANS ANY HOUSEHOLD WHOSE INCOME DOES NOT EXCEED  
24 EIGHTY PERCENT OF THE COLORADO MEDIAN INCOME.

25  
26 (k) "NEW ENERGY ECONOMY" MEANS CREATING AN ENERGY POLICY TO CREATE  
27 JOBS, REVITALIZE THE ECONOMY, PROTECT THE ENVIRONMENT, AND HELP SECURE OUR  
28 NATION'S ENERGY FUTURE.

29  
30 (l) "RENEWABLE ENERGY" MEANS ENERGY OBTAINED FROM SOURCES THAT ARE  
31 ESSENTIALLY INEXHAUSTIBLE. THESE SOURCES INCLUDE, BUT ARE NOT RESTRICTED TO,  
32 WIND, SOLAR, BIOMASS, GEOTHERMAL ENERGY, AND HYDROELECTRICITY WITH A  
33 NAMEPLATE RATING OF TEN MEGAWATTS OR LESS. THIS TERM SHALL EXCLUDE NUCLEAR  
34 ENERGY.

35  
36 (m) "THERM" MEANS A UNIT OF ENERGY DEFINED AS ONE HUNDRED THOUSAND  
37 BRITISH THERMAL UNITS.

38  
39 (3)(a) A CLEAN ENERGY PROGRESS FEE SHALL BE IMPOSED ON THE PRODUCTION OF  
40 GLOBAL WARMING POLLUTION FROM NATURAL GAS CONSUMPTION AND ELECTRICITY  
41 PRODUCTION. WHEN NATURAL GAS COMBUSTION IS USED TO GENERATE ELECTRICITY, THE  
42 FEE SHALL BE IMPOSED ON THE ELECTRICITY GENERATED AND NOT THE NATURAL GAS  
43 CONSUMPTION.

44  
45 (b) THE FEE SHALL BE COMPUTED AT A RATE OF THREE DOLLARS PER METRIC TON OF  
46 CARBON DIOXIDE EQUIVALENT EMITTED TO THE ATMOSPHERE FROM ELECTRICITY  
47 GENERATION AND NATURAL GAS COMBUSTION.  
48



1 (c) THE ENTITY PROVIDING THE ENERGY TO THE END USER OF ENERGY SHALL BE  
2 RESPONSIBLE FOR COLLECTING THE REVENUES FROM THE END USER OF ENERGY AND  
3 REMITTING THEM QUARTERLY TO THE PUBLIC UTILITIES COMMISSION, OR ANY SUCCESSOR  
4 COMMISSION. THE PUBLIC UTILITIES COMMISSION SHALL REMIT THE REVENUES QUARTERLY  
5 TO THE STATE TREASURER. THE STATE TREASURER SHALL CREDIT THE REVENUES IN THE  
6 CLEAN ENERGY PROGRESS FUND, WHICH IS HEREBY CREATED IN THE STATE TREASURY.  
7

8 (d) THE CARBON INTENSITY FOR ELECTRICITY SHALL BE COMPUTED BY EACH  
9 ELECTRICITY-SUPPLYING ENTITY IN THE STATE ON AN ANNUAL BASIS FROM JANUARY 1 TO  
10 DECEMBER 31. THE CARBON INTENSITY SHALL BE REPORTED TO THE GOVERNOR'S ENERGY  
11 OFFICE, OR ANY SUCCESSOR OFFICE, ON MAY 1 AND SHALL BE APPLIED TO CALCULATING THE  
12 FEE EFFECTIVE JULY 1 OF THE SAME YEAR. THE CARBON INTENSITY SHALL REPRESENT THE  
13 TOTAL ANNUAL EMISSIONS OF CARBON DIOXIDE EQUIVALENT OF GLOBAL WARMING  
14 POLLUTION CREATED IN ORDER TO SUPPLY THE END USERS OF ENERGY IN COLORADO,  
15 DIVIDED BY THE ANNUAL DELIVERY OF ENERGY TO THE END USERS OF ENERGY IN  
16 COLORADO. THE CARBON DIOXIDE EQUIVALENT SHALL BE MEASURED AT THE GENERATING  
17 STATION AND SHALL ACCOUNT FOR ALL ENERGY LOSSES DUE TO TRANSMISSION AND  
18 DISTRIBUTION OF THE ELECTRICITY.  
19

20 (e) THE CARBON INTENSITY FOR NATURAL GAS SHALL BE SET AT TWELVE AND EIGHT-  
21 TENTHS POUNDS OF CARBON DIOXIDE PER THERM.  
22

23 (f) THE CARBON INTENSITY REPORTED BY THE ENERGY-SUPPLYING ENTITIES SHALL  
24 BE SUBJECT TO AUDIT BY THE GOVERNOR'S ENERGY OFFICE, OR ANY SUCCESSOR OFFICE.  
25

26 (4) THE FEES IMPOSED BY THIS SECTION SHALL BE IN ADDITION TO ANY OTHER  
27 PROGRAMS TO SUPPORT JOBS CREATION, ECONOMIC DEVELOPMENT, ENERGY SECURITY,  
28 ENERGY RATEPAYER RELIEF, AND GLOBAL WARMING POLLUTION REDUCTION EXISTING AS OF  
29 THE EFFECTIVE DATE OF THIS SECTION. SUCH EXISTING PROGRAMS SHALL NOT BE REPEALED  
30 OR REDUCED BY THE GENERAL ASSEMBLY IN CONSIDERATION OF THIS SECTION.  
31

32 (5) ALL REVENUES RECEIVED BY OPERATION OF SUBSECTION (3) OF THIS SECTION  
33 SHALL BE EXCLUDED FROM FISCAL YEAR SPENDING, AS THAT TERM IS DEFINED IN SECTION 20  
34 OF ARTICLE X OF THE STATE CONSTITUTION, AND SHALL BE EXCLUDED FROM THE  
35 CORRESPONDING SPENDING LIMITS UPON STATE GOVERNMENT AND ALL LOCAL  
36 GOVERNMENTS RECEIVING SUCH REVENUES.  
37

38 (6) THE REVENUES GENERATED BY THE OPERATION OF SUBSECTION (3) OF THIS  
39 SECTION SHALL BE APPROPRIATED ANNUALLY BY THE GENERAL ASSEMBLY AND SHALL BE  
40 ADMINISTERED BY THE GOVERNOR'S ENERGY OFFICE, OR ANY SUCCESSOR OFFICE. THE  
41 GOVERNOR'S ENERGY OFFICE, OR ANY SUCCESSOR OFFICE, SHALL ADMINISTER THE CLEAN  
42 ENERGY PROGRESS FUND TO MAXIMIZE THE REDUCTION OF GLOBAL WARMING POLLUTION IN  
43 COLORADO SUBJECT TO THE FOLLOWING RESTRICTIONS:  
44

45 (a) A MINIMUM OF TWENTY PERCENT OF THE REVENUES SHALL BE USED ANNUALLY  
46 FOR THE PURPOSES OF DELIVERING ENERGY EFFICIENCY PROGRAMS TO COLORADO  
47 RESIDENCES AND BUSINESSES, INCLUDING ENERGY AUDITS AND INSTALLATION OF ENERGY  
48 EFFICIENCY MEASURES. THESE FUNDS MAY NOT BE USED FOR RESEARCH AND DEVELOPMENT.

1 A MINIMUM OF TWENTY-FIVE PERCENT OF THE AMOUNT ALLOCATED IN THIS CATEGORY  
2 SHALL BE USED ANNUALLY FOR LOW-INCOME RESIDENTIAL ENERGY-EFFICIENCY PROJECTS IN  
3 COLORADO.

4  
5 (b) A MINIMUM OF FIFTEEN PERCENT OF THE REVENUES SHALL BE USED ANNUALLY  
6 TO IMPLEMENT RENEWABLE ENERGY IN COLORADO.

7  
8 (c) A MINIMUM OF FIVE PERCENT OF THE REVENUES SHALL BE USED ANNUALLY TO  
9 IMPLEMENT CARBON SEQUESTRATION IN COLORADO. NO MORE THAN TWO PERCENT OF THE  
10 REVENUES SHALL BE USED FOR GEOLOGIC SEQUESTRATION OF CARBON. THIS PARAGRAPH (c)  
11 SHALL BE ADMINISTERED AFTER CONSULTATION WITH THE COLORADO DEPARTMENT OF  
12 AGRICULTURE AND THE COLORADO DEPARTMENT OF NATURAL RESOURCES.

13  
14 (d) A MINIMUM OF FIVE PERCENT OF THE REVENUES SHALL BE USED ANNUALLY FOR  
15 PROGRAMS TO REDUCE THE TOTAL EMISSIONS OF GLOBAL WARMING POLLUTION FROM THE  
16 TRANSPORTATION SECTOR IN COLORADO. THIS PARAGRAPH (d) SHALL BE ADMINISTERED  
17 AFTER CONSULTATION WITH THE COLORADO DEPARTMENT OF TRANSPORTATION.

18  
19 (e) A MINIMUM OF FIVE PERCENT OF THE REVENUES SHALL BE USED ANNUALLY FOR  
20 WORKFORCE TRAINING AND DEVELOPMENT PROGRAMS AT COLORADO HIGHER EDUCATION  
21 AND VOCATIONAL EDUCATION INSTITUTIONS FOR THE PURPOSE OF CREATING AND FILLING  
22 JOBS IN THE RENEWABLE ENERGY AND ENERGY EFFICIENCY INDUSTRIES. THIS PARAGRAPH  
23 (e) SHALL BE ADMINISTERED AFTER CONSULTATION WITH THE COLORADO DEPARTMENT OF  
24 LABOR AND EMPLOYMENT.

25  
26 (f) A MINIMUM OF FIVE PERCENT OF THE REVENUES SHALL BE USED ANNUALLY TO  
27 SUPPORT EFFORTS TO ACCELERATE THE COMMERCIALIZATION OF CLEAN ENERGY  
28 TECHNOLOGY. THIS PARAGRAPH (f) SHALL BE ADMINISTERED AFTER CONSULTATION WITH  
29 THE COLORADO OFFICE OF ECONOMIC DEVELOPMENT.

30  
31 (g) A MINIMUM OF FIVE PERCENT OF THE REVENUES SHALL BE USED ANNUALLY FOR  
32 COMMUNICATIONS, OUTREACH, AND EDUCATION OF COLORADO CITIZENS ON METHODS OF  
33 REDUCING GLOBAL WARMING POLLUTION.

34  
35 (h) FIVE PERCENT OF THE REVENUES SHALL BE USED ANNUALLY TO HIRE NEW OR  
36 SUPPORT EXISTING FACULTY TO DEVELOP PROGRAMS AND CURRICULA IN CLIMATE CHANGE  
37 AND SUSTAINABLE ENERGY AT THE UNIVERSITY OF COLORADO, COLORADO STATE  
38 UNIVERSITY, AND THE COLORADO SCHOOL OF MINES. THE UNIVERSITY OF COLORADO SHALL  
39 RECEIVE FORTY PERCENT OF THE MONEYS, COLORADO STATE UNIVERSITY SHALL RECEIVE  
40 FORTY PERCENT OF THE MONEYS, AND THE COLORADO SCHOOL OF MINES SHALL RECEIVE  
41 TWENTY PERCENT OF THE MONEYS. THIS PARAGRAPH (h) SHALL BE ADMINISTERED AFTER  
42 CONSULTATION WITH THE COLORADO COMMISSION ON HIGHER EDUCATION.

43  
44 (i) TWO HUNDRED THOUSAND DOLLARS SHALL BE USED ANNUALLY FOR THE  
45 ESTABLISHMENT AND OPERATION OF A CLEAN ENERGY PROGRESS TASK FORCE COMPRISED OF  
46 A BALANCED ASSEMBLY OF REPRESENTATIVES FROM THE STATE'S COAL INDUSTRY,  
47 RENEWABLE ENERGY INDUSTRY, THE ENERGY EFFICIENCY INDUSTRY, OIL AND GAS  
48 INDUSTRY, PROPANE INDUSTRY, BIOFUELS INDUSTRY, AND UTILITY COMPANIES TO DEVELOP

1 STRATEGIES FOR A CLEAN ENERGY PORTFOLIO FOR COLORADO. THE CLEAN ENERGY  
2 PROGRESS TASK FORCE SHALL MEET AT LEAST ANNUALLY AND SHALL PRODUCE WRITTEN  
3 RECOMMENDATIONS TO ADVISE THE DIRECTOR OF THE GOVERNOR'S ENERGY OFFICE, OR ANY  
4 SUCCESSOR OFFICE. THE MEMBERS OF THE TASK FORCE SHALL BE BALANCED IN  
5 REPRESENTING THE ABOVE-NAMED INTEREST GROUPS, WITH NO MORE THAN TWO-THIRDS OF  
6 THE MEMBERS FROM ONE POLITICAL PARTY. THE MEMBERS SHALL BE NOMINATED BY THE  
7 DIRECTOR OF THE GOVERNOR'S ENERGY OFFICE, OR ANY SUCCESSOR OFFICE, AND CONFIRMED  
8 BY THE COLORADO SENATE.

9  
10 (j) TWO HUNDRED FIFTY THOUSAND DOLLARS SHALL BE USED ANNUALLY TO FUND  
11 THE PERMANENT STAFF POSITION OF THE GOVERNOR'S SENIOR ADVISOR ON CLIMATE CHANGE  
12 AND TO SUPPORT THE ACTIVITIES OF THAT POSITION.

13  
14 (7) END USERS OF ENERGY WHO ENTER INTO VOLUNTARY CONTRACTS TO PURCHASE  
15 SOME PORTION OF THEIR ENERGY FROM SOURCES THAT DO NOT CREATE GLOBAL WARMING  
16 POLLUTION, SUCH AS WIND POWER, SHALL BE EXEMPTED FROM PAYING THE CLEAN ENERGY  
17 PROGRESS FEE ON THAT PORTION OF THEIR ENERGY CONSUMPTION.

18  
19 (8) INTEREST AND INCOME EARNED ON THE DEPOSIT AND INVESTMENT OF MONEYS IN  
20 THE CLEAN ENERGY PROGRESS FUND SHALL BE CREDITED TO THE FUND. MONEYS IN THE  
21 FUND AT THE END OF ANY STATE FISCAL YEAR SHALL REMAIN IN THE FUND AND SHALL NOT  
22 BE CREDITED TO THE STATE GENERAL FUND OR ANY OTHER FUND.

23  
24 (9) THE DIRECTOR OF THE GOVERNOR'S ENERGY OFFICE, OR ANY SUCCESSOR OFFICE,  
25 SHALL DELIVER AN ANNUAL REPORT ON THE CLEAN ENERGY PROGRESS FUND, IN PERSON AND  
26 ACCOMPANIED BY A WRITTEN REPORT, TO A JOINT MEETING OF THE HOUSE TRANSPORTATION  
27 AND ENERGY COMMITTEE AND THE SENATE AGRICULTURE, NATURAL RESOURCES, AND  
28 ENERGY COMMITTEE, OR ANY SUCCESSOR COMMITTEES, OF THE COLORADO GENERAL  
29 ASSEMBLY. THE REPORT SHALL INDICATE THE TOTAL REVENUES COLLECTED AND HOW THE  
30 REVENUES WERE USED. THE REPORT SHALL ALSO QUANTIFY THE AMOUNT OF GLOBAL  
31 WARMING POLLUTION THAT WAS AVOIDED. THE REPORT SHALL BE DELIVERED EVERY YEAR  
32 NOTWITHSTANDING PROVISIONS OF THE "INFORMATION COORDINATION ACT", SECTION 24-  
33 1-136 (11) (a) (I).

34  
35 (10) COLLECTION OF FEES SHALL BEGIN ON JULY 1, 2009.

36  
37 Proponents:

38 J. Thomas McKinnon  
39 2218 Mapleton Ave.  
40 Boulder, CO 80304  
41 (303) 638-2533

42 [jmckinno@resgroupinc.com](mailto:jmckinno@resgroupinc.com)

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**J. Thomas McKinnon**

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March 18, 2008

Mike Coffman  
Secretary of State  
1700 Broadway, Suite 270  
Denver, CO 80290

**RECEIVED**

MAR 18 2008

ELECTIONS/LICENSING  
SECRETARY OF STATE

Re: Title setting request


Dear Mr. Coffman,

Please find enclosed the following documents which constitute our request for title setting for the Clean Energy Progress Fund statute:

1. The statute version submitted to Legislative Council on February 26, 2008.
2. The memorandum from Legislative Council commenting on our March 26 submission.
3. A marked-up version of the statute reflecting how we addressed the comments from Legislative Council.
4. A memo we submitted to Legislative Council on March 12, 2008 with a narrative responding to their questions.
5. The revised version of the statute that we submitted to Legislative Council on March 13, 2008.

We are also submitting all of these documents electronically to your office today. We look forward to working with the Title Setting Board.

Sincerely,



J. Thomas McKinnon

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APR 09 2008  
ELECTORAL DIVISION  
SECRETARY OF STATE  
DJB

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IN THE MATTER OF THE TITLE AND BALLOT AND TITLE SUBMISSION CLAUSE  
FOR INITIATIVE 2007-2008 #83

---

**MOTION FOR REHEARING**

---

On behalf of Terrance G. Ross, a registered elector of the State of Colorado, the undersigned hereby files this Motion for Rehearing in connection with the Proposed Initiative 2007-2008 #83 ("Fees on Energy Emissions", hereinafter described as the "Initiative") which the Title Board (the "Board") heard on April 2, 2008 (the "Hearing").

1. **INTRODUCTION**

At the Hearing, the Initiative was the subject of a more than two-hour discussion by the Board regarding whether the Initiative proposes more than one subject, and whether the complex proposals contained within the Initiative can be accurately reflected in the title. Much effort was spent by Proponents and the Board to redraft the title to avoid and minimize the concerns expressed by the Board regarding the intent of the Initiative and whether more than one subject is expressed. Despite the considerable discussion and consideration of the concerns raised regarding the Initiative's proposals, the Board failed to conclude that the Initiative contains more than one subject. Further, the title as adopted by the Board, and only released to the public on April 7<sup>th</sup>, fails to accurately reflect the intent of the Initiative.

**2. THE BOARD LACKS JURISDICTION TO SET A TITLE FOR THIS INITIATIVE AS IT CONTAINS MULTIPLE, UNRELATED SUBJECTS IN VIOLATION OF COLO. CONST. ART. V, § 1(5.5) AND COLO. REV. STAT. § 1-40-106.5.**

Initiatives that have more than one subject and contain more than one separate and individually distinct subject that are not necessarily related to or dependent upon each other, violate the single subject requirement. *In re Proposed Ballot Initiative on Parental Rights*, 913 P.2d 1127, 1130 (Colo. 1996). While on its face an initiative may appear to meet the single subject requirement, “an initiative with multiple subjects may be improperly offered as a single subject by stating the subject in broad terms.” *In the Matter of the Title, Ballot Title and Submission Clause, for 2007-2008 #17*, 172 P.3d 871, 873-874 (Colo. 2007) (citing *In re Title, Ballot Title & Submission Clause, & Summary 2005-2006 #55*, 138 P.3d 273, 274 (Colo. 2006)).

Under the broad and ubiquitous banner of “global warming”, the Initiative joins multiple subjects that contain more than one distinct and separate purpose, which are otherwise not dependant upon or connected to the other. “The People recognize that efforts to advance the new energy economy will lead to...the reduction of global warming pollution.” *See Section 1 of the Initiative*. The fee that the Initiative will impose is to be assessed on the “production of global warming pollution from natural gas consumption and electricity production.” *See Section 3(a) of the Initiative*. It is clear that the Initiative is proposing to use the fee as a means to reduce global warming pollution through the implementation of separate and distinct programs. This concept was confirmed by Board member Mr. Hobbs’ statement at the Hearing that the Initiative is about global warming. “Grouping the provisions of a proposed initiative under a broad concept that potentially misleads voters will not satisfy the single subject requirement.” *In re Proposed Initiative, 1996-4*, 916 P.2d 528, 532 (Colo.1996) (citing *In re Title, Ballot Title and Submission*

*Clause, and Summary with Regard to a Proposed Petition for an Amendment to the Constitution to the State of Colorado Adding Subsection (10) to Section 20 of Article X (Amend Tabor 25), 900 P.2d 121, 125 (Colo. 1995)).* While the Initiative proposes to impose a carbon tax on consumers, the revenues from which would be used to purportedly advance the “new energy economy”, it also proposes to regulate carbon dioxide (“CO2”), implement carbon sequestration and with it a new regulatory scheme, and repeal the established doctrine that legislatures may not be prohibited from acting in subsequent legislative sessions. *See Sections 1, 4 and 6(c) of the Initiative.*

By its very nature, the topic of global warming entails the intersection of economic, environmental, health, scientific, social and legal issues across borders and continents. It is unlike virtually any other public policy issue of the day. “The global nature of the problem...implies that the full breadth of human social structures is encompassed.” Intergovernmental Panel on Climate Change, *Climate Change 2001: Mitigation (“IPCC 2001”)*, at 607, *available at* <http://www.ipcc.ch/>. The Initiative reflects the wide breadth of the issues and subjects that global warming entails as it attempts to include several subjects, each of which is distinct and separate from the other, under what is claimed to be the single subject of global warming.

**A. THE INITIATIVE CREATES A NEW REGULATORY SCHEME THROUGH ITS IMPOSITION OF A CARBON SEQUESTRATION PROGRAM IN THE STATE.**

The Initiative mandates that a minimum of five percent of the revenues collected from the tax imposed on carbon emissions “shall be used annually to implement carbon sequestration in Colorado.” *See Section 6(c) of the Initiative.* Of this five percent, “[n]o more than two percent of the revenues shall be used for **geologic sequestration** of carbon.” (emphasis added.) *See*

*Section 6(c) of the Initiative.* “Geologic sequestration” is defined in the Initiative as the storage of CO<sub>2</sub> “for at least one thousand years at a depth of at least one thousand feet below the surface of the earth.” *See Section 2(g) of the Initiative.* The Initiative defines carbon sequestration to include “but is not limited to, the use of natural carbon sinks, such as in soils or forests.” *See Section 2(c) of the Initiative.* Despite statements made by proponents of the Initiative at the Hearing that they do not intend for the Initiative to include geologic sequestration, their statement of intent does not negate the Initiative’s plain language. Nowhere in the Initiative is the carbon sequestration program restricted to just terrestrial sequestration.

Terrestrial sequestration involves the removal of CO<sub>2</sub> from the atmosphere through plants and microorganisms in the soil. *See National Energy Technology Laboratory, [http://www.netl.doe.gov/technologies/carbon\\_seq/FAQs/carbon-seq.html](http://www.netl.doe.gov/technologies/carbon_seq/FAQs/carbon-seq.html).*

Geologic sequestration is accomplished through first capturing the CO<sub>2</sub> and then injecting it into underground reservoirs where it is stored. *Id.* It is important to note that the challenging elector supports sequestration programs, and desires that they be implemented correctly with the full and active participation of the proper regulatory authorities, scientific community and industry. However, carbon sequestration is a separate subject from whether or not consumers should be taxed on their electricity and natural gas usage that result in CO<sub>2</sub> emissions.

As discussed in more detail below, geologic sequestration programs typically will apply to sources that are regulated under federal environmental law. Geologic sequestration will require these regulated sources to equip their facilities with technologies to capture the CO<sub>2</sub>, and to construct pipelines to transport the CO<sub>2</sub> to its ultimate geologic storage site. Before CO<sub>2</sub> can be sequestered, it must be captured and transported to its sequestration destination. *See National Energy Technology Laboratory,*



[http://www.netl.doe.gov/technologies/carbon\\_seq/FAQs/carbon-seq.html](http://www.netl.doe.gov/technologies/carbon_seq/FAQs/carbon-seq.html).

Beyond the financial costs that will be incurred under a geologic sequestration program, designing and implementing such a program will require substantial consideration of legal and policy issues. Issues of liability; conformance with existing state and federal emission control programs; and the impact that such a program may have under federal environmental laws are but a few of the legal and policy issues that must be and will be considered when implementing the Initiative's carbon sequestration program.

#### **B. THE INITIATIVE WILL AUTHORIZE THE REGULATION OF CO<sub>2</sub>**

CO<sub>2</sub> is a clear, odorless gas that appears naturally in the earth's atmosphere and is a fundamental component of life on earth. All animals (including human beings) inhale oxygen and exhale CO<sub>2</sub>, and plants take in CO<sub>2</sub> from the atmosphere as a part of photosynthesis and return oxygen to the atmosphere as a byproduct of the same process. CO<sub>2</sub> is also a naturally occurring "greenhouse gas." The earth has a natural "greenhouse effect" in which heat from the sun is trapped below the earth's atmosphere and is partially prevented from re-radiating back into space. The greenhouse gases that cause this effect appear in trace amounts in the atmosphere and include water vapor (by far the most significant greenhouse gas), CO<sub>2</sub> methane, nitrous oxides and stratospheric ozone. Without the naturally occurring greenhouse effect, the earth's climate would be far too cold to sustain life as we know it.

CO<sub>2</sub> is not a regulated "pollutant" under federal or Colorado law. In light of the 2007 decision by the Supreme Court of the United States in *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), EPA is now considering the complexities and ramifications of regulating greenhouse gas emissions (GHG) - including CO<sub>2</sub>. In *Massachusetts v. EPA*, the Court found that GHG emissions are "pollutants under the Clean Air Act;" but that EPA must first determine whether

GHGs emitted from new motor vehicles do or do not endanger public health or welfare, or supply a reason for not making this determination; and that, if EPA makes an “endangerment finding”, it must issue regulations. Although the Court decision is technically limited to new motor vehicles, the precedent extends throughout the Clean Air Act. “[A]ny regulation of greenhouse gases – even from mobile sources – could automatically result in other regulations applying to stationary sources and extend to small sources including many not previously regulated under the Clean Air Act.” “If greenhouse gases were to become regulated...the number of Clean Air Act permits could increase significantly and the nature of the sources requiring permits could expand to include many smaller sources not previously regulated under the Clean Air Act.” *See March 27, 2008 Letter of EPA Administrator Johnson attached hereto as Exhibit A.* Clearly any regulation of a greenhouse gas, whether at the state or federal level will have far reaching legal, social, economic and policy consequences.

Through the Initiative’s proposal to implement a carbon sequestration program, the voters of Colorado are being asked (but not being clearly told) whether or not carbon should be a regulated pollutant. Further, to implement a carbon sequestration program requires the regulation of carbon. A sequestration program which allows for geologic sequestration cannot exist unless there are regulations which set the amounts of carbon that may be emitted and what amounts must be sequestered. In so doing, carbon will become a regulated pollutant under Colorado law. The question of whether carbon should be a regulated pollutant in Colorado is a subject completely separate from whether or not a consumption fee should be assessed on carbon emissions.

**C. THE INITIATIVE WILL REPEAL THE COLORADO DEPARTMENT OF HEALTH AND ENVIRONMENT'S AUTHORITY TO PROMULGATE EMISSION CONTROL REGULATIONS CONSISTENT WITH THE CLEAN AIR ACT (42 U.S.C. 7401).**

Under its mandate to implement a carbon sequestration program, the Initiative reassigns authority granted to the Commission to promulgate certain emission control regulations in compliance with the federal Clean Air Act. *See CRS §25-7-105(12) and (15) and §25-7-103(11).*

The Commission does not have the authority to adopt regulations or standards covering regulated sources that are contrary to or “otherwise more stringent than” the requirements of Part C, Part D or Title V of the Clean Air Act. *See CRS §25-7-105.1.* A regulated source under the Clean Air Act is one that emits or has the potential to emit regulated air pollutants, which include hazardous air pollutants. Under the Clean Air Act, regulated sources must obtain permits which among other things, place restrictions on what air emission limits must be met. Under Parts C and D and Title V of the Clean Air Act, states and the federal government shall implement regulations that are designed to reduce or prevent the emissions of regulated air pollutants by regulated sources.

Regulated air pollutants are established under the Clean Air Act and through regulations adopted by the EPA. Under the authority granted to the Commission by the General Assembly, the Commission may adopt and enforce emission control regulations that cover regulated sources. These emission control regulations must be consistent with emission standards promulgated under section 112 of the Clean Air Act. *See CRS §25-7-103(11) and CRS §25-7-109.3.* Section 112 of the Clean Air Act lists all regulated pollutants that have been determined to be hazardous air pollutants. CO<sub>2</sub> is not included in section 112, nor has it been included in subsequent lists of regulated air pollutants promulgated by the EPA. Through the proposed

carbon sequestration program, the Initiative will mandate an emission control standard that will apply to regulated sources under the Clean Air Act. As currently provided under CRS §25-7-105.1 the Commission could not implement such a program since it would “otherwise be more stringent” than the requirements of the Clean Air Act.

However, to avoid this intersection of state and federal law, the Initiative stealthily delegates to the Colorado Departments of Agriculture and Natural Resources and the Governor’s Office of Energy the authority to implement a carbon sequestration program, and consequently the authority to promulgate emission control standards concerning CO2 emissions. *See Section 6(c) of the Initiative.* When considered in the context of the central theme of the Initiative, it is unclear as to how delegating a portion of the Commission’s authority to the Departments of Agriculture and Natural Resources and the Governor’s Office of Energy is directly tied to the imposition of a consumer tax on CO2. When one considers that the Commission would be prohibited from promulgating regulations that regulate CO2 it becomes clear that the purpose behind reassigning authority from the Commission to the Departments of Agriculture and Natural Resources and the Governor’s Office of Energy is to hide this fact from the voters.

The Initiative is seeking to hide significant policy changes under the broad banner of global warming. Nowhere in the Initiative does it allude to the fact that the Commission would be prohibited from otherwise implementing a carbon sequestration program because CO2 is not a regulated pollutant under section 112 of the Clean Air Act, or that CO2 is currently not a regulated pollutant in Colorado. Instead, the Initiative seeks to avoid informing voters of these material facts. While the proponents made statements at the Hearing that confirmed the understanding of the Board that the carbon sequestration program would only involve the “planting of a few trees”, clearly the plain meaning of the Initiative demonstrates otherwise.

While undoubtedly a complex issue of federal and state law, the Initiative hides from voters the true and complete ramifications of Section 6(c).

**D. THE INITIATIVE SEEKS TO REPEAL THE ESTABLISHED DOCTRINE THAT FUTURE LEGISLATURES MAY NOT BE PROHIBITED FROM ACTING TO AMEND OR REPEAL LEGISLATION.**

It is expressly recognized that “[t]he general rule is that one legislature cannot bind the hands of its successors.” *Hessick, et al. v. Moynihan, et al.* 262 P. 907, 915 (1927); *See also People v. Hull*, 8 Colo. 485, 496 (Colo. 1885). The Initiative seeks to preempt this doctrine and forbid future legislatures from acting to repeal or reduce spending on “any other programs to support jobs creation, economic development, energy security, energy ratepayer relief, and global warming pollution reduction.” *See Section (4) of the Initiative*. The Initiative does not specify that the General Assembly shall be restricted from reducing spending for a certain period of time on the above programs, but instead clearly prohibits the General Assembly from ever reducing or repealing spending on these programs. “Such existing programs **shall not be** repealed or reduced by the General Assembly in consideration of this section.” (emphasis added.) *See Section (4) of the Initiative*. The plain meaning of Section 4 of the Initiative is to prohibit the General Assembly from taking any action to reduce or repeal funding to programs that support job creation, economic development, energy security, energy ratepayer relief, or global warming pollution reduction. Despite statements made by proponents at the Hearing that it is not their intent to restrict the legislature, the Initiative clearly does just that.

Further, it is not clear how a prohibition on repealing or reducing spending on all programs that support job creation or economic development can be tied to the Initiative’s central focus of implementing a CO2 tax on consumers that will advance a new energy economy. There are multiple programs across various departments and agencies of State government that

promote job creation and economic development across all sectors of the economy, not just in what could be considered the “new energy economy”. To purportedly tie the hands of future General Assemblies by prohibiting them from reducing funding for or eliminating certain job creation or economic development programs in areas well outside the theme of the Initiative, is a separate and distinct subject that will considerably alter the longstanding doctrine that future legislatures cannot be bound by the hands of its predecessors.

The Initiative is proposing four subjects, each of which are distinct and separate from each other. First, should consumers be taxed on CO2 emissions which result from their consumption of electricity and natural gas? Second, should CO2 be a regulated pollutant? Third, if CO2 is to be a regulated pollutant, shall the Departments of Agriculture and Natural Resources and the Governor’s Energy Office, but not the Commission, implement a carbon sequestration plan that includes geologic sequestration? Fourth, should future General Assemblies be prohibited from repealing or reducing funding to certain programs? “The prohibition against multiple subjects serves to defeat voter surprise by prohibiting proponents from hiding effects in the body of an initiative.” *In the Matter of the Title and Ballot Title and Submission Clause fir 2005-2006 #55*, 138 P.3d 273, 282 (Colo.2006). “An initiative that joins multiple subjects poses the danger of voter surprise and fraud occasioned by the inadvertent passage of a surreptitious provision coiled up in the folds of a complex initiative.” *In re Title, Ballot Title and Submission Clause 2007-2008, #17*, 172 P.3d 875. The Initiative fails to meet one of the basic requirements under the single subject requirement which is to “apprise voters of the subject of each measure”. *Id.* Clearly, voters would be surprised to learn that by voting “yes” or “no” to the Initiative will result in all four of these subjects being passed or rejected.

### **3. THE BALLOT TITLE AND SUBMISSION CLAUSE IS CONFUSING AND MISLEADING.**

The Board must set forth titles that are “sufficiently clear and brief for the voters to understand the principal features of what is being proposed; a material omission can create misleading titles.” *In re Ballot Title 1999-2000 #258(A)*, 4 P.3d 1094, 1098 (Colo. 2000). It is the duty of the Board to set a title that enables voter choice. *In re Ballot Title 1999-2000 #258(A)*, 4 P.3d 1098. When setting title, the Board “shall consider public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general understanding of the effect of a “yes” or “no” vote will be unclear.” *CRS § 1-40-106(3)(b)*. Further, to eliminate a key feature of the initiative from the title will be considered a fatal defect if it results in voter confusion as to what the initiative actually proposes. *In the Matter of the Title, Ballot Title and Submission Clause for Proposed Initiative 2001-02 #43*, 46 P.3d 438, 442 (Colo. 2002). The Initiative’s ballot title and submission clause fail to meet this standard.

#### **A. THE TITLE FAILS TO INFORM VOTERS SUFFICIENTLY OF WHO THE CONSUMER IS AND WHAT ACTIVITY WILL RESULT IN THE ASSESSMENT OF THE FEE.**

The first portion of the title and submission clause state that the Initiative will impose a fee “on the consumption of electricity or natural gas based on carbon dioxide emissions.” Further within the opening sentence, the title states that the fee is “based upon the amount of carbon dioxide emissions resulting from natural gas consumption and electricity production.” This language fails to answer these questions: is the fee assessed on production or consumption? Or both? Who exactly pays the fee? No voter would consider him or herself to be an “electricity producer”. Nor would many voters identify their use of natural gas as resulting in CO2 emissions. The above language used in the title would indicate that the fee is to be assessed on

energy producers not on consumers. It certainly would create confusion within the minds of voters as to who is exactly subject to the fee. By stating in the title that the fee is assessed on electricity production, many voters would think that the Initiative applies to electricity producers such, as utilities – not themselves.

Additionally, the title fails to inform voters what the rate of the fee is and that the General Assembly has the authority to increase the rate of the fee. Knowing what the rate of the fee is and that this rate can be increased by the General Assembly is important information that voters must have to make an informed decision regarding the fee. Some voters may support a CO2 fee, but find the rate of the fee to be too high and vote against it for that reason.

The Initiative is proposing a consumption tax on CO2 emissions resulting from the individual use of electricity and natural gas. As it is currently written, voters are left to imagine precisely who may be subject to this fee, at what point and how exactly it will be imposed, what the rate of the fee is and whether or not the rate can be increased.

#### **B. THE PURPORTED ‘FEE’ IS IN FACT A TAX.**

As noted at the very beginning of the title the “fee” proposed by the Initiative is in fact a tax. “State taxes shall be increased \$209 million annually.” However, throughout the rest of the title, the term “tax” is not used, but rather the term “fee” is. As noted above, the title already results in voter confusion regarding who is subject to the fee and at what point the fee will be assessed. Failing to correctly identify that the Initiative will raise taxes on all consumers of electricity and natural gas, further adds to the confusion as to who will exactly be subject to the Initiative.

“A fee is a charge imposed on persons or property to defray costs of a particular government service. A tax is a means of distributing the general burden of the cost of



government, rather than an assessment of benefits.” *Bruce v. City of Colorado Springs*, 131 P.3d 1187, 1190 (Colo. 2005), citing *E-470 Pub. Highway Auth. 455 Co.*, 3 P.3d 18 (Colo. 2000), and *Thorpe v. State*, 107 P.3d 1064 (Colo.App.2004). Nowhere in the Initiative is there a discussion of a government service or benefit that the voter is being asked to pay for in connection with the use of electricity or natural gas. The activity that is resulting in revenue generation under the Initiative is CO2 emissions produced from the consumption of electricity and natural gas. Every time a voter uses electricity and natural gas the resulting CO2 emission is taxed. To term the “tax” as a “fee” misleads the voter to believe that in exchange for the fee a government service is to be received, but that is not the case. “The distinction between a fee and a tax depends on the nature and function of the charge, not on its label.” *Bruce v. City of Colorado Springs*, 131 P.3d 1190, citing *Westrac, Inc. v. Walker Field*, 812 P.2d 714 (Colo.App.1991).

**C. THE BALLOT TITLE FAILS TO INFORM VOTERS OF THE BREADTH OF THE STATUTORY AND POLICY CHANGES IT WILL RESULT IN.**

The title makes reference that the Initiative will devote revenues generated from the tax to carbon sequestration and work force training, and that “the fee is in addition to certain existing programs.” However, it fails to explain to voters that each of these activities will result in substantial statutory and policy changes. As noted above, the Initiative will implement a carbon sequestration program. Currently CO2 emissions are not regulated under federal environmental law or by the State of Colorado. The Initiative seeks to regulate CO2, and in so doing the Initiative stealthily assigns to the Departments of Agriculture and Natural Resources and the Governor’s Energy Office the authority to implement an emission control program. These are separate subjects that are not in anyway addressed or explained to the voters in the title.

As noted by the Colorado Supreme Court definitions should be included in the title where there is an adoption of “a new or controversial legal standard.” *In re Ballot Title for 1999-2000*

#255, 4 P.3d 485, 497 (Colo. 2000). As discussed earlier, the Initiative will result in the implementation of a carbon sequestration program, a new legal standard that will be applied to emission sources in the State. However, nowhere in the title are the definitions for “carbon sequestration” or “geological sequestration” provided. Yet, each of these concepts is defined within the Initiative.

Further, the Initiative seeks to prohibit the General Assembly from reducing funding to or repealing programs in connection with jobs creation, economic development, energy security, energy ratepayer relief, and global warming pollution reduction. This is a radical limitation of the General Assembly’s authority to legislate: one that is contrary to longstanding doctrine that future legislatures shall not be bound by the acts of their predecessors. The only vague reference to this concept is introduced in the title where it states that “the fee is in addition to certain existing programs.” This vague reference in no way alerts the voter to the concept that is being introduced by the Initiative.

The Initiative’s title fails to inform voters that it would change the substantive law of Colorado with respect to environmental statutes. The title misleads voters by stating the purpose of the Initiative is to impose a fee on the consumption of electricity and natural gas with the revenues used in part for the purpose of carbon sequestration, without mentioning the substantive changes to current law and doctrine.

**D. THE TITLE FAILS TO INFORM VOTERS WHAT FORMS OF POLLUTION WILL BE REDUCED AND WHO WILL OVERSEE THE SPENDING OF THE MONIES RAISED BY THE FEE.**

The title fails to provide voters with any specificity as to what forms of pollution are proposed to be reduced. The title merely states that “revenues [] are to be spent on the following purposes: ... (4) pollution reduction.” Voters are not told what form or forms of pollution are to

be reduced. The Initiative provides that a minimum of five percent of the revenues from the fee will be used to reduce emissions from global warming pollution in the transportation sector. *See Section 6(d)*. Seeking to reduce emissions from the transportation sector could entail significant policy and program initiatives that would affect a majority of voters. Despite its potential wide reaching effects on it, the title fails to include any reference to the transportation sector.

Nor does the title inform voters as to what entity will be in charge of spending the revenues collected from the fee. It is left to the voter to determine what entity will be spending the revenues. From the text of the title, a voter's most logical conclusion would be to assume that the newly created clean energy task force will determine how exactly the revenues are spent but this would be incorrect. Voters need to know who shall have the authority to spend the revenues generated. A voter may or may not want an official in the Office of the Governor to be responsible for determining how these substantial revenues are spent. As the title is currently drafted, the entity that has the authority to spend these revenues is left to the imagination of the voter.

**4. THE TITLE, BALLOT AND SUBMISSION CLAUSE CONTAIN THE IMPERMISSIBLE CATCH PHRASES "POLLUTION" AND "CLIMATE CHANGE."**

The title includes the phrases "pollution" and "climate change", each of which is a catch phrase that fails to convey to the voters what the Initiative's imposition of a consumption tax on CO<sub>2</sub> will result in. "Catch phrases" are words that work to a proposal's favor without contributing to voter understanding." *In re Ballot Title 1999-2000 #258(A)*, 4 P.3d 1100. "It is well established that the use of catch phrases or slogans in the title, ballot title and submission clause, and summary should be carefully avoided by the Board." *In re Ballot Title 1999-2000 #258(A)*, 4 P.3d 1100 (citing *In re Amend Tabor No. 32*, 908 P.2d 125, 130 (Colo. 1995)). Catch

phrases can be used to form a slogan by those who desire to campaign for or against an initiative, ultimately prejudicing further voters understanding of the issues contained in the initiative. *In re Ballot Title 1999-2000 #258(A)*, 4 P.3d 1100 (citing *In re Ballot Title 1999-2000 §227 & 228*, 3 P.3d at 6-7).

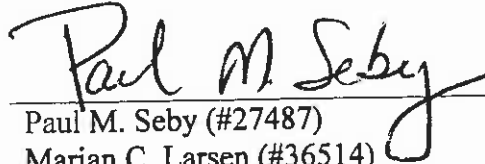
Contemporary political debate is the basis for determining whether a catch phrase or slogan exists. See *In re Ballot Title 1999-2000 #227 & 228*, 3 P.3d 1, 7 (Colo. 2000). The phrase climate change is shorthand for the issue of global warming. It is important to note that the elector does not challenge the validity of the science behind global warming, or the policy issues that global warming raise. The issue of global warming though is still a topic of heated political and social discussion. See *A Shift in the Debate Over Global Warming* by Andrew C. Revkin, April 6, 2008, The New York Times. Regardless of one's opinion on the subject of global warming, it is clear that the subject is emotional and contentious, one that "provokes political emotion". *In re Ballot Title 1999-2000 #258(A)*, 4 P.3d 1100. The use of the phrase "climate change" in the title is one that will "impede voter understanding", and will surely result in it being used as a slogan. *Id.*

As with the catch phrase "global warming" the term "pollution" "provoke[s] political emotion". *Id.* Pollution is defined as "the action of polluting especially by environmental contamination with man-made waste." *Merriam-Webster's Collegiate Dictionary (Tenth Edition 1999)*. As the definition of pollution indicates, few voters would immediately view themselves as polluters. The term "pollution" will provoke incorrect assumptions that the Initiative seeks to impose a CO2 fee on industry polluters. It will certainly result in impeding voter understanding as to the true meaning of the Initiative and its effect upon voters.

For the reasons outlined herein, the Board is respectfully requested to set a rehearing in

this matter for the next Title Board Meeting.

**MOYE WHITE LLP**

A handwritten signature in black ink that reads "Paul M. Seby". The signature is written in a cursive style and is positioned above a horizontal line.

Paul M. Seby (#27487)

Marian C. Larsen (#36514)

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CERTIFICATE OF SERVICE

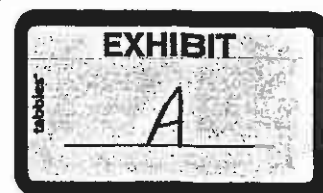
I hereby certify that on this 9th day of April, 2008, a true and correct copy of the foregoing **MOTION FOR REHEARING** was mailed by U.S. mail, postage prepaid, to the person(s) named below:

J. Thomas McKinnon  
2218 Mapleton Ave.  
Boulder, CO 80304

Samuel P. Weaver  
2423 23<sup>rd</sup> Street  
Boulder, CO 80304



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460



THE ADMINISTRATOR

March 27, 2008

The Honorable John Dingell  
Chairman  
Committee on Energy and Commerce  
U. S. House of Representatives  
Washington, D.C. 20515

The Honorable Joe Barton  
Ranking Member  
Committee on Energy and Commerce  
U. S. House of Representatives  
Washington, D.C. 20515

Dear Chairman Dingell and Ranking Member Barton:

Knowing of your continued interest in the issues involving greenhouse gas emissions, I am writing to inform you of action I have taken today to move the Agency forward to examine these critical issues.

In the time since the Supreme Court's *Massachusetts v. EPA* decision I have benefited from extensive briefings by EPA staff as they worked to develop an initial response to that decision and I carefully considered how EPA should best move forward.

As we were working on this response, Congress passed and the President signed the Energy Independence and Security Act (EISA) which, among other things, expanded EPA's authority over renewable fuels and required the Department of Transportation to coordinate with EPA on its CAFE regulations. Thus, the EISA represents a statutory change that will have concrete effects upon the emissions of greenhouse gases though it does not change EPA's obligation to provide a response to the Supreme Court decision. In the weeks following the passage of this law, I considered a range of options for how to move forward.

In doing so, EPA has gone beyond the specific mandate of the Court under section 202 of the Clean Air Act and evaluated the broader ramifications of the decision throughout the Clean Air Act. This review has made it clear that implementing the Supreme Court's decision could affect many sources beyond just the cars and trucks considered by the Court, including schools, hospitals, factories, power plants, aircraft and ships. In fact, the Agency currently has many pending petitions, lawsuits, and deadlines that must be viewed in light of the Supreme Court's decision.

During this review, I considered the option of soliciting public input through an Advance Notice of Proposed Rulemaking (ANPR) as the Agency considers the specific effects of climate change and potential regulation of greenhouse gas emissions from stationary and mobile sources

under the Clean Air Act. I have concluded this is the best approach given the potential ramifications.

Such an approach makes sense because, as the Act is structured, any regulation of greenhouse gases – even from mobile sources – could automatically result in other regulations applying to stationary sources and extend to small sources including many not previously regulated under the Clean Air Act. Consequently, any individual decision on whether and how sources and gases should be regulated may dictate future regulatory actions to address climate change. My approach will allow EPA to solicit public input and relevant information regarding these interconnections and their possible regulatory requirements.

This approach gives the appropriate care and attention this complex issue demands. It will also allow us to use existing work. Rather than rushing to judgment on a single issue, this approach allows us to examine all the potential effects of a decision with the benefit of the public's insight. In short, this process will best serve the American public.

In the advance notice EPA will present and request comment on the best available science including specific and quantifiable effects of greenhouse gases relevant to making an endangerment finding and the implications of this finding with regard to the regulation of both mobile and stationary sources.

In addition, exploring the many relevant sections of the Clean Air Act, particularly those raised by groups requesting that we regulate greenhouse gases, we will highlight the complexity and interconnections within various sections of the Clean Air Act. EPA's advanced notice will also seek comment, relevant data, questions about and the implications of the possible regulation of stationary and mobile sources, particularly covering the various petitions, lawsuits and court deadlines before the Agency. These include the Agency response to the *Massachusetts v. EPA* decision, several mobile source petitions (on-road, non-road, marine, and aviation), and several stationary source rulemakings (petroleum refineries, Portland cement, and power plant and industrial boilers).

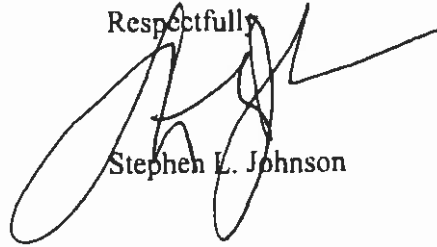
The advance notice will also raise potential issues in the New Source Review (NSR) program, including greenhouse gas thresholds and whether permitting authorities might need to define best available control technologies. If greenhouse gases were to become regulated under the NSR program, the number of Clean Air Act permits could increase significantly and the nature of the sources requiring permits could expand to include many smaller sources not previously regulated under the Clean Air Act. This notice will provide EPA an opportunity to hear from the public and from states on these issues.

In order to execute this plan, I have directed my staff to draft the ANPR to discuss and solicit public input on these interrelated issues. This advanced notice will be issued later this spring and will be followed by a public comment period. The Agency will then consider how to best respond to the Supreme Court decision and its implications under the Clean Air Act.



If you have additional questions or concerns, please contact me or EPA's Associate Administrator, Office of Congressional and Intergovernmental Relations, Chris Bliley, at 202-564-5200.

Respectfully

A handwritten signature in black ink, appearing to be 'S. Johnson', written over the word 'Respectfully'.

Stephen L. Johnson

cc: Speaker Nancy Pelosi  
Minority Leader John Boehner

## **Ballot Title Setting Board**

### **Proposed Initiative 2007-2008 #83<sup>1</sup>**

The title as designated and fixed by the Board is as follows:

State taxes shall be increased \$209 million annually by an amendment to the Colorado Revised Statutes concerning a fee imposed on the consumption of electricity or natural gas to be used to reduce certain forms of pollution, and, in connection therewith, imposing the fee at a rate of three dollars per metric ton of carbon dioxide or carbon dioxide equivalent emitted to the atmosphere from electricity generation and natural gas combustion; collecting the fee from consumers; specifying that the fee is in addition to certain existing programs; exempting revenues generated from the fee from applicable constitutional spending limits; specifying minimum percentages of the revenues that are to be spent on the following purposes: (1) energy efficiency, (2) renewable energy, (3) carbon sequestration, (4) pollution reduction, (5) workforce training, (6) technology commercialization, (7) public education, and (8) curricula development; establishing and funding a clean energy progress task force to develop strategies for a clean energy portfolio; and funding a senior advisor to the governor on climate change.

The ballot title and submission clause as designated and fixed by the Board is as follows:

Shall state taxes be increased \$209 million annually by an amendment to the Colorado Revised Statutes concerning a fee imposed on the consumption of electricity or natural gas to be used to reduce certain forms of pollution, and, in connection therewith, imposing the fee at a rate of three dollars per metric ton of carbon dioxide or carbon dioxide equivalent emitted to the atmosphere from electricity generation and natural gas combustion; collecting the fee from consumers; specifying that the fee is in addition to certain existing programs; exempting revenues generated from the fee from applicable constitutional spending limits; specifying minimum percentages of the revenues that are to be spent on the following purposes: (1) energy efficiency, (2) renewable energy, (3) carbon sequestration, (4) pollution reduction, (5) workforce training, (6) technology commercialization, (7) public education, and (8) curricula development; establishing and funding a clean energy progress task force to develop strategies for a clean energy portfolio; and funding a senior advisor to the governor on climate change?

*Hearing April 2, 2008:*

*Single subject approved; staff draft amended; titles set.*

*Hearing adjourned 11:14 a.m.*

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<sup>1</sup> Unofficially captioned "Fees on Energy Emissions" by legislative staff for tracking purposes. Such caption is not part of the titles set by the Board.

*Hearing April 16, 2008:*

*Motion for Rehearing granted in part to the extent Board amended titles; denied in all other respects.*

*Hearing adjourned 2:02 p.m.*