

IN THE SUPREME COURT OF THE STATE OF OREGON

PAUL R. ROMAIN,

Petitioner,

v.

ELLEN F. ROSENBLUM, Attorney
General of the State of Oregon,

Respondent.

Case No.

PETITION TO REVIEW
BALLOT TITLE CERTIFIED
BY THE ATTORNEY
GENERAL

Initiative Petition 45 (2015)

BALLOT TITLE CERTIFIED

August 21, 2015

Initiative Petition 45 (2015)

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PETITION

Pursuant to ORS 250.085 and ORAP 11.30, Petitioner asks the Court to review the ballot title for Initiative Petition 45 (2015) (Ex. A.) ("IP45"). The ballot title was certified by the Attorney General on August 21, 2015 (Ex. B).

PETITIONER'S INTEREST

Petitioner Paul R. Romain is an Oregon elector and is dissatisfied with the ballot title certified by the Attorney General. Petitioner reviewed the draft ballot title (Ex. C) and submitted comments to the Attorney General (Ex. D). Accordingly, Petitioner has standing under ORS 250.085(2) to seek review of the certified ballot title.

ARGUMENT

I. Introduction

IP45 would amend Section 6, Chapter 754, Oregon Laws 2009, as amended by Section 3, Chapter 4, Oregon Laws 2015 (the "Low Carbon Fuel Standard" or "LCFS"). The LCFS directs the Oregon Environmental Quality Commission ("EQC") to establish low carbon fuel standards for gasoline, diesel, and fuels used as substitutes for gasoline and diesel. Pursuant to this authority, the EQC has adopted OAR Chapter 340, Division 253. The standards include a schedule to phase in the rules with the goal of reducing the amount of greenhouse gas emissions from the fuels by 10% below 2010 levels by 2025, primarily by blending gasoline and diesel with nonpetroleum based fuels. The LCFS provides for alternative compliance with the standard by allowing regulated parties to purchase credits for fuels used as substitutes for gasoline or diesel from sellers of lower carbon intensity motor vehicle fuels such as compressed and/or liquefied natural gas, electricity, and hydrogen. See OAR 340-253-0200(3), OAR 340-253-0320 to 0340; OAR 340-253-1000 to 1050.

IP45 proposes to amend the LCFS in four significant ways:

First, it limits the standard to liquid fuels. Ex. A, Section 1.6.1.b.

Second, it requires the EQC to adopt a schedule to phase in a 5% carbon intensity reduction for gasoline and diesel over time, conditioned upon the commercial availability of lower carbon intensity liquid fuels, and establishes a required analytical framework for EQC to determine the commercial availability of such fuels. Ex A., Section 1.6.2.b.A, Section 1.6.4.

Third, IP45 limits the authority of the EQC to adopt rules requiring more than a 10% ethanol or 5% biodiesel blend, or requiring a regulated party to blend any low carbon intensity fuel that is not available at an average retail cost equal to or less than gasoline or diesel. Ex. A, Section 1.6.2.c.

Finally, IP45 eliminates the buying and selling of credits as an alternative to compliance with fuel standard. Ex. A, Section 1.6.2, deleted subsection d.

II. Standard of Review

This Court reviews ballot titles for substantial compliance with ORS 250.035. ORS 250.085(1).

III. The Certified Ballot Title

On August 21, 2015, the Attorney General certified the following ballot title:

**Restricts low carbon fuel standards to requiring blending
gasoline/diesel with other fuels; other limits.**

Result of "Yes" Vote: "Yes" vote limits low carbon fuel standards' carbon reduction requirements; restricts standards to requiring gasoline/diesel blends with commercially available fuels; eliminates fuel credit system.

Result of "No" Vote: "No" vote retains low carbon fuel standards for liquid, non-liquid transportation fuels; standards allow obtaining fuel credits to satisfy standards, require rules to control costs.

Summary: Currently, Environmental Quality Commission sets low carbon fuel standards for gasoline, diesel, other fuels; may reduce average greenhouse gas emissions per unit of energy by 10% below 2010 levels by 2025. Commission must adopt rules to control costs, must allow compliance by obtaining credits from lower carbon fuel providers. Measure restricts low carbon fuel standards to requiring blending of gasoline or diesel with other liquid fuels; standards inapplicable to non-liquid fuels; eliminates credit system. Measure further provides that adopted standards cannot require carbon reductions greater than 5% from 2010 levels; cannot require any reductions unless low carbon fuel needed for blending requirements is "available in commercial quantities" (defined); costs no more than the gasoline or diesel into which it is blended. Other provisions.

IV. Proposed Ballot Title

In lieu of the ballot title certified by the Attorney General, Petitioner seeks certification of the alternative ballot title set forth below:

Low carbon fuel standards require liquid fuel blends; eliminates fuel credits; requires commercially available alternatives.

Result of "Yes" Vote: "Yes" vote modifies low carbon fuel standards' carbon reduction requirements; restricts standards to requiring gasoline/diesel blends with commercially available fuels; eliminates fuel credit system.

Result of "No" Vote: "No" vote retains existing low carbon fuel standards for liquid, non-liquid transportation fuels; retains rules that allow the purchase of fuel credits to satisfy standards.

Summary: Currently, Environmental Quality Commission sets low carbon fuel standards for gasoline, diesel, other fuels; may reduce average greenhouse gas emissions per unit of energy by 10% below 2010 levels by 2025. Commission must adopt rules to allow compliance by purchasing credits from lower carbon fuel providers. Measure limits low carbon fuel standards to requiring blending of gasoline or diesel with other liquid fuels; standards inapplicable to non-liquid fuels; limits blend percentages; eliminates the credit system as compliance alternative. Measure further provides for phased carbon reductions up to 5% from 2010 levels; cannot require any reductions unless low carbon fuel needed for blending requirements is "available in commercial quantities" (defined); costs no more than the gasoline or diesel into which it is blended. Other provisions.

V. Arguments and Authorities

A. The Caption Does Not Substantially Comply with ORS 250.035(2)(a).

ORS 250.035(2)(a) provides that the ballot title caption must contain "not more than 15 words that reasonably identif[y] the subject matter of the state measure." "The caption is the 'headline' of the ballot; it 'provides the context for the reader's consideration of the other information in the ballot title' and must describe the proposed measure's subject matter accurately." Towers v. Rosenblum, 354 Or 125, 129, 310 P3d 1136 (2013) (quoting Greene v. Kulongoski, 322 Or 169, 175, 903 P2d 366 (1995)).

The "subject matter" of a measure refers to "the 'actual major effect' of a measure or, if the measure has more than one major effect, all such effects (to the limit of the available words)." Buehler v. Rosenblum, 354 Or 318, 323, 311 P3d 882 (2013) (quoting Whitsett v. Kroger, 348 Or 243, 247, 230 P3d 545 (2010)). "The caption must also identify the measure's subject matter in terms that will not

'confuse or mislead potential petition signers and voters,' Mabon v. Myers, 332 Or 633, 637, 33 P3d 988 (2001), and it cannot overstate or understate the scope of the legal changes that the measure would enact. Kain/Waller v. Myers, 337 Or 36, 40, 93 P3d 62(2004)." Buchler, 354 Or at 323.

The certified caption for IP45 is misleading in that it only addresses the liquid fuels restriction and lumps all of the other changes—which are at least as significant as the liquid fuels limitation—into "other limits." It is not sufficient to state only one major effect of the measure when the caption can state all of the major effects.

To correct this deficiency the caption should read:

"Low carbon fuel standards require liquid fuel blends; eliminates fuel credits; requires commercially available alternatives."

B. The "Yes" and "No" vote statements do not substantially comply with ORS 250(2)(c).

ORS 250.035(2)(b) requires the "yes" vote statement to describe "the result if the state measure is approved" within 25 words. "[T]he result of a proposed measure's enactment that belongs in the 'yes' vote result statement is that outcome that is the most significant and immediate, or that carries the greatest consequence, for the general public. Stated differently, the legislature intended the 25-word 'yes' vote result statement to notify petition signers and voters of the result or results of enactment that would have the greatest importance to the people of Oregon." Carley v. Myers, 340 Or 222, 231, 132 P3d 651 (2006) (quoting Novick/Crew v. Myers, 337 Or 568, 574, 100 P3d 1064 (2004)).

ORS 250.035(2)(c) requires the "no" vote statement to describe "the result if the state measure is rejected" within 25 words. The "no" vote result statement "should state accurately what voters would retain, under their existing legal or contractual arrangements, if they defeat the measure." Carson v. Kroger,

351 Or 508, 518, 270 P3d 243 (2012) (quoting Earls v. Myers, 330 Or 171, 177, 999 P2d 1134 (2000)). "The object is to advise 'potential voters as to the choice they are being asked to make.'" Carson, 351 Or at 518, 270 P3d 243 (quoting Whitsett v. Kroger, 348 Or 243, 252, 230 P3d 545 (2010)).

The statement that a "yes" vote "limits low carbon fuel standards' carbon reduction requirements" is misleading and potentially prejudicial to proponents. The current carbon reduction standard of 10% is a goal, not a mandate. The current standard is premised upon the concept that traditional liquid fuels like gasoline and diesel will not be able to comply with a 10% reduction in carbon content by blending anything that will likely become available in the marketplace. Therefore, those who produce and use gasoline and diesel will be required to buy carbon credits from those who produce and use alternative fuels, increasing the cost of gasoline and diesel at the pump. One of the arguments of the proponents of the measure will be that the credit system is in fact a stealth gas tax to subsidize alternative fuel providers and that the LCFS will not result in meeting the stated carbon reduction goal for fuels.

Under IP45, if low carbon-intensity liquid fuel is produced that can be blended into gasoline and diesel, and if it is commercially available at a reasonable cost, those who produce gasoline and diesel will be required to blend it. The measure does reduce the carbon intensity reduction goal from 10% to 5%, but this reflects the likely commercial availability of alternative fuels for blending. It will be the proponents' position that IP45 will actually produce equal to or better carbon reduction in gasoline and diesel fuels, compared with the existing LCFS, because it sets an achievable standard and does not allow a regulated provider to avoid compliance by the purchase of credits.

The phrase in the "no" vote statement saying "require rules to control costs" is similarly misleading to the voter and prejudicial to proponents of the

proposed measure: It implies that that the proposed measure will eliminate rules to control costs of compliance and that a "no" will retain those cost control provisions. This is not the case. IP45 Sections 1.6.2.d, 1.6.2.b.A, 1.6.2.c, and 1.6.4 explicitly require the EQC to determine the cost and availability of alternative fuels as a condition precedent to phased reduction in carbon intensity and establishes a methodology to do so. See Ex. A. Section 1.6.2.c specifically limits the requirement to blend fuels if the cost of lower carbon fuels exceeds that of gasoline or diesel. Finally, the proposed measure does not modify Section 6.3 of the current LCFS, which requires the EQC to evaluate cost-effectiveness and minimization of compliance costs when adopting rules.

This phrase also misleadingly implies that the EQC rules will actually control costs. The EQC has adopted the credit system, which allows a regulated provider to buy out of compliance by purchasing carbon credits. See OAR 340-253-0200(3), OAR 340-253-0320 to 0340; OAR 340-253-1000 to 1050. The buying and selling of carbon credits is the major cost factor in the existing low carbon fuel standard, and the debate is over just how much the price of gasoline and diesel will increase, not whether or not it will increase. IP45 eliminates this costly subsidy of lower carbon fuel providers.

Accordingly, the "yes" and "no" vote statements should instead read as follows:

Result of "Yes" Vote: "Yes" vote modifies low carbon fuel standards' carbon reduction requirements; restricts standards to requiring gasoline/diesel blends with commercially available fuels; eliminates fuel credit system.

Result of "No" Vote: "No" vote retains existing low carbon fuel standards for liquid, non-liquid transportation fuels; retains rules that allow the purchase of fuel credits to satisfy standards.

C. The certified summary does not substantially comply with ORS 250.035(2)(d).

ORS 250.035(2)(d) requires that a ballot title contain "[a] concise and impartial statement of not more than 125 words summarizing the state measure and its major effect." The purpose of an initiative ballot summary "is to help voters understand what will happen if the measure is approved, and* * *[it] should* * *be worded so that voters will understand the breadth of its impact." Wyant v. Myers, 336 Or 128, 139, 81 P3d 692 (2003) (quoting Fred Meyer, Inc. v. Roberts, 308 Or 169, 175, 777 P2d 406 (1989)).

The certified summary contains the same misleading statement about adopting rules to control costs as the "no" statement, and does not accurately or completely describe the impacts of IP45 as set forth above.

To correct these deficiencies, the summary should read:

Summary: Currently, Environmental Quality Commission sets low carbon fuel standards for gasoline, diesel, other fuels; may reduce average greenhouse gas emissions per unit of energy by 10% below 2010 levels by 2025. Commission must adopt rules to allow compliance by purchasing credits from lower carbon fuel providers. Measure limits low carbon fuel standards to requiring blending of gasoline or diesel with other liquid fuels; standards inapplicable to non-liquid fuels; limits blend percentages; eliminates the credit system as compliance alternative. Measure further provides for phased carbon reductions up to 5% from 2010 levels; cannot require any reductions unless low carbon fuel needed for blending requirements is "available in commercial quantities" (defined), costs no more than the gasoline or diesel into which it is blended. Other provisions.

VI. Conclusion

For the reasons stated above, the certified ballot title fails to substantially comply with ORS 250.035(2). Petitioner respectfully requests the Court to certify his proposed alternative ballot title or modify the Attorney General's proposed ballot title, as appropriate in accordance with ORS 250.085(8).

DATED this 4th day of September, 2015.

THE ROMAIN GROUP, LLC

Paul R. Romain, OSB No. 732565
Of Attorneys for Petitioner

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I electronically filed the Petition to Review Ballot Title Certified by the Attorney General (Initiative Petition 45-2015) on September 4, 2015, with the Appellate Court Administrator, Appellate Court Records Section, by using the court's electronic filing system pursuant to ORAP 16 on September 4, 2015.

I hereby certify that I served the foregoing Petition to Review Ballot Title Certified by the Attorney General (Initiative Petition 45-2015) on the parties below on September 4, 2015, by mailing true and correct copies by U.S. Mail (two copies to the Attorney General; one copy to all other parties). I also certify that I e-mailed one copy to the Secretary of State at the e-mail address below and pursuant to ORS 250.085(4).

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DATED this 4th day of September, 2015.

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EXHIBIT A

Relating to transportation fuel cost containment.

Be It Enacted by the People of the State of Oregon:

Section 1. Section 6, chapter 754, Oregon Laws 2009, as amended by Section 3, chapter 4, Oregon Laws 2015, is amended to read:

Sec. 6. (1) As used in this section:

- (a) "Greenhouse gas" has the meaning given that term in ORS 468A.210.
- (b) "Low carbon fuel standards" means standards for the reduction of greenhouse gas emissions [on average, per unit of fuel energy] by the blending of liquid fuel available in commercial quantities in this state.
- (c) "Motor vehicle" has the meaning given that term in ORS 801.360.
- (d) "Available in commercial quantities" means that the liquid fuel must actually be available in the State of Oregon in sufficient quantities as determined pursuant to Section 4 of this section for all persons who import gasoline or diesel to comply with the standards.

(2)(a) The Environmental Quality Commission shall adopt by rule low carbon fuel standards for gasoline, diesel and liquid fuels used as substitutes for gasoline and diesel.

(b) The commission shall *[may]* adopt the following related to the standards, including but not limited to:

(A) A schedule to phase in a 5% carbon intensity reduction for gasoline and diesel on average, [implementation of the standards in a manner that reduces the average amount of greenhouse gas emissions per unit of fuel energy of the fuels by 10 percent below 2010 levels by the year 2025 or by a later date if the commission determines that an extension is appropriate to implement the standards]; The schedule shall provide that, beginning January 1, 2016, the first reduction in carbon intensity ("C.I.") of gasoline and diesel will be 0.25% from a baseline of clear gasoline and diesel sold in Oregon during 2010. Further reductions in C.I. of Oregon liquid fuels will be implemented over time. The subsequent reductions, by percent, will be 0.5%, 1.0%, 1.5%, 2.5%, 3.5%, and 5%. These reductions shall be the average fuel reduction for all subject fuels sold in Oregon. The commission's rules shall provide that a C.I. reduction adjustment will be made no less than one year from the last reduction adjustment implemented. The commission's rules shall provide that a scheduled C.I. reduction adjustment shall not be made unless the commission conducts an analysis pursuant to section 4 of these sections and makes a determination that sufficient low C.I. biofuel blend stocks are available in commercial quantities.

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(B) Standards for greenhouse gas emissions attributable to the fuels throughout their lifecycles, including but not limited to emissions from the production, storage, transportation and combustion of the fuels and from changes in land use associated with the fuels;[;]

(C) Provisions allowing the use of all types of liquid low carbon fuels to meet the low carbon fuel standards [, including but not limited to biofuels, biogas, natural gas, liquefied petroleum gas, gasoline, diesel, hydrogen and electricity];

(D) Standards for the issuance of deferrals, established with adequate lead time, as necessary to ensure adequate fuel supplies;[;]

(E) Exemptions for fuels that are used in volumes below thresholds established by the commission;[;]

(F) Standards, specifications, testing requirements and other measures as needed to ensure the quality of fuels produced in accordance with the low carbon fuel standards, including but not limited to the requirements of ORS 646.910 to 646.923 and administrative rules adopted by the State Department of Agriculture for motor fuel quality, [and]

[(G) Adjustments to the amounts of greenhouse gas emissions per unit of fuel energy assigned to fuels for combustion and drive train efficiency.]

[(c) Before adopting standards under this section, the commission shall consider the low carbon fuels standards of other states, including but not limited to Washington, for the purpose of determining schedules and goals for the reduction of the average amount of greenhouse gas emissions per unit of fuel energy and the default values for these reductions for applicable fuels.]

[(c) As a means for containing the costs of compliance with the standards, the commission shall adopt by rule provisions for blending liquid fuels available in commercial quantities in this state. Provisions adopted under this subparagraph may not:

[(A) Require that any person who imports gasoline or diesel fuel blend into that fuel more ethanol or biodiesel than 10 percent ethanol (E-10) and 5 percent biodiesel (B-5); or

[(B) Provide for or require that any person who imports gasoline or diesel fuel blend into that fuel any low C.V. fuel that is not available at average market retail costs equal to or less than the base gasoline or diesel.

[(d) The commission shall adopt by rule provisions for managing and containing the costs of compliance with the standards, including but not limited to provisions to facilitate compliance with the standards by ensuring that persons may obtain credits for fuels used as substitutes for gasoline or diesel and by creating opportunities for persons to trade credits.]

[(e)] [(d)] The commission shall exempt from the standards any person who imports in a calendar year less than 500,000 gallons of gasoline and diesel fuel, in total. Any fuel imported by persons that are related or share common ownership or control shall be aggregated together to determine whether a person is exempt under this paragraph.

[(f)] [(e)] (A) The commission by rule shall prohibit fuels that contain biodiesel from being considered an alternative fuel under these standards unless the fuel meets the following standards:

(i) Fuel that consists entirely of biodiesel, designated as B100, shall comply with ASTM D 6751 and shall have an oxidation stability induction period of not less than eight hours as determined by the test method described in European standard EN 15751; and

(ii) Fuel that consists of a blend of diesel fuel and between 6 and 20 volume percent biodiesel, and designated as biodiesel blends B6 to B20, shall comply with ASTM D 7467 and shall have an oxidation stability induction period of not less than 20 hours as determined by the test method described in European standard EN 15751.

(B) The commission may adopt rules different from those required under subparagraph (A) of this paragraph if an ASTM or EN standard applicable to biodiesel is approved or amended after March 12, 2015, or if the commission finds that different rules are necessary due to changes in technology or fuel testing or production methods.

(C) As used in this subsection, "biodiesel" means a motor vehicle fuel consisting of mono-alkyl esters of long chain fatty acids derived from vegetable oils, animal fats or other nonpetroleum resources, not including palm oil.

(f) The commission may not differentiate among crude oils in determining the life cycle carbon intensity value for gasoline and diesel.

(3) In adopting rules under this section, the Environmental Quality Commission shall evaluate:

- (a) Safety, feasibility, net reduction of greenhouse gas emissions and cost-effectiveness;
- (b) Potential adverse impacts to public health and the environment, including but not limited to air quality, water quality and the generation and disposal of waste in this state;
- (c) Flexible implementation approaches to minimize compliance costs; and
- (d) Technical and economic studies of comparable greenhouse gas emission reduction measures implemented in other states and any other studies as determined by the commission.

(4) The commission shall determine that there is a sufficient volume of low C.I. fuels available in commercial quantities in order to approve the next scheduled reduction adjustment. This determination shall be based upon the following considerations:

(a) The commission will conduct an analysis to assess the capability of the low C.I. fuel facilities within and without the State of Oregon to provide low C.I. fuels available in commercial quantities. This analysis shall consider:

- (A) Design capacity in gallons per day.
- (B) Date of construction and completion.
- (C) Date that feedstock was first introduced to the process.

(D) Date that commercial quantities of on-specification product was first produced. Planned or advertised dates will not be considered.

(E) Highest utilization demonstrated in a consecutive three-month period (utilization is defined as production rate divided by design capacity, inclusive of downtime).

(F) Percent of product that was produced on-specification, without reprocessing or blending during the period in Section 4(a)(E) of this section.

(G) Duration, in days, of longest continuous period of plant operation.

(H) Utilization during the last calendar year (production rate divided by design capacity, inclusive of downtime).

(I) Percent of product that was produced on-specification without reprocessing or blending during the period in Section 4(a)(H) of this section.

(J) Annual Production forecast for the next one to three years (high, medium, and low estimates) based on historic production and any technical issues to date. The commission shall include variations based on projected feedstock availability and any changes to feedstock being used in the process.

b. The commission shall analyze whether available low C.I. fuels are cost competitive. If the fuels are not available at average market retail costs equal to or less than the base petroleum products, the low C.I. fuels will not be considered available in commercial quantities.

c. The Commission shall conduct an analysis to determine the capability of the distribution system infrastructure (including retail sites) to handle the projected volumes and types of fuels. If insufficient to handle projected volumes and types of low C.I. fuels, the volume of fuels that would exceed the distribution system capacity will not be considered available in commercial quantities.

d. The commission shall determine whether there are sufficient commercially produced vehicles able to utilize the low C.I. fuels following the scheduled reduction adjustment. If an insufficient number of such vehicles are able to utilize the low C.I. Fuels following the scheduled reduction adjustment, the low C.I. fuels will not be considered available in commercial quantities.

[(4)](5)(a) The provisions of this section do not apply to fuel that is demonstrated to have been used in any of the following:

- (A) Motor vehicles registered as farm vehicles under the provisions of ORS 805.300.
- (B) Farm tractors, as defined in ORS 801.265.
- (C) Implements of husbandry, as defined in ORS 801.310.
- (D) Motor trucks, as defined in ORS 801.355, used primarily to transport logs.
- (E) Motor vehicles that are not designed primarily to transport persons or property, that are operated on highways only incidentally, and that are used primarily for construction work.
- (F) Watercraft.

(G) Railroad locomotives.

(b) The Environmental Quality Commission shall adopt by rule standards for persons to qualify for the exemptions provided in this subsection.

EXHIBIT B

OFFICE OF THE SECRETARY OF STATE

JEANNE P. ATKINS
SECRETARY OF STATE

ROBERT TAYLOR
DEPUTY SECRETARY OF STATE



ELECTIONS DIVISION

JIM WILLIAMS
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INITIATIVE PETITION

TO: All Interested Parties
FROM: Lydia Plukchi, Compliance Specialist
DATE: August 21, 2015
SUBJECT: Initiative Petition 2016-045 Certified Ballot Title

The Elections Division received a certified ballot title from the Attorney General on August 21, 2015, for Initiative Petition 2016-045, proposed for the November 8, 2016, General Election.

Caption

Restricts low carbon fuel standards to requiring blending gasoline/diesel with other fuels; other limits

Chief Petitioners

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Charles E. Ireland PO Box 815 Myrtle Creek, OR 97457

Appeal Period

Any registered voter, who submitted timely written comments on the draft ballot title and is dissatisfied with the certified ballot title issued by the Attorney General, may petition the Oregon Supreme Court to review the ballot title.

If a registered voter petitions the Supreme Court to review the ballot title, the voter must notify the Elections Division of Ballot Title Challenge. If this notice is not timely filed, the petition to the Supreme Court may be dismissed.

Appeal Due	How to Submit Appeal	
September 4, 2015	Refer to Oregon Rules of Appellate Procedure, Rule 11.30 or contact the Oregon Supreme Court for more information at 503.986.5555.	
Notice Due	How to Submit Notice	Where to Submit Notice
1 st business day after appeal filed with Supreme Court, 5 pm	Scan and Email Fax Mail	irrlstnotifier.sos@state.or.us 503.373.7414 255 Capitol St NE Ste 501, Salem OR 97310

ELLEN F. ROSENBLUM
Attorney General



FREDERICK M. BOSS
Deputy Attorney General

DEPARTMENT OF JUSTICE
APPELLATE DIVISION

August 21, 2015

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SECRETARY OF STATE

Jim Williams
Director, Elections Division
Office of the Secretary of State
141 State Capitol
Salem, OR 97310

Re: Proposed Initiative Petition — Restricts Low Carbon Fuel Standards to Requiring
Blending Gasoline/Diesel with Other Fuels; Other Limits
DOJ File #BT-45-15; Elections Division #2016-045

Dear Mr. Williams:

We received comments on the Attorney General's draft ballot title for Initiative Petition 45 (2016) (IP 45) from Nik Blosser (through counsel, Steven Berman), and Paul Romain (through counsel, The Romain Group, LLC). Both commenters object to all parts of the ballot title. In this letter, we discuss why we made or did not make changes to each part of the ballot title in light of the submitted comments.

A. The caption

The ballot title must include "[a] caption of not more than 15 words that reasonably identifies the subject matter of the state measure." ORS 250.035(2)(a). The draft caption provides:

**Low carbon fuel standards can only require fuel blends; carbon reduction and
blend requirements limited**

1. Comments

Commenter Blosser submits that the caption accurately describes the subject matter of IP 45 with one exception: it "does not convey to voters that the Initiative drastically limits the fuels that may be used to meet the Initiative's 'carbon intensity'

standards by *eliminating* a series of alternative fuels, including liquid fuels, from consideration in meeting the low carbon fuel standards.” (Berman, 6, emphasis in original). He contends that the elimination of alternative fuels like biogas, natural gas, liquefied petroleum gas, hydrogen and electricity should be made clear in the caption, and proposes the following alternative: “Low carbon fuel standards can only require blends; carbon reduction, alternative fuels, blend requirements limited”. (*Id.*).

Commenter Romain objects that the statement “can only require fuel blends” is misleading because “the measure limits the low carbon fuel standards to *liquid* fuels.” (Romain Group, 2). He also states that the “actual major effect” of IP 45 is “to amend the low carbon fuel standard to eliminate the buying and selling of credits as an alternative and requiring that alternative fuels be commercially available.” (*Id.*). He proposes the caption should read: “Low carbon fuel standards require liquid fuel blends; eliminates fuel credits; requires commercially available alternatives.” *Id.*

2. Our response to the comments

After reviewing the comments, we agree that the caption should be revised. We agree that the caption may be improved to better identify that IP 46 eliminates alternative fuels from meeting existing low carbon fuel standards, IP 46, § 6(1)(b); 6(2)(c), but disagree that the caption should use the term “alternative fuels” in doing so. We agree that the caption should identify that IP 45 limits low carbon fuel standards to blending fuels with gasoline and diesel. IP 45, § 6(1)(b); 6(2)(b)(C). We disagree that the elimination of “the buying and selling of credits as an alternative” is an “actual major effect” of IP 45; rather, it is one of several methods for complying with the very same fuel standards IP 45 would substantially modify.

In light of the comments above, we modify the caption to read as follows:

Restricts low carbon fuel standards to requiring blending gasoline/diesel with other fuels; other limits

B. The “yes” and “no” vote result statements

We next consider the draft “yes” and “no” vote result statements. A ballot title must include “[a] simple and understandable statement of not more than 25 words that describes the result if the state measure is approved.” ORS 250.035(2)(b). The ballot title also must include “[a] simple and understandable statement of not more than 25 words that describes the result if the state measure is rejected.” ORS 250.035(2)(c). “The ‘yes’ and ‘no’ vote result statements should be read together.” *Rasmussen v. Kroger*, 351 Or 358, 365, 266 P3d 87 (2011) (citing *Potter v. Kulongoski*, 322 Or 575, 582, 910 P2d 377 (1996)). The draft “yes” and “no” vote result statements are as follows:

Result of “Yes” Vote: “Yes” vote provides low carbon fuel standards for reducing greenhouse gas emissions can only require liquid fuel blends; limits permissible blend requirements, carbon reduction requirements.

Result of “No” Vote: “No” vote retains law requiring low carbon fuel standards for liquid, non-liquid transportation fuels to reduce greenhouse gas emissions, requiring rules controlling costs of standards.

1. Comments

Commenter Blosser objects that the vote result statements do not comply with ORS 250.035(2)(b). First, he renews his objections raised with respect to the caption, that is, that the “yes” vote result statement fails to identify that IP 45 eliminates certain “alternative fuels” for satisfying the low carbon fuel standards. (Berman, 7). Second, he argues that the “yes” vote result statement fails to inform voters that “the Initiative would allow for increased greenhouse gas and carbon emissions.” (*Id.*). Third, he contends that the “yes” vote result statement does not explain that “the Initiative amends, and severely limits, the cost containment provisions in the 2015 Clean Fuels law.” (*Id.*). Last, he argues that the phrase “liquid, non-liquid transportation fuels” in the “no” vote result statement “is a potentially inaccurate and misleading way to describe the wide range of fuels that may be used to meet the current low carbon fuel standards” and that a voter may conclude that there are alternative fuels that are neither “liquid” nor “non-liquid” that are not covered by the existing law. (*Id.*).

Commenter Romain objects that the “yes” and “no” vote result statements are inaccurate. First, he claims that the statement “alternative fuel cost, availability limit permissible requirements” in the “yes” vote result statement is misleading because “[t]hese are not the primary effects of the measure.”¹ (Romain Group, 3). He argues that the primary effects of the measure include changing the low carbon fuel standards to apply to commercially available liquid fuels and to eliminate the requirement to buy credits as an alternative for compliance with the low carbon fuel standards. (*Id.*). Second, he argues that the phrase “requiring rules controlling costs of standards” in the “no” vote result statement is “very misleading” because it (1) incorrectly implies that there are existing rules that control costs, and (2) implies that IP 45 “will not control costs.” (*Id.*).

¹ This objection appears to concern text in the “yes” vote result statement for the draft ballot title for Initiative Petition 46—not IP 45. Accordingly, we do not consider that objection any further.

2. Our response to the comments

After reviewing the comments concerning the “yes” vote result statement, we agree that it should be revised. We agree that the statement could be improved to better identify that IP 45 eliminates certain “alternative fuels” from consideration in meeting the low carbon fuel standards but disagree that the statement should use the term “alternative fuels” in doing so. We also agree that the statement should identify that IP 45 limits the low carbon fuel standards to commercially available liquid fuel blending with gasoline and diesel. And we agree that the statement should identify that IP 45 eliminates existing fuel credits as a possible way to satisfy the low carbon fuel standards.

We disagree with the remaining objections concerning the “yes” vote result statement. We disagree that the statement should explain that IP 45 “would allow for increased greenhouse gas and carbon emissions” because that statement depends on impermissible speculation about how scientific, economic, political, and other forces would alter greenhouse gas or carbon emissions if IP 45 were approved. Similarly, we disagree with that the statement should explain that IP 45 “severely limits” the “cost containment provisions” under existing law, because that statement requires speculation about whether IP 45’s apparent cost-containment provisions, which use a different methodology than under existing law, would “severely limit” or otherwise affect existing “cost containment provisions.”

After reviewing the comments with respect to the “no” vote result statement, and after our own review, we agree that the “no” vote result statement should be revised. Because of changes to the “yes” vote result statement concerning the elimination of fuel credits, we modify the “no” vote result statement to keep those statements in parallel. With respect to the comments, we disagree with the comment that the phrase “liquid, non-liquid transportation fuels” in the “no” vote result statement is inaccurate or misleading. We also disagree with the comment that the phrase “requiring rules controlling costs of standards” is necessarily misleading.

In light of our discussion above, we certify the following vote result statements:

Result of “Yes” Vote: “Yes” vote limits low carbon fuel standards’ carbon reduction requirements; restricts standards to requiring gasoline/diesel blends with commercially available fuels; eliminates fuel credit system.

Result of “No” Vote: “No” vote retains low carbon fuel standards for liquid, non-liquid transportation fuels; standards allow obtaining fuel credits to satisfy standards, require rules to control costs.

C. The summary

We next consider the draft summary. A ballot title must include “[a] concise and impartial statement of not more than 125 words summarizing the state measure and its major effect.” ORS 250.035(2)(d). “The purpose of a ballot title’s summary is to give voters enough information to understand what will happen if the initiative is adopted.” *McCann*, 354 Or at 708. The draft summary reads:

Summary: Currently, Environmental Quality Commission must set low carbon fuel standards for reducing average greenhouse gas emissions from gasoline, diesel, substitute transportation fuels, including non-liquid fuels; cost controls required. Measure limits scope of low carbon fuel standards to apply only to liquid fuels, limits potential greenhouse gas emission reductions to reductions achievable by blending low carbon intensity fuel with gasoline, diesel and substitutes; standards cannot reduce carbon intensity more than 5% from 2010 levels. Measure provides that adopted standards cannot require carbon reductions unless necessary low carbon fuel costs no more than the fuel into which it is blended, and is available in sufficient quantities for all fuel importers in Oregon to meet standards. Measure requires modifying existing Oregon Clean Fuels Program. Other provisions.

1. Comments

Commenter Blosser contends that the summary is deficient in several respects. First, he renews the objections he raised above concerning the summary and vote result statements, but without any further specifics. (Berman, 8). We understand his objections to be that the summary fails to explain: (1) that IP 45 eliminates “alternative fuels” from meeting the low carbon fuel standards, (Berman, 7); (2) that IP 45 allows for increased greenhouse gas and carbon emissions, (*Id.*); (3) that IP 45 “severely limits” the cost-containment provisions under existing laws, (*Id.*); and (4) that existing law allows for a wide range of fuels to meet the existing low carbon fuel standards. (*Id.*). He argues that the summary should explain that IP 45 “replaces Oregon’s current low carbon fuel standards to reduce greenhouse gas emissions with substantially weaker emissions standards.” (*Id.*). He also argues that the term “carbon intensity” is a unique, undefined term lacking any generally understood meaning, and should be identified as being an undefined term. (*Id.*). Lastly, he argues that the summary should explain that IP 45 would eliminate certain other alternative fuels from consideration in meeting low carbon fuel standards, including “natural gas, liquefied petroleum gas and electricity.” (*Id.*).

Commenter Romain also contends that the summary is deficient in several respects. First, he contends that the statement “[m]easure requires modifying existing Oregon Clean Fuels Program” is a non-neutral term not contained within or referenced in existing law. (Romain Group, 4). Second, he argues that the summary should explain

that under existing law, gas or diesel importers must purchase credits if it cannot satisfy low carbon fuel standards—a subsidy for alternative fuels, and that IP 45 would require “a realistically achievable carbon intensity reduction for liquid fuels” through the use of commercially available fuels. (*Id.*).

2. Our response to the comments


After a review of the comments, and after our own review, we agree that the summary should be revised. We disagree with Commenter Blosser’s four generalized objections, *i.e.* the summary fails to explain the elimination of “alternative fuels”, that IP 45 would increase greenhouse gas emissions, that IP 45 “severely limits” the cost-containment provisions in existing law, or that the description of “liquid” and “non-liquid fuels” is misleading. With respect to his specific objections, we agree that the summary should provide some comparison between the carbon-reduction standards under existing law and under IP 45. Second, we decline to explain that the term “carbon intensity” is undefined and do note that there is an existing definition supplied by administrative rule, OAR 340-253-0040(9) (“Carbon intensity” means the amount of lifecycle greenhouse gas emissions per unit of energy of fuel expressed in grams of carbon dioxide equivalent per megajoule (gCO₂e per MJ)). Last, we disagree that the summary need identify specific types of alternative fuels eliminated from consideration in meeting low carbon fuel standards, including “natural gas, liquefied petroleum gas and electricity.” With respect to Commenter Romain’s objections, we agree that the sentence “[m]easure requires modifying existing Oregon Clean Fuels Program” should be removed. We also agree that the summary should include an explanation concerning the provision for fuel credits under existing law, and the elimination of those credits under IP 45.

Accordingly, we certify the following summary:

Summary: Currently, Environmental Quality Commission sets low carbon fuel standards for gasoline, diesel, other fuels; may reduce average greenhouse gas emissions per unit of energy by 10% below 2010 levels by 2025. Commission must adopt rules to control costs, must allow compliance by obtaining credits from lower carbon fuel providers. Measure restricts low carbon fuel standards to requiring blending of gasoline or diesel with other liquid fuels; standards inapplicable to non-liquid fuels; eliminates credit system. Measure further provides that adopted standards cannot require carbon reductions greater than 5% from 2010 levels; cannot require any reductions unless low carbon fuel needed for blending requirements is “available in commercial quantities” (defined), costs no more than the gasoline or diesel into which it is blended. Other provisions.

E. Conclusion

We certify the attached ballot title.

Matthew J. Lysne 
Senior Assistant Attorney General
matthew.j.lysne@doj.state.or.us

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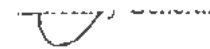
Enclosure

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BALLOT TITLE

Restricts low carbon fuel standards to requiring blending gasoline/diesel with other fuels; other limits

Result of “Yes” Vote: “Yes” vote limits low carbon fuel standards’ carbon reduction requirements; restricts standards to requiring gasoline/diesel blends with commercially available fuels; eliminates fuel credit system.

Result of “No” Vote: “No” vote retains low carbon fuel standards for liquid, non-liquid transportation fuels; standards allow obtaining fuel credits to satisfy standards, require rules to control costs.

Summary: Currently, Environmental Quality Commission sets low carbon fuel standards for gasoline, diesel, other fuels; may reduce average greenhouse gas emissions per unit of energy by 10% below 2010 levels by 2025. Commission must adopt rules to control costs, must allow compliance by obtaining credits from lower carbon fuel providers. Measure restricts low carbon fuel standards to requiring blending of gasoline or diesel with other liquid fuels; standards inapplicable to non-liquid fuels; eliminates credit system. Measure further provides that adopted standards cannot require carbon reductions greater than 5% from 2010 levels; cannot require any reductions unless low carbon fuel needed for blending requirements is “available in commercial quantities” (defined), costs no more than the gasoline or diesel into which it is blended. Other provisions.

EXHIBIT C

OFFICE OF THE SECRETARY OF STATE

JEANNE P. ATKINS
SECRETARY OF STATE

ROBERT TAYLOR
DEPUTY SECRETARY OF STATE



ELECTIONS DIVISION

JIM WILLIAMS
DIRECTOR

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(503) 586-1518

INITIATIVE PETITION

TO: All Interested Parties
FROM: Lydia Plukchi, Compliance Specialist
DATE: July 23, 2015
SUBJECT: Initiative Petition 2016-045 Draft Ballot Title

The Elections Division received a draft ballot title from the Attorney General on July 23, 2015, for Initiative Petition 2016-045, proposed for the November 8, 2016, General Election.

Caption

Low carbon fuel standards can only require fuel blends; carbon reduction and blend requirements limited

Chief Petitioners

Lila Leathers-Fitz 255 Depot St Fairview, OR 97024
Charles E. Ireland PO Box 815 Myrtle Creek, OR 97457

Comments

Written comments concerning the legal sufficiency of the draft ballot title may be submitted to the Elections Division. Comments will be delivered to the Attorney General for consideration when certifying the ballot title.

Additionally, the Secretary of State is seeking public input on whether the petition complies with the procedural constitutional requirements established in the Oregon Constitution for initiative petitions. The Secretary will review any procedural constitutional comments received by the deadline and make a determination whether the petition complies with constitutional requirements.

To be considered, draft ballot title comments and procedural constitutional requirement comments must be received in their entirety by the Elections Division no later than 5 pm:

Comments Due	How to Submit	Where to Submit
August 6, 2015	Scan and Email	irrlistnotifier.sos@state.or.us
	Fax	503.373.7414
	Mail	255 Capitol St NE Ste 501, Salem OR 97310

ELLEN F. ROSENBLUM
Attorney General



FREDERICK M. BOSS
Deputy Attorney General

DEPARTMENT OF JUSTICE
APPELLATE DIVISION

July 23, 2015

Jim Williams
Director, Elections Division
Office of the Secretary of State
141 State Capitol
Salem, OR 97310

RECEIVED
2015 JUL 23 PM 4:29
SECRETARY OF STATE

Re: Proposed Initiative Petition — Low Carbon Fuel Standards Can Only Require Fuel
Blends; Carbon Reduction and Blend Requirements Limited
DOJ File #BT-45-15; Elections Division #2016-045

Dear Mr. Williams:

We have prepared and hereby provide to you a draft ballot title for the above-referenced prospective initiative petition. The proposed measure relates to only requiring fuel blends for low carbon fuel standards, and limiting carbon reduction and blend requirements.

Written comments from the public are due to you within ten business days after your receipt of this draft title. A copy of all written comments provided to you should be forwarded to this office immediately thereafter.

A copy of the draft ballot title is enclosed.

Alicia Thomas
Legal Secretary

AF176678870

Enclosure

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DRAFT BALLOT TITLE

Low carbon fuel standards can only require fuel blends; carbon reduction and blend requirements limited

Result of “Yes” Vote: “Yes” vote provides low carbon fuel standards for reducing greenhouse gas emissions can only require liquid fuel blends; limits permissible blend requirements, carbon reduction requirements.

Result of “No” Vote: “No” vote retains law requiring low carbon fuel standards for liquid, non-liquid transportation fuels to reduce greenhouse gas emissions, requiring rules controlling costs of standards.

Summary: Currently, Environmental Quality Commission must set low carbon fuel standards for reducing average greenhouse gas emissions from gasoline, diesel, substitute transportation fuels, including non-liquid fuels; cost controls required. Measure limits scope of low carbon fuel standards to apply only to liquid fuels, limits potential greenhouse gas emission reductions to reductions achievable by blending low carbon intensity fuel with gasoline, diesel and substitutes; standards cannot reduce carbon intensity more than 5% from 2010 levels. Measure provides that adopted standards cannot require carbon reductions unless necessary low carbon fuel costs no more than the fuel into which it is blended, and is available in sufficient quantities for all fuel importers in Oregon to meet standards. Measure requires modifying existing Oregon Clean Fuels Program. Other provisions.

EXHIBIT D

THE ROMAIN GROUP, LLC LAWYERS & PUBLIC POLICY ADVOCATES

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August 6, 2015

VIA FACSIMILE (503) 373-7414 & Email

Jeanne P. Atkins
Secretary of State
Elections Division
255 Capitol St. N.E., Suite 501
Salem, OR 97310

Re: Written Comments on Draft Ballot Title for Initiative Petition No. 2016-045

Dear Secretary Atkins:

Our office represents Paul Romain, an elector and a person dissatisfied with the Attorney General's draft ballot title for Initiative Petition No. 45. Mr. Romain objects to the Attorney General's draft ballot title on the grounds that the draft ballot title does not substantially comply with ORS 250.035(2).

For the reasons set forth below, we respectfully request that the alternative ballot title caption, statements and summary set forth in this submission be certified in lieu of the Attorney General's draft ballot title.

1. THE DRAFT CAPTION DOES NOT COMPLY WITH ORS 250.035(2)(a).

The draft caption states:

Low carbon fuel standards can only require fuel blends; carbon reduction and blend requirements limited.

ORS 250.035(2)(a) provides that the ballot title caption must contain "not more than 15 words that reasonably identifi[y] the subject matter of the state measure." "The caption is the 'headline' of the ballot; it 'provides the context for the reader's consideration of the other information in the ballot title' and must describe the proposed measure's subject matter accurately." *Towers v. Rosenblum*, 354 Or 125, 129, 310 P3d 1136 (2013) (quoting *Greene v. Kulongoski*, 322 Or 169, 175, 903 P2d 366 (1995)).

The "subject matter" of a measure refers to "the 'actual major effect' of a measure or, if the measure has more than one major effect, all such effects (to the limit of the available words)." *Buehler v. Rosenblum*, 354 Or 318, 323, 311 P3d 882 (2013) (quoting *Whitsett v.*

Kroger, 348 Or 243, 247, 230 P3d 545 (2010)). “The caption must also identify the measure’s subject matter in terms that will not ‘confuse or mislead potential petition signers and voters,’ *Mabon v. Myers*, 332 Or 633, 637, 33 P3d 988 (2001), and it cannot overstate or understate the scope of the legal changes that the measure would enact. *Kain/Waller v. Myers*, 337 Or 36, 40, 93 P3d 62(2004).” *Buehler*, 354 Or at 323.

“A caption may describe accurately the actual major effect of a measure and still not comply with the requirements of the statute if the description is ‘too vague and gives voters no clear picture of what is at stake.’” *Girod v. Kroger*, 351 Or 389, 397, 268 P3d 562 (2011) (quoting *Hunnicut/Stacey v. Myers*, 343 Or 387, 391, 171 P3d 349 (2007)).

In this case, the draft caption for Initiative Petition No. 45 is misleading in stating that it “can only require fuel blends;” the measure limits the low carbon fuel standards to *liquid* fuels. The phrase “carbon reduction and blend requirements limited” is correct, but it is not the “actual major effect,” which is to amend the low carbon fuel standard to eliminate the buying and selling of credits as an alternative and requiring that alternative fuels be commercially available.

For this reason, we suggest the caption should read:

Low carbon fuel standards require liquid fuel blends; eliminates fuel credits; requires commercially available alternatives.

2. THE DRAFT “YES” AND “NO” VOTE STATEMENTS DO NOT COMPLY WITH ORS 250.035(2)(b) AND (c).

The draft “yes” and “no” vote statements read as follows:

Result of “Yes” Vote: “Yes” vote provides low carbon fuel standards for reducing greenhouse gas emissions can only require liquid fuel blends; limits permissible blend requirements, carbon reduction requirements.

Result of “No” Vote: “No” vote retains law requiring low carbon fuel standards for liquid, non-liquid transportation fuels to reduce greenhouse gas emissions, requiring rules controlling costs of standards.

ORS 250.035(2)(b) requires the “yes” vote statement to describe “the result if the state measure is approved” within 25 words. “[T]he result of a proposed measure’s enactment that belongs in the ‘yes’ vote result statement is that outcome that is the most significant and immediate, or that carries the greatest consequence, for the general public. Stated differently, the legislature intended the 25-word ‘yes’ vote result statement to notify petition signers and voters of the result or results of enactment that would have the greatest importance to the people of Oregon.” *Carley v. Myers*, 340 Or 222, 231, 132 P3d 651 (2006) (quoting *Novick/Crew v. Myers*, 337 Or 568, 574, 100 P3d 1064 (2004)).

ORS 250.035(2)(c) requires the “no” vote statement to describe “the result if the state measure is rejected” within 25 words. The “no” vote result statement “should state accurately what voters would retain, under their existing legal or contractual arrangements, if they defeat the measure.” *Carson v. Kroger*, 351 Or 508, 518, 270 P3d 243 (2012) (quoting *Earls v. Myers*, 330 Or 171, 177, 999 P2d 1134 (2000)). “The object is to advise ‘potential voters as to the

choice they are being asked to make.” *Carson*, 351 Or at 518, 270 P3d 243 (quoting *Whitsett v. Kroger*, 348 Or 243, 252, 230 P3d 545 (2010)).

The proposed draft “yes” and “no” vote statements are inaccurate. Stating in the “yes” vote statement that “alternative fuel cost, availability limit permissible requirements” is misleading for the same reason that the caption is misleading: These are not the primary effects of the measure.

The current low carbon fuel standard is premised upon the concept that traditional liquid fuel like gasoline and diesel will not be able to comply with a 10 percent reduction in carbon content by blending anything that will likely become available in the marketplace. Therefore, those who produce and use gasoline and diesel will have to buy carbon credits from those who produce and use alternative fuels like electricity. In other words, it is simply a means of requiring those consumers of gasoline and diesel to pay money for the privilege of using those fuels, and the recipients of that money will be those who produce and use alternatives.

If low carbon-intensity liquid fuel is produced that can be blended into gasoline and diesel, and if it is commercially available at a reasonable cost, those who produce gasoline and diesel will have to blend it. The measure does reduce the carbon intensity reduction standard from 10 percent to 5 percent, but this reflects the likely commercial availability of alternative fuels for blending. As noted above, the 10 percent standard under the existing statute is not realistically achievable during the ten-year time frame and will therefore require importers to buy credits as an alternative to actually reducing the carbon intensity of liquid fuels.

The phrase in the “no” vote statement saying “requiring rules controlling costs of standards” is very misleading to the voter. It implies that there are actual rules that control costs (there are none), and it implies that the proposed measure will not control costs. The current law states that rules should be developed to control costs, but no such rules exist. Sections 1(6)(2)(d), 1(6)(2)(b)(A), 1(6)(2)(c), and 1(6)(4) of the proposed measure explicitly require the EQC to determine the cost and availability of alternative fuels as a condition precedent to phased reduction in carbon intensity, and establish a methodology to do so. Only actual existing fuels can be used to comply with the program, those fuels must have a reasonable cost related to the cost of the fuel into which it is blended, and the ability to buy your way out of compliance by purchasing credits is eliminated. The buying and selling of carbon credits is the major cost factor in the low carbon fuel standard, and the debate is over just how much the price of gasoline and diesel will increase, not whether or not it will increase. The elimination of the requirement to buy credits as an alternative to compliance with the low carbon fuel standard is the most significant effect of the proposed measure.

Accordingly, the “yes” and “no” vote statements should instead read as follows:

Result of “Yes” Vote: “Yes” vote provides low carbon fuel standards for reducing greenhouse gas emissions by blending commercially available liquid fuel; eliminates compliance by obtaining, selling fuel credits.

Result of “No” Vote: “No” vote retains law requiring low carbon fuel standards, allowing for compliance by blending fuel or purchasing carbon credits from alternative fuel providers and users.

3. THE DRAFT SUMMARY DOES NOT COMPLY WITH ORS 250.035(2)(d).

The draft summary states:

Summary: Currently, Environmental Quality Commission must set low carbon fuel standards for reducing average greenhouse gas emissions from gasoline, diesel, and substitute transportation fuels, including non-liquid fuels; cost controls required. Measure limits scope of low carbon fuel standards to apply only to liquid fuels, limits potential greenhouse gas emission reductions to those reductions that are achievable by blending low carbon intensity fuels with gasoline, diesel and liquid substitutes; standards cannot reduce carbon intensity by more than 5% from 2010 levels. Measure provides that adopted standards cannot require carbon reductions unless necessary low carbon fuel costs no more than the fuel into which it is blended, and is available in sufficient quantities for all fuel importers in Oregon to meet the standards. Measure requires modifying existing Oregon Clean Fuels Program. Other provisions.

ORS 250.035(2)(d) requires that a ballot title contain “[a] concise and impartial statement of not more than 125 words summarizing the state measure and its major effect.” The purpose of an initiative ballot summary “is to help voters understand what will happen if the measure is approved, and ...[it] should ...be worded so that voters will understand the breadth of its impact.” *Wyant v. Myers*, 336 O 128, 139, 81 P3d 692 (2003) (quoting *Fred Meyer, Inc. v. Roberts*, 308 Or 169, 175, 777 P2d 406 (1989)).

In *Novick/Crew*, the Oregon Supreme Court described the “major effect” requirement as follows:

Logically, those would include additional important consequences or details that the result statement does not convey and helpful contextual information about the impact of the proposed measure on existing law.

337 Or at 574, 100 P3d 1064.

In order to fully understand what the proposed Initiative measure does, you have to understand exactly what the current law requires. The statement in the draft summary that the “[m]easure requires modifying existing Oregon Clean Fuels Program” is incorrect. The existing statute never refers to an “Oregon Clean Fuels Program.” That phrase is a political concoction of the supporters of the existing program that was adopted by the Environmental Quality Commission as a way to make the low carbon fuel standard more palatable to the voters. The program is a “low carbon fuel standard,” and to call it anything else is simply politicking and is far from impartial. Any description of the existing law should use the language that is in the law, not some political phrase developed by a public relations firm.

The low carbon fuel standard law requires the Environmental Quality Commission to determine the carbon intensity of gasoline, diesel and other fuels used as substitutes for gasoline and diesel. Once that carbon intensity of the particular fuel is determined, only gasoline and diesel have to reduce that carbon intensity by 10 percent over a ten year period. Contrary to the implication in the first line of the draft ballot title, there is no requirement that a fuel like propane or electricity reduce its carbon intensity by any number. Gasoline and diesel can reduce their carbon intensity numbers by blending into that fuel other fuels, like ethanol and biodiesel, which have a lower carbon intensity number. However, there is a limit on just how much ethanol and

biodiesel can be blended into gasoline and biodiesel. Depending upon the carbon intensity number of the ethanol or biodiesel that is available to blend, it soon becomes impossible for anyone producing or using gasoline or diesel to comply with the program simply by blending fuel.

As an alternative to making lower carbon intensity fuel, the Environmental Quality Commission has given the gasoline and diesel producers and users an expensive way out. All fuels that are lower in carbon intensity than gasoline and diesel will generate carbon credits, and these credits can be sold to those who produce gasoline and diesel. Those credits, which do nothing to reduce the carbon intensity of gasoline and diesel, can be used by the producers to comply with the program. In other words, you do not have to make a lower carbon intensity fuel; you simply have to have enough money to transfer to those who are producing or using fuel like propane or electricity. If the government collected this money from gasoline and diesel producers and transferred it to those who produce propane or electricity, it would be called a tax. Since it is a mandate to produce, pay or stop selling, it avoids the consequences of a fuel tax.

A simple description of the low carbon fuel standard is that it requires gasoline and diesel producers to do something with their fuel that is impossible with existing alternatives. Once it becomes impossible to comply, those producers have to subsidize those who produce and use alternative fuels like propane and electricity, or go out of business. The proposed initiative simply removes the "impossibility" alternative. It requires carbon reduction when commercially available alternative fuel exists, it removes the mandated subsidization of other alternative fuels by those who produce and use gasoline and diesel, and sets a realistically achievable carbon intensity reduction for liquid fuels at a maximum of 5 percent.

For these reasons, we propose the following summary.

Summary: Current law requires Environmental Quality Commission to reduce carbon intensity of transportation fuels by 10% over 10 years. Requires importers of gasoline and diesel to reduce the carbon intensity of fuel by blending lower carbon intensity fuels like ethanol and biodiesel. If lower carbon intensity fuels are not available, importers must buy credits from producers and users of alternative fuels like electricity and propane, or stop selling fuel. This measure allows importers to continue selling gasoline and diesel if there is not enough commercially available lower carbon intensity fuel to blend; eliminates the alternative requirement to buy credits; limits the standard to liquid fuels; prohibits EQC from requiring more than 10% ethanol, 5% biodiesel blends. Phased reductions of 5% tied to fuel availability.

Thank you for your consideration of these comments.

The Romain Group, LLC,
by Paul R. Romain
