

ELLEN F. ROSENBLUM
Attorney General



FILED September 28, 2015 04:34 PM
Appellate Court Records

FREDERICK M. BOSS
Deputy Attorney General

DEPARTMENT OF JUSTICE
APPELLATE DIVISION

September 28, 2015

The Honorable Thomas A. Balmer
Chief Justice, Oregon Supreme Court
Supreme Court Building
1163 State Street
Salem, OR 97310

Re: *Paul R. Romain v. Ellen F. Rosenblum*
SC S063533

Dear Chief Justice Balmer:

Petitioner Paul Romain has filed a ballot title challenge in the above-referenced matters. Pursuant to ORS 250.067(4), the Secretary of State is required to file with the court the written comments submitted in response to the draft ballot title. Those written comments, under the cover of Elections Division Compliance Specialist Lydia Plukchi's letter, are enclosed for filing with the court. Pursuant to ORAP 11.30(7), we also have enclosed for filing with the court the draft and certified ballot titles, together with their respective cover letters.

Sincerely,

/s/ Jeff J. Payne

Jeff J. Payne
Senior Assistant Attorney General
jeff.j.payne@doj.state.or.us

JJP:aft/6816529

cc: Paul R. Romain
Lila Leathers-Fitz/without encl.
Charles Ireland/without encl.

IN THE SUPREME COURT OF THE STATE OF OREGON

PAUL R. ROMAIN,

Petitioner,

v.

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

Respondent.

Supreme Court No. S063533

RESPONDENT'S ANSWERING
MEMORANDUM TO PETITION TO
REVIEW BALLOT TITLE RE:
INITIATIVE PETITION NO. 47

Petitioner Paul Romain challenges the certified ballot title for Initiative Petition 47 (2015) (IP 47). Petitioner Romain, who submitted comments on the draft ballot title, challenges all parts of the certified ballot title. As authorized by ORAP 11.30(6), the Attorney General submits this Answering Memorandum to the petition for review.

This court reviews to decide only whether the Attorney General's certified ballot title is in "substantial compliance" with the statutory requirements. ORS 250.085(5). On review, this court "examine[s] the proposed ballot title against the statutory requirements * * * [and is] not concerned with whether petitioners' proposed titles may be better or even whether [the court] could devise a better one[.]" *Burbidge v. Paulus*, 289 Or 35, 38, 609 P2d 815 (1980).¹ Because the ballot title substantially complies with the requirements of ORS 250.035, this court should certify it without modification.

¹ Petitioner Romain has included his own proposed ballot title and "seeks certification" from this court of that alternative title.

A. IP 47's changes to current law

Before discussing petitioner Romain's challenges to the certified ballot title, the state sets out current law and how IP #47, if enacted, would change it.

1. Or Laws 2009, ch 754

In 2009 the Oregon legislature enacted Oregon Laws 2009, Chapter 754. The new law gave the Environmental Quality Commission ("EQC") the authority to establish low carbon fuel standards to reduce greenhouse gas emissions, set limits on the scope of the EQC's rulemaking authority and imposed certain requirements in the rulemaking. The law defined "greenhouse gas" and "low carbon fuel standards." Or Laws 2009, ch 754 § 6(1)(a), (b).

The law authorized the EQC to adopt rules for "low carbon fuel standards for gasoline, diesel and fuels used as substitutes for gasoline or diesel." Or Laws 2009, ch 754 § 6(2)(a). Before adopting such rules, the EQC was required to consider low carbon fuel standards of other states, including but not limited to Washington. Or Laws 2009, ch 754 § 6(2)(c). To mitigate the cost of complying with the standards, the EQC was required to provide exemptions and deferrals. Or Laws 2009, ch 754 § 6(2)(d). In adopting the rules, the EQC was required to evaluate a number of factors, including:

- Safety, feasibility, net reduction of greenhouse gas emissions and cost-effectiveness;

- Potential adverse impacts to public health and the environment;
- Flexible implementation approaches to minimize the cost of complying with the rules;
- Technical and economic studies of greenhouse gas emission reduction measures in other states.

Or Laws 2009, ch 754 § 6(3)(a)-(d). Exempted from the law are farm vehicles, farm tractors, other specified agricultural vehicles, and logging trucks. Or Laws 2009, ch 754 § 6(4).

The law authorizes the EQC to adopt standards including not limited to:

- A schedule to phase in the rules by 2020 so as to reduce the amount of greenhouse gas emissions from the fuels to 10% below 2010 levels;
- Standards for greenhouse gas emissions attributable to fuels through their lifecycles, including, but not limited to, emissions from production, storage, transportation and combustion of fuels and from changes in land use associated with the fuels;
- Allow use of all types of low carbon fuels to meet the standards, including, but not limited to, biofuels, biogas, compressed natural gas, gasoline, diesel, hydrogen and electricity;
- Deferrals from the low carbon fuel standards as necessary to ensure adequate fuel supplies;
- Exemptions for liquefied petroleum gas and other alternative fuels used in volumes below thresholds established by the EQC;

- Standards, specifications and testing requirements and other measures as needed to ensure the quality of fuels produced pursuant to the low carbon fuels standards;
- Adjustments to the amounts of greenhouse gas emissions per unit of fuel energy assigned to fuels for combustion and drive train efficiency.

Or Law 2009, ch 754 § 6(2)(b)(a)-(g). Section 6 took effect on July 1, 2011.

The law allowed the EQC to adopt rules prior to that date that would take effect on that date. Or Laws 2009, ch 764 §7. The law contained a sunset clause that would repeal § 6 on December 31, 2015. Or Laws 2009, ch 754 § 8. Pursuant to the new law, the EQC adopted an extensive set of rules for low carbon fuel standards, currently codified at OAR 340-253-0000, *et seq.*

2. Or Laws 2015, ch 4

In 2015, Senate Bill 324 amended the 2009 law. It became effective on March 12, 2015, and has been designated as Oregon Laws 2015, ch 4. Section 1 of SB 324 repeals the sunset clause of the 2009 law. Or Laws 2015, ch 4 § 1. SB 324, Section 3 made numerous amendments to the 2009 law. Specifically, it:

- Provides that the EQC “shall” adopt low carbon fuel standards (replacing “may” in the 2009 law). Or Laws 2015, ch 4 § 3(2)(a).
- Extends the deadline to obtain a reduction in low carbon fuel emissions to 10% below 2010 levels from 2020 to 2025. Or Laws 2015, ch 4 § 3(b)(A).

- Removes the provision in the 2009 law allowing the EQC to issue exemptions and deferrals to the rules. Or Laws 2015, ch 4 § 3(2)(d).
- Requires the EQC to adopt rules for managing and containing the costs of compliance by including provisions that ensure the ability to obtain and trade credits for fuels used as substitutes for gasoline or diesel. Or Laws 2015, ch 4 § 3(2)(d).
- Requires the EQC to exempt from the standards any person importing less than 500,000 gallons of diesel or gasoline in any calendar year. Or Laws 2015, ch 4 § 3(2)(e).²
- Prohibits consideration of biodiesel as an “alternate fuel” unless it meets certain requirements. Or Laws 2015, ch 4 § 3(f).
- Modifies the non-exclusive list of low carbon fuels that may be used to meet the low carbon fuel standards. Or Laws 2015, ch 4 § 3(2)(b)(C).
- Modifies exemptions to the 2009 law, to clarify that it applies to fuel for certain vehicles; expands the list of exempt vehicles; requires the EQC to adopt rules setting forth qualifications for those exemptions. Or Laws 2015, ch 4 § 4(a), (b).

3. IP 47’s changes to the law

IP 47 is straightforward. It provides:

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

(Underlining in original). Thus, if passed, IP 47 repeals in its entirety the portion of the statute that requires the EQC to adopt rules pertaining to low

² The current rules allowed for an exemption of 250,000 gallons. OAR 340-253-0100(1)(b); OAR 350-253-0040(51).

carbon standards for the reduction of greenhouse gases. A direct result of the repeal is that the rules adopted by the EQC in 2011 would be invalidated.

B. The caption substantially complies with ORS 250.035(2)(a)

The Attorney General's caption substantially complies with ORS 250.035(2)(a), which requires a caption of up to 15 words that "reasonably identifies the [proposed measure's] subject matter." The caption reads:

**Repeals law requiring adoption of standards for low carbon
fuel to reduce greenhouse gas emissions**

To determine whether the caption reasonably identify the measure's subject matter this court first examines the text of the initiative petition and the changes it makes to existing law, and then examines the words of the caption. *Kain v. Meyers*, 337 Or 36, 41, 93 P3d 62 (2004). "Subject matter," 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). *See, e.g., Terhune v. Myers*, 342 Or 475, 480, 154 P3d 1284 (2007) (so holding). The caption must "inform potential petition signers and voters of the sweep of the measure." *Id.* at 479. It must identify the "principal effect" or "actual major effect" of the proposed measure, *id.*, without being inaccurate or underinclusive. *Hunnicut v. Myers*, 342 Or 491, 495, 155 P3d 870 (2007).

Petitioner Romain asserts that the caption is noncompliant in that it gives potential voters the "impression" that approving IP 47 will eliminate the sole

means of reducing greenhouse gases. In his view, there are “many ways to reduce greenhouse gas emissions” besides low carbon fuels and, thus, the caption will “confuse or mislead” voters. He also asserts that implementing low carbon fuel standards “will not actually be effective in reducing greenhouse gases,” and, as a result, the caption is “neither accurate nor impartial.”

To the contrary, the caption neither states nor implies that adopting low carbon fuel standards is the sole means of reducing greenhouse gases. Moreover, petitioner Romain’s opinion that low carbon fuels are ineffective in reducing greenhouse gases does not render the caption inaccurate. Discussion of the efficacy of such fuels in reducing greenhouse gases is best left to the voting process which gives supporters and opponents the opportunity to debate that issue. Such a discussion is not the function of the caption.

C. The “Yes” and “No” vote result statement substantially comply with ORS 250.035(2)(b) and ORS 250.035(2)(c).

The “Yes” vote result statement substantially complies with ORS 250.035(2)(b), which requires a “simple and understandable statement of not more than 25 words that describes the result if the state measure is approved.”

The Attorney General’s “Yes” vote result statement reads:

Result of “Yes” Vote: “Yes” vote repeals law requiring Environmental Quality Commission to adopt rules for low carbon fuel standards to reduce greenhouse gas emissions; invalidates rules already adopted.

Likewise, the Attorney General’s certified “No” vote result statement substantially complies with ORS 250.035(2)(c), which also requires a “simple and understandable statement of not more than 25 words that describes the result if the state measure is rejected.” The “No” vote result statement reads:

Result of “No” Vote: “No” vote retains law requiring Environmental Quality Commission to adopt rules for low carbon fuel standards to reduce greenhouse gas emissions; leaves current rules intact.

Petitioner Romain, for largely the same reasons explained above with respect to the caption, asserts that the results statements are noncompliant. He maintains that there is “considerable doubt” as to whether low carbon fuels have “any effect on greenhouse emissions.” He also asserts that allowing producers of fuels who cannot meet the required reduction in carbon content to buy carbon credits from others will result in “no carbon reduction whatsoever.” In essence, petitioner Romain disagrees with the policy decisions behind the enactment of the law that authorized the EQC to establish low carbon fuel standards.

However, as with the caption, petitioner Romain’s contentions do not establish that the vote results statements are noncompliant. The vote results statements do not imply that use of low carbon fuels is the only means for reducing greenhouse gases, nor are they confusing to potential voters. As noted, IP 47 is straightforward— if enacted it would repeal the statute granting authority to the EQC to adopt rules pertaining to low carbon standards for the

reduction of greenhouse gases. The vote results statements are simple and understandable statements of the effect of IP 47 if passed or rejected.

D. The summary substantially complies with ORS 250.035(2)(d).

The Attorney General's summary substantially complies with ORS 250.035(2)(d), which requires "[a] concise and impartial statement of not more than 125 words summarizing the measure and its major effect." The Attorney General's summary states:

Summary: Current law requires Environmental Quality Commission (EQC) to adopt low carbon standards for gasoline, diesel, and substitute fuels. In adopting rules, EQC must evaluate the reduction of greenhouse gases, cost-effectiveness, possible adverse effects on public health, ways to minimize costs of complying with fuel standards; EQC must adopt rules for managing costs of complying with fuel standards. EQC may phase in rules to achieve 10% reduction in greenhouse gas emissions below 2010 levels, and may adopt rules allowing all types of low carbon fuels; fuels used in certain vehicles exempt from standards. Initiative repeals law requiring EQC to adopt rules for low carbon fuel standards to reduce greenhouse gas emissions. Repeal invalidates rules for fuel standards already adopted by EQC under current law.

Petitioner Romain challenges the summary for the same reasons he challenges the caption and results statements. He contends that current law has resulted in an "impossible program" which "do[es] nothing to reduce the carbon intensity of gasoline and diesel[.]" He also contends that the portion of the program which allows fuel producers to purchase carbon credits is nothing more than a sham tax on the producers. The crux of his contention is that the

statute is poorly designed and IP 47, if enacted, would rectify these shortcomings by doing away with them. In petitioner Romain's view, because the summary does not describe current law as an "impossible program" it is "not impartial, nor does it give the voter an accurate picture of the existing law."

This court should reject petitioner Romain's assertions for the same reasons set out above. That is, debating the merits of the current program or the merits of repealing it is the function of the voting process, not the summary. Because the summary is a concise and impartial statement that summarizes the measure and its major effect, it complies with ORS 250.035(2)(d).

F. Conclusion

This court should certify the ballot title without modification.

Respectfully submitted,

ELLEN F. ROSENBLUM #753239
Attorney General
PAUL L. SMITH #001870
Deputy Solicitor General

/s/ Jeff J. Payne

JEFF J. PAYNE #050102
Senior Assistant Attorney General
jeff.j.payne@doj.state.or.us

Attorneys for Respondent
Ellen F. Rosenblum, Attorney
General, State of Oregon

Thomas Alicia F

From: PLUKCHI Lydia <lydia.plukchi@state.or.us>
Sent: Wednesday, September 09, 2015 11:08 AM
To: THOMAS Alicia F
Subject: Initiative Petition #45, #46 and #47 Appealed
Attachments: 045dbt.pdf; 045cbt.pdf; 045cmts.pdf; 046cbt.pdf; 046cmts.pdf; 046dbt.pdf; 047cbt.pdf; 047cmts.pdf; 047dbt.pdf

OFFICE OF THE SECRETARY OF STATE

JEANNE P. ATKINS
SECRETARY OF STATE

ROBERT TAYLOR
DEPUTY SECRETARY OF STATE



ELECTIONS DIVISION

JIM WILLIAMS
DIRECTOR

255 CAPITOL STREET NE, SUITE 501
SALEM, OREGON 97310-0722
(503) 986-1518

September 9, 2015

The Hon. Ellen Rosenblum, Attorney General
Anna Joyce, Solicitor General
Dept. of Justice, Appellate Division
400 Justice Building
Salem, OR 97310

Via Email

Dear Ms. Joyce:

In accordance with ORS 250.067(4) please file the attached comments with the court as part of the record in the ballot title challenge filed by [Paul Romain](#) on Initiative Petition **2016-045**, **2016-046**, and **2016-047**. [The appeal notice was filed after the deadline](#). Also attached are the draft and certified ballot titles with their respective transmittal letters.

Sincerely,

LYDIA PLUKCHI
Compliance Specialist

JEANNE P. ATKINS
SECRETARY OF STATE
ROBERT TAYLOR
DEPUTY SECRETARY OF STATE



JIM WILLIAMS
DIRECTOR
255 CAPITOL STREET NE, SUITE 501
SALEM, OREGON 97310-0722
(503) 986-1518

INITIATIVE PETITION

TO: All Interested Parties
FROM: Lydia Plukchi, Compliance Specialist
DATE: July 23, 2015
SUBJECT: Initiative Petition **2016-047** Draft Ballot Title

The Elections Division received a draft ballot title from the Attorney General on July 23, 2015, for Initiative Petition **2016-047**, proposed for the November 8, 2016, General Election.

Caption

Repeals law requiring adoption of standards for low carbon fuel to reduce greenhouse gas emissions

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

RECEIVED
2015 JUL 23 PM 4 30
SECRETARY OF STATE

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

Re: Proposed Initiative Petition — Repeals Law Requiring Adoption of Standards for Low Carbon Fuel to Reduce Greenhouse Gas Emissions
DOJ File #BT-47-15; Elections Division #2016-047

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 repealing the law requiring the adoption of standards for low carbon fuel to reduce greenhouse gas emissions.

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

AFT/6678889

Enclosure

Paul Romain
707 SW Washington St., Ste. 927
Portland, OR 97205

Lila Leathers-Fitz
255 Depot Street
Fairview, OR 97024

Charles E. Ireland, Jr.
P.O. Box 815
Myrtle Creek, OR 97457

DRAFT BALLOT TITLE

Repeals law requiring adoption of standards for low carbon fuel to reduce greenhouse gas emissions

Result of “Yes” Vote: “Yes” vote repeals law requiring Environmental Quality Commission to adopt rules for low carbon fuel standards to reduce greenhouse gas emissions; invalidates rules already adopted.

Result of “No” Vote: “No” vote retains law requiring Environmental Quality Commission to adopt rules for low carbon fuel standards to reduce greenhouse gas emissions; leaves current rules intact.

Summary: Repeals law requiring Environmental Quality Commission (EQC) to adopt rules for low carbon fuel standards to reduce greenhouse gas emissions. Repeal would invalidate rules for fuel standards already adopted by EQC under current law. Current law requires EQC to adopt low carbon standards for gasoline, diesel, and substitute fuels. In adopting rules EQC must evaluate the reduction of greenhouse gases, cost-effectiveness, possible adverse effects on public health, ways to minimize costs of complying with fuel standards; EQC must adopt rules for managing costs of complying with fuel standards. EQC may phase in rules to achieve 10% reduction in greenhouse gas emissions below 2010 level, and may adopt rules allowing all types of low carbon fuels; fuels used in certain vehicles exempt from standards.

RECEIVED
2015 JUL 23 PM 4 31
SECRETARY OF STATE

THE ROMAIN GROUP, LLC

LAWYERS & PUBLIC POLICY ADVOCATES

UNION BANK TOWER
707 S.W. WASHINGTON STREET, SUITE 927
PORTLAND, OREGON 97205
TELEPHONE: 503-226-8090
FAX: 503-227-0351

PAUL R ROMAIN
PROMAIN@THEROMAINGROUP.COM
DANELLE ROMAIN
DROMAIN@THEROMAINGROUP.COM

RECEIVED
2015 AUG 6 PM 1 45
SECRETARY OF STATE

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. 2016-047

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.47. 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:

Repeals law requiring adoption of standards for low carbon fuel to reduce greenhouse gas emissions

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).” *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 *Hunnicutti/Stacey v. Myers*, 343 Or 387, 391, 171 P3d 349 (2007)).

In this case, the draft caption for Initiative Petition No. 47 is not sufficient in that it gives the impression to the potential voter that the measure will eliminate the means to reduce greenhouse gas emissions. There are many ways to reduce greenhouse gas emission other than a low carbon fuel standard. The draft caption will tend to confuse the voter. The proposed measure simply repeals the authority of the Environmental Quality Commission to adopt one means of possibly reducing greenhouse gas. The caption should reflect this simple message.

In addition, as explained in greater detail below, one of the arguments against the low carbon fuel standard is that it will not actually be effective in reducing greenhouse gas emissions. The draft caption at the very least implies that the low carbon fuel standard will reduce greenhouse gas emissions, which is debatable and creates the misleading implication that the vote for the measure is a vote against reducing greenhouse gas emissions. The draft caption is neither accurate nor impartial within the meaning of ORS 250.032.

For these reasons, we suggest the caption should read:

Repeals the authority of the Environmental Quality Commission to adopt a low carbon fuel standard

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 repeals law requiring Environmental Quality Commission to adopt rules for low carbon fuel standards to reduce greenhouse gas emissions; invalidates rules already adopted.

Result of “No” Vote: “No” vote retains law requiring Environmental Quality Commission to adopt rules for low carbon fuel standards to reduce greenhouse gas emissions; leaves current rules intact.

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. Myerrs*, 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 confusing in the same manner that the draft caption is confusing to the voter. The two vote statements imply that you are eliminating the means to reduce greenhouse gas emissions. In fact, there is considerable doubt whether or not a low carbon fuel standard has any effect on greenhouse gas emissions. By leaving open the ability to buy carbon credits to comply with the standards, the same amount of carbon can exist. The standard simply becomes a way to transfer money from one fuel source to another, with no carbon reduction what so ever.

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

Result of “Yes” Vote: “Yes” vote repeals the statutory authority of the Environmental Quality Commission (EQC) to adopt a low carbon fuel standard.

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: Repeals law requiring Environmental Quality Commission (EQC) to adopt rules for low carbon fuel standards to reduce greenhouse gas emissions. Repeal would invalidate rules for fuel standards already adopted by EQC under current law. Current law requires EQC to adopt low carbon fuel standards for gasoline, diesel, and substitute fuels. In adopting rules EQC must evaluate the reduction of greenhouse gases, cost-effectiveness, possible adverse effects on public health, ways to minimize costs of complying with fuel standards; EQC must adopt rules for managing costs of complying with fuel standards. EQC may phase in rules to achieve 10% reduction in greenhouse gas emissions below 2010 level, and may adopt rules allowing all types of low carbon fuels; fuels used in certain vehicles exempt from standards.

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)).

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.

The current 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. 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 repeals this impossible program. The summary should describe the current law to be repealed in simple, accurate terms.

For these reasons, we propose the following summary.

Summary: Current law gives the Environmental Quality Commission (EQC) the authority to reduce the carbon intensity of transportation fuels by 10% over 10 years. Requires importers of gasoline and diesel reduce the carbon intensity of the fuel by blending lower carbon intensity fuels like ethanol and biodiesel. When there are no lower carbon intensity alternative fuels available to blend, importers have to buy credits from producers and users of other alternative fuels

like electricity, natural gas and propane, or stop selling gasoline and diesel. This measure repeals the authority of the EQC to adopt a low carbon fuel standard.

Thank you for your consideration of these comments.

By Paul R. Romain

STOLL BERNE

STOLL STOLL BERNE LOKTING & SHLACHTER P.C. LAWYERS

Steven C. Berman
sberman@stollberne.com

August 6, 2015

VIA EMAIL

Jeanne Atkins
Secretary of State
Elections Division
255 Capital Street NE, Suite 501
Salem, OR 97310

RECEIVED
2015 AUG 6 PM 4 16
SECRETARY OF STATE

Re: Initiative Petition No. 47 for the General Election of November 8, 2016

Dear Secretary Atkins:

I represent Nik Blosser regarding the ballot title for Initiative Petition No. 47 for the General Election of November 8, 2016 (the "Initiative"). Mr. Blosser is an elector in the State of Oregon. This letter is written in response to your office's press release, dated July 23, 2015, which invites comments on the draft ballot title for the Initiative.

Mr. Blosser respectfully submits that the results statements and summary for the draft ballot title do not meet the requirements of ORS 250.035(2)(b), (c) and (d). Mr. Blosser requests that the Attorney General certify a ballot title that corrects those deficiencies and substantially complies with the statutory requirements.

I. An Overview of Initiative Petition No. 47

The Initiative is the third of three Initiatives filed by the same chief petitioners this cycle that attacks Oregon's recently amended Clean Fuels law. Mr. Blosser also is providing comments regarding the draft ballot titles for the prior two initiatives, Initiative Petitions Nos. 45 and 46. Unlike the prior two initiatives, which substantially revise Oregon's Clean Fuel program, this Initiative repeals it in its entirety.

Mr. Blosser provides the following background regarding Oregon's Clean Fuels program, to place the Initiative and its impact on current law in context.

A. House Bill 2186 (2009)

In 2009, the Oregon legislature passed House Bill 2186. That bill was signed into law on July 22, 2009, and designated as Oregon Laws 2009, Chapter 754.

The 2009 Clean Fuels law provided the Environmental Quality Commission ("EQC") with authority to adopt rules to establish low carbon fuel standards for gasoline, diesel and fuel

{SSBLS Main Documents/8587/004/00531918-1 }

209 SW OAK STREET, SUITE 500 PORTLAND, OR 97204 TEL (503) 227-1600 FAX (503) 227-6840

alternatives for gasoline and diesel. Or Laws 2009, ch 754, § 6(2)(a). Those standards included, but were not limited to:

- A schedule to phase in a reduction in the average amount of greenhouse gas emissions to 10% below 2010 levels by the year 2020. Or Laws 2009, ch 754, § 6(2)(b)(A).
- Standards for greenhouse gas emissions attributable to fuels throughout their lifecycles, including, but not limited to, emissions from production, storage, transportation and combustion of fuels and from changes in land use associated with fuels. Or Laws 2009, ch 754, § 6(2)(b)(B).
- Provisions allowing the use of “all types of low carbon fuels” to meet the low carbon fuel standards, including (but not limited to) biofuels, biogas, compressed natural gas, gasoline, diesel, hydrogen and electricity. Or Laws 2009, ch 754, § 6(2)(b)(C).
- Provisions for deferrals from the low carbon fuel standards, as necessary to ensure adequate fuel supplies. Or Laws 2009, ch 754, § 6(2)(b)(D).
- Exemptions for liquefied petroleum gas and other fuel alternatives used in volumes below thresholds established by the EQC. Or Laws 2009, ch 754, § 6(2)(b)(E).
- Standards, specifications and testing requirements and other measures, as needed, to ensure the quality of fuels produced pursuant to the low carbon fuel standards. Or Laws 2009, ch 754, § 6(2)(b)(F).
- Adjustments to the amounts of greenhouse gas emissions assigned to fuels for combustion and drive train efficiency. Or Laws 2009, ch 754, § 6(2)(b)(G).

The 2009 Clean Fuels law required the EQC to consider low carbon fuel standards from other states, including but not limited to Washington, before the EQC adopted low carbon fuel standards for Oregon. Or Laws 2009, ch 754 § 6(2)(c). The 2009 Clean Fuels law also required the EQC to provide exemptions and deferrals to the low carbon fuel standards, to mitigate the costs of compliance with those standards. Mitigation would be based on a 12-month rolling average of the price of gasoline or diesel in Arizona, Nevada, Oregon and Washington. Or Laws 2009, ch 754, § 6(2)(d). Finally, the 2009 Clean Fuels law required the EQC to evaluate a series of factors in adopting rules, including: safety; feasibility; net reduction of greenhouse gas emissions; cost-effectiveness; potential adverse impacts to public health and the environment (including, but not limited to air and water quality, and waste generation and disposal); minimizing costs of compliance; and technical and economic studies of greenhouse gas emissions reduction measures in other states. Or Laws 2009, ch 754, § 6(3). Exempted from the 2009 Clean Fuels law were: tractors, farm vehicles and certain other vehicles used in agriculture; and, motor trucks used primarily to transport logs. Or Laws 2009, ch 754, § 6(4).

Section 6 of HB 2186 (2009) specifically incorporated the definition of “greenhouse gas” in ORS 468A.210. Or Laws 2009, ch 754, § 6(1)(a). Under that definition, “greenhouse gas” means “any gas that contributes to anthropogenic global warming including, but not limited to, carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulfur

hexafluoride.” ORS 468A.210(2). HB 2186 (2009) defined “low carbon fuel standards” as “standards for the reduction of greenhouse gas emissions, on average, per unit of fuel energy.” Or Laws 2009, ch 754, § 6(1)(b).

The effective date for section 6 of the 2009 Clean Fuels law was July 1, 2011. However, the law allowed the EQC to adopt rules before July 1, 2011 to take effect on July 1, 2011. Or Laws 2009, ch 754, § 7. Section 6 had a sunset provision. Under HB 2186 (2009), section 6 would be repealed on December 31, 2015. Or Laws 2009, ch 754, § 8.

In summary, the 2009 Clean Fuels law provided the EQC with the authority to adopt low carbon fuel standards to reduce greenhouse gas emissions. The bill set certain requirements and limits on the scope of EQC’s rulemaking authority. The EQC has enacted rules adopting Oregon’s Clean Fuels program, pursuant to the authority granted by the 2009 law. Those rules are codified at OAR 340-253-0000, *et seq.*

B. Senate Bill 324 (2015)

The 2015 Oregon legislature amended the 2009 Clean Fuels law with Senate Bill 324. That bill was signed by the Governor and became effective on March 12, 2015. It has been designated as Oregon Laws 2015, Chapter 4.

Section 1 of the 2015 Clean Fuels law repeals the sunset provisions of the 2009 Clean Fuels law. Or Laws 2015, ch 4, § 1. Section 2 requires codification of the operative provisions the 2009 Clean Fuels law – Section 6 of HB 2186 (2009) – as part of Oregon Revised Statutes, chapter 468A. Or Laws 2015, ch 4, § 2.

Section 3 of the 2015 Clean Fuels law contains multiple amendments to Section 6 of HB 2186 (2009). The most significant changes to the Clean Fuels program made by the 2015 enactment are:

- Making the low carbon fuel standards in Oregon’s Clean Fuels law mandatory, rather than permissive. Or Laws 2015, ch 4, § 3(2)(a).
- Extending by five years, from 2020 to 2025, “or by later date if the commission determines that an extension is appropriate to implement the standards,” the deadline to obtain a reduction in low carbon fuel emissions to 10% below 2010 levels. Or Laws 2015, ch 4, § 3 (2)(b)(A).
- Removing the provision of the 2009 law allowing the EQC to issue exemptions and deferrals based on a 12-month rolling average price of gasoline and diesel in four states (Oregon, Arizona, Nevada and Washington). Or Laws 2015, ch 4, § 3(2)(d).
- Adding a cost containment requirement that the EQC adopt rules to manage and contain costs of compliance with the required low carbon fuel standards, including (but not limited to) ensuring the ability to obtain and trade credits for fuels used as substitutes for gasoline or diesel. Or Laws 2015, ch 4, § 3(2)(d).

- Requiring the commission to exempt from the low carbon fuel standards any importer of less than 500,000 total gallons of diesel or gasoline in each calendar year. Or Laws 2015, ch 4, § 3(2)(e). This was an increase from the 250,000 total gallon exemption established by rule. OAR 340-253-0100(1)(b); OAR 340-253-0040(51).
- Prohibiting biodiesel from being considered an “alternative fuel” under the Clean Fuels program unless it meets certain requirements. Or Laws 2015, ch 4, § 3(f).

Section 3 of the 2015 Clean Fuels law also:

- Modifies the non-exclusive list of low carbon fuels that may be used to meet the low carbon fuel standards. Or Laws 2015, ch 4, § 3(2)(b)(C).
- Modifies the exemptions in the 2009 law, to clarify that it applies to fuel for certain vehicles, expands the list of vehicles, and requires the EQC to adopt rules setting forth qualifications for those exemptions. Or Laws 2015, ch 4, § 3(4).

Section 4 of the 2015 Clean Fuels law amends the provision of the 2009 Clean Fuels law requiring the EQC to report to the legislature on the status of Oregon’s Clean Fuels law. Section 5 is an emergency clause.

Following the passage of SB 324 (2015), Oregon’s Clean Fuels law currently:

- Requires the EQC to adopt rules to reduce the average amount of greenhouse gas emissions from transportation fuels to 10% below 2010 levels by 2025 (or later, if necessary).
- Allows for a wide variety of low carbon alternative fuels, including liquefied petroleum gas, to meet the Clean Fuels standards.
- Excludes biodiesel as an “alternative fuel” under the Clean Fuels standards, unless it meets certain fuel quality requirements.
- Mandates that the EQC take cost containment into consideration in adopting the rules, including providing a means for trading credits for diesel and gasoline substitutes.

C. The Initiative

Initiative Petition No. 47 repeals the operative provision of Oregon’s Clean Fuels law. The Initiative contains one section. It provides, in its entirety:

“Section 6, chapter 754, Oregon Laws 2009, as amended by Section 3, chapter 4, Oregon laws 2015, is repealed.”

II. The Draft Ballot Title

A. The Caption

ORS 250.035(2)(a) provides that a ballot title must contain a “caption of not more than 15 words that reasonably identifies the subject matter of the state measure.” The caption must “state or describe the proposed measure’s subject matter accurately, and in terms that will not confuse or mislead potential petition signers and voters.” *Lavey v. Kroger*, 350 Or 559, 563 (2011) (citations omitted; internal quotation marks omitted). The “subject matter” of an initiative is its “actual major effect.” *Lavey*, 350 Or at 563 (citation omitted; internal quotation marks omitted). The “actual major effect” is the change or changes “the proposed measure would enact in the context of existing law.” *Rasmussen v. Kroger*, 350 Or 281, 285 (2011). “The caption is the cornerstone for the other portions of the ballot title.” *Greene v. Kulongoski*, 322 Or 169, 175 (1995). As the “headline,” the caption “provides the context for the reader’s consideration of the other information in the ballot title.” *Greene*, 322 Or at 175.

The draft caption provides:

**Repeals law requiring adoption of standards for low carbon fuel to reduce
greenhouse gas emissions**

Mr. Blosser submits that the caption substantially complies with the statutory requirements.

B. The Results Statements

ORS 250.035(2)(b) and (c) require that the ballot title contain “simple and understandable statement[s] of not more than 25 words that describe[] the result if the state measure is” approved or rejected. The yes statement “should describe the most significant and immediate effects of the ballot initiative for the general public.” *McCann v. Rosenblum*, 354 Or 701, 707 (2014) (internal quotation marks omitted; citation omitted). The yes statement must “provide the voter with sufficient substantive information to understand the policy choice proposed by the measure’s operative terms.” *Rasmussen v. Rosenblum*, 354 Or 344, 348 (2013). A result of yes statement is not statutorily compliant if it is inaccurate, confusing or misleading. “To substantially comply with [ORS 250.035(2)(b)], an *accurate* description of the change that will be caused by the measure is key.” *Lavey*, 350 Or at 564 (emphasis in original). *See also* *Dixon v. Rosenblum*, 355 Or 364, 374 (2014) (referring certified ballot title to Attorney General for modification because result of no statement was “confusing, if not misleading”). The results statements cannot create even an “erroneous inference” of current law or the impact the Initiative would have on current law. *McCormick v. Kroger*, 347 Or 293, 300 (2009).

The draft results statements provide:

“Yes” vote repeals law requiring Environmental Quality Commission to adopt rules for low carbon fuel standards to reduce greenhouse gas emissions; invalidates rules already adopted.

“No” vote retains law requiring Environmental Quality Commission to adopt rules for low carbon fuel standards to reduce greenhouse gas emissions; leaves current rules intact.”

Mr. Blosser respectfully submits that the results statements do not comply with the requirements of ORS 250.035(2)(b) and (c) for the following reasons:

The draft result of yes statement is flawed because it fails to inform voters that, if passed, the Initiative would allow for increased greenhouse gas and carbon emissions. The Initiative eliminates the existing greenhouse gas reduction standards set by Oregon’s Clean Fuels program, and as a result, eliminates emission reduction requirements established in current law. That is a predominant result if the Initiative is passed, and should be included in the result of yes statement.

The result of no statement does not inform voters that current law has a cost containment provision. That was an essential element of the 2015 Clean Fuels law. Moreover, the draft result of no statements for Initiative Petitions Nos. 45 and 46 both address the cost containment provisions in current law. In the light of the fact that the result if Initiative Petitions Nos. 45, 46 or 47 are rejected by voters will be the same, there is no valid reason why the results of no statements for Initiative Petitions 45 and 46 should discuss cost containment, but the result of no statement for this Initiative does not.

Mr. Blosser further submits that the phrase “liquid, non-liquid transportation fuels” in the result of no 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. Under existing law, “all types of low carbon fuels” may be used “to meet the low carbon fuel standards.” Or Laws 2015, ch 4, § 3(2)(b)(C) (emphasis added). “Liquid, non-liquid” could confuse voters into drawing the “erroneous inference” that there are alternative fuels that fall outside the artificial “liquid, non-liquid” classification that are not covered by current law.

Results statements that comply with the statutory requirements would provide:

“Yes” vote repeals requiring Environmental Quality Commission adopt rules for low carbon fuel standards that reduce greenhouse gas emissions; invalidates existing rules; allows increased emissions.

“No” vote retains law requiring low carbon fuel standards for variety of transportation fuels that reduce greenhouse gas emissions, requiring rules controlling costs of standards.

C. The Summary

ORS 250.035(2)(d) requires that the ballot title contain a “concise and impartial statement of not more than 125 words summarizing the state measure and its major effect.” Mr. Blosser respectfully submits that the summary is flawed for the reasons set forth above and for the following reasons:

- The summary should inform voters that the Initiative will prevent reductions in greenhouse gas emissions, thereby allowing increased greenhouse gas emissions. That is a significant effect of the Initiative that must be conveyed to voters.
- The summary should specify the alternative fuels under current law that can be included in meeting the low carbon fuel standards if the Initiative passes. As was discussed above, current law sets forth that *all* alternative low-carbon fuels may be used to meet the low carbon fuels standards. Voters should be informed of the options that are being eliminated from consideration, including “natural gas, liquefied petroleum gas and electricity.”
- Finally, the summary runs the risk of confusing voters, because the last three sentences of the summary state what current law requires, but do not set forth with sufficient clarity that the Initiative eliminates those requirements.

Thank you for your consideration of these comments. Please notify me when a certified ballot title is issued.

Steven C. Berman

SCB:jjjs
cc: client

JEANNE P. ATKINS
SECRETARY OF STATE
ROBERT TAYLOR
DEPUTY SECRETARY OF STATE



JIM WILLIAMS
DIRECTOR
255 CAPITOL STREET NE, SUITE 501
SALEM, OREGON 97310-0722
(503) 986-1518

INITIATIVE PETITION

TO: All Interested Parties
FROM: Lydia Plukchi, Compliance Specialist
DATE: August 21, 2015
SUBJECT: Initiative Petition **2016-047** Certified Ballot Title

The Elections Division received a certified ballot title from the Attorney General on August 21, 2015, for Initiative Petition **2016-047**, proposed for the November 8, 2016, General Election.

Caption

Repeals law requiring adoption of standards for low carbon fuel to reduce greenhouse gas emissions

Chief Petitioners

Lila Leathers-Fitz 255 Depot St Fairview, OR 97024
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

September 4, 2015

How to Submit Appeal

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

1st business day after
appeal filed with
Supreme Court, 5 pm

How to Submit Notice

Scan and Email
Fax
Mail

Where to Submit Notice

irrlisnotifier.sos@state.or.us
503.373.7414
255 Capitol St NE Ste 501, Salem OR 97310



DEPARTMENT OF JUSTICE
APPELLATE DIVISION

August 21, 2015

RECEIVED
2015 AUG 21 PM 2 33
SECRETARY OF STATE

Jim Williams
Director, Elections Division
Office of the Secretary of State
255 Capitol St. NE, Suite 501
Salem, OR 97310

Re: Proposed Initiative Petition — Repeals Law Requiring Adoption of Standards for Low Carbon Fuel to Reduce Greenhouse Gas Emissions
DOJ File #BT-47-15; Elections Division #2016-047

Dear Mr. Williams:

We received comments about the draft ballot title for the above-referenced measure from Steven Berman on behalf of elector Nik Blosser, and from elector Paul Romain. This letter summarizes those comments, our responses to the comments and the reasons why we altered or declined to alter the draft ballot title in response to the comments. ORAP 11.30(7) requires this letter to be included in the record if the Oregon Supreme Court is asked to review the ballot title.

Before addressing the comments on the draft ballot title, we first discuss the state of current law and IP 47's changes to the law.

A. Current law

1. Or Laws 2009, ch 754

In 2009 the Oregon legislature passed House Bill 2186 which was signed into law as Oregon Laws 2009, Chapter 754. The new law provided the Environmental Quality Commission ("EQC") with the authority to establish low carbon fuel standards to reduce greenhouse gas emissions.

The law set limits on the scope of the EQC's rulemaking authority and imposed certain requirements in the rulemaking. The law adopted the definition of "greenhouse

gas” in ORS 468A.210,¹ and defined “low carbon fuel standards” as “standards for the reduction of greenhouse gas emission, on average, per unit of fuel energy.” Or Laws 2009, ch 754 § 6(1)(a), (b).

The law authorized the EQC to adopt rules for “low carbon fuel standards for gasoline, diesel and fuels used as substitutes for gasoline or diesel.” Or Laws 2009, ch 754 § 6(2)(a). Before adopting such rules, the law required the EQC to consider the low carbon fuel standards of other states, including but not limited to Washington. Or Laws 2009, ch 754 § 6(2)(c). To mitigate the cost of complying with the standard, the EQC was required to provide exemptions and deferrals. Or Laws 2009, ch 754 § 6(2)(d). In adopting the rules, the EQC was also required to evaluate a number of factors, including:

- Safety, feasibility, net reduction of greenhouse gas emissions and cost-effectiveness;
- Potential adverse impacts to public health and the environment;
- Flexible implementation approaches to minimize the cost of complying with the rules;
- Technical and economic studies of greenhouse gas emission reduction measures in other states.

Or Laws 2009, ch 754 § 6(3)(a)-(d). Exempted from the law are farm vehicles, farm tractors, other specified agricultural vehicles, and logging trucks. Or Laws 2009, ch 754 § 6(4).

The standards that the law authorizes the EQC to adopt include but are not limited to:

- A schedule to phase in the rules by 2020 so as to reduce the amount of greenhouse gas emissions from the fuels to 10% below 2010 levels;
- Standards for greenhouse gas emissions attributable to fuels through their lifecycles, including, but not limited to, emissions from production, storage, transportation and combustion of fuels and from changes in land use associated with the fuels;

¹ 468A.210(2) defines “greenhouse gas” as “any gas that contributes to anthropogenic global warming including, but not limited to, carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulfur hexafluoride.”

- Provisions that allow the use of all types of low carbon fuels to meet the standards, including, but not limited to, biofuels, biogas, compressed natural gas, gasoline, diesel, hydrogen and electricity;
- Provisions for deferrals from the low carbon fuel standards as necessary to ensure adequate fuel supplies;
- Exemptions for liquefied petroleum gas and other alternative fuels used in volumes below thresholds established by the EQC;
- Standards, specifications and testing requirements and other measures as needed to ensure the quality of fuels produced pursuant to the low carbon fuels standards;
- Adjustments to the amounts of greenhouse gas emissions per unit of fuel energy assigned to fuels for combustion and drive train efficiency.

Or Law 2009, ch 754 § 6(2)(b)(a)-(g).

Section 6 of Or Law 2009, ch 754 took effect on July 1, 2011. However, the law allowed the EQC to adopt rules prior to that date that would take effect on that date. Or Laws 2009, ch 764 §7. The law contained a sunset clause that would repeal § 6 on December 31, 2015. Or Laws 2009, ch 754 § 8.

Pursuant to Or Laws 2009, ch 754, the EQC adopted an extensive set of rules for low carbon fuel standards. The rules are currently codified at OAR 340-253-0000, *et seq.*

2. Or Laws 2015, ch 4

In 2015, the Oregon legislature amended the 2009 law with Senate Bill 324. The governor signed that bill and it became effective on March 12, 2015. It has been designated as Oregon Laws 2015, ch 4.

Section 1 of SB 324 repeals the sunset clause of the 2009 law. Or Laws 2015, ch 4 § 1. Section 3 of SB 324 made numerous amendments to the 2009 law. Specifically, it:

- Requires that the EQC “shall” adopt low carbon fuel standards (as opposed to the permissive “may” in the 2009 law). Or Laws 2015, ch 4 § 3(2)(a).
- Extends the deadline to obtain a reduction in low carbon fuel emissions to 10% below 2010 levels from 2020 to 2025. Or Laws 2015, ch 4 § 3(b)(A).
- Removes the provision in the 2009 law allowing the EQC to issue exemptions and deferrals to the rules. Or Laws 2015, ch 4 § 3(2)(d).
- Requires the EQC to adopt rules for managing and containing the costs of compliance by including provisions that ensure the ability to obtain and trade credits for fuels used as substitutes for gasoline or diesel. Or Laws 2015, ch 4 § 3(2)(d).
- Requires the EQC to exempt from the standards any person importing less than 500,000 gallons of diesel or gasoline in any calendar year. Or Laws 2015, ch 4 § 3(2)(e).²
- Prohibits biodiesel from being considered an “alternate fuel” unless it meets certain requirements. Or Laws 2015, ch 4 § 3(f).
- Modifies the non-exclusive list of low carbon fuels that may be used to meet the low carbon fuel standards. Or Laws 2015, ch 4 § 3(2)(b)(C).
- Modifies exemptions to the 2009 law, to clarify that it applies to fuel for certain vehicles; expands the list of exempt vehicles; requires the EQC to adopt rules setting forth qualifications for those exemptions. Or Laws 2015, ch 4 § 4(a), (b).

B. IP 47’s changes to the law

IP 47 is straightforward. It provides:

² The current rules allowed for an exemption of 250,000 gallons. OAR 340-253-0100(1)(b); OAR 350-253-0040(51).

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

(Underlining in original). Thus, if passed, the initiative repeals in its entirety the portion of the statute detailed above that requires the EQC to adopt rules pertaining to low carbon standards for the reduction of greenhouse gases. A direct result of the repeal is that the rules adopted by the EQC in 2011 would be invalidated.

C. The caption

The caption of a ballot title must “reasonably identif[y] the subject matter of the state measure.” ORS 250.035(2)(a). 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).” *Whitsett v. Kroger*, 348 Or 243, 247, 230 P3d 545 (2010). The draft ballot title contains the following caption:

**Repeals law requiring adoption of standards for low carbon fuel to
reduce greenhouse gas emissions**

Commenter Blosser agrees that the caption substantially complies with the statutory requirements and suggests no changes to it. Commenter Romain asserts that the caption does not meet statutory requirements because it “will tend to confuse the voter.” In his view, “[t]here are many ways to reduce greenhouse gas emissions other than a low carbon fuel standard,” and the caption “gives the impression” that low carbon fuels are the only avenue for reducing those emissions. Commenter Romain also asserts that the caption is misleading because it is “debatable” that the use of low carbon fuels reduces greenhouse gas emissions.

We disagree. IP 47 is straightforward; it repeals the law requiring that EQC adopt low fuel standards to help reduce greenhouse gas emissions. Nothing in the caption implies that low carbon fuel standards are the only means for reducing greenhouse gas emissions. Moreover, a discussion of the efficacy of the current law and the best means of reducing greenhouse gas emissions is best left to the voters’ pamphlet and the political process.

We certify the following caption:

**Repeals law requiring adoption of standards for low carbon fuel to
reduce greenhouse gas emissions**

D. The vote result statements

ORS 250.035(2)(b) and (c) require a ballot title to contain “[a] simple and understandable statement of not more than 25 words that describes the result if the state measure” is approved or rejected. The draft ballot title contains the following result statements:

Result of “Yes” Vote: “Yes” vote repeals law requiring Environmental Quality Commission to adopt rules for low carbon fuel standards to reduce greenhouse gas emissions; invalidates rules already adopted.

Result of “No” Vote: “No” vote retains law requiring Environmental Quality Commission to adopt rules for low carbon fuel standards to reduce greenhouse gas emissions; leaves current rules intact.

Commenters Blosser and Romain assert that the results statements do not meet statutory standards, albeit for diametrically opposed reasons. Commenter Blosser asserts that the “Yes” statement is deficient because the “predominant result” of the initiative, if passed, would be to “allow for increased greenhouse gas and carbon emissions.” On the other hand, Commenter Romain asserts the “Yes” statement is deficient because “there is considerable doubt whether or not a low carbon fuel standard has any effect on greenhouse gas emissions.” He further asserts that, due to the “ability to buy carbon credits to comply with the standards,” no emission reduction results from low carbon fuel standards. Commenter Romain similarly asserts that the “No” statement is deficient for similar reasons.³

However, a discussion of whether low carbon fuels do or do not affect the level of greenhouse gas emissions is not the function of a results statement. Rather, that is a discussion best left to the voting process and the voters’ pamphlet. We conclude that the results statements accurately describe “the result if the state measure” is passed or rejected. ORS 250.035(2)(b), (c). We certify the following result statements:

Result of “Yes” Vote: “Yes” vote repeals law requiring Environmental Quality Commission to adopt rules for low carbon fuel standards to reduce greenhouse gas emissions; invalidates rules already adopted.

³ Commenter Blosser asserts that the phrase “liquid, no-liquid transportation fuels” in the “No” statement is potentially misleading and inaccurate. We believe the Commenter Blosser may be referring to language in the ballot titles for IPs # 45 or #46. IP #47 does not contain that language.

Result of “No” Vote: “No” vote retains law requiring Environmental Quality Commission to adopt rules for low carbon fuel standards to reduce greenhouse gas emissions; leaves current rules intact.

E. The summary

ORS 250.035(2)(d) requires a “concise and impartial statement of not more than 125 words summarizing the state measure and its major effect.” The draft summary reads:

Summary: Repeals law requiring Environmental Quality Commission (EQC) to adopt rules for low carbon fuel standards to reduce greenhouse gas emissions. Repeal would invalidate rules for fuel standards already adopted by EQC under current law. Current law requires EQC to adopt low carbon standards for gasoline, diesel, and substitute fuels. In adopting rules EQC must evaluate the reduction of greenhouse gases, cost-effectiveness, possible adverse effects on public health, ways to minimize costs of complying with fuel standards; EQC must adopt rules for managing costs of complying with fuel standards. EQC may phase in rules to achieve 10% reduction in greenhouse gas emissions below 2010 level, and may adopt rules allowing all types of low carbon fuels; fuels used in certain vehicles exempt from standards.

Commenter Blosser asserts that the summary does not meet statutory requirements for three reasons: (1) it does not inform voters that passage of the initiative will result in increased greenhouse gases; (2) it does not specify that current law allows low-carbon fuels such as “natural gas, liquefied petroleum gas and electricity” to meet low-carbon standards and that those sources would be eliminated from consideration; and (3) it is confusing because, although it makes clear what current law requires, it does not make clear that the initiative eliminates those requirements.

We reject Commenter Blosser’s first two assertions for the reasons discussed above. However, we agree with his third assertion and makes changes to the summary accordingly.


Commenter Romain asserts that the summary is deficient because it does not make plain that the low-carbon fuel blending program that is allowed under the statute is an “impossible program.” Moreover, he asserts, the summary does not explain that the option of trading credits by using non-carbon fuels such as propane or electricity amounts to nothing more than “producers hav[ing] to subsidize those who produce and use alternative fuels like propane and electricity, or go out of business.” The crux of his contention is that the statute is poorly designed and that IP #47, if enacted, would rectify

those shortcomings by doing away with them. Notably, Commenter Romain does not assert that any of the information in the summary is incorrect.

We reject Commenter Romain's assertions for the same reasons we rejected his comments with respect to the caption and results statements. That is, discussing the merits of the current program or the merits of repealing it is not the function of the summary. That is the function of the voting process.

We certify the following summary:

Summary: Current law requires Environmental Quality Commission (EQC) to adopt low carbon standards for gasoline, diesel, and substitute fuels. In adopting rules, EQC must evaluate the reduction of greenhouse gases, cost-effectiveness, possible adverse effects on public health, ways to minimize costs of complying with fuel standards; EQC must adopt rules for managing costs of complying with fuel standards. EQC may phase in rules to achieve 10% reduction in greenhouse gas emissions below 2010 levels, and may adopt rules allowing all types of low carbon fuels; fuels used in certain vehicles exempt from standards. Initiative repeals law requiring EQC to adopt rules for low carbon fuel standards to reduce greenhouse gas emissions. Repeal invalidates rules for fuel standards already adopted by EQC under current law.

Jeff J. Payne 
Assistant Attorney General
jeff.j.payne@doj.state.or.us

JJP:aft/6745637

Enclosure

Paul Romain
707 SW Washington St., Ste. 927
Portland, OR 97205

Lila Leathers-Fitz
255 Depot Street
Fairview, OR 97024

Charles E. Ireland, Jr.
P.O. Box 815
Myrtle Creek, OR 97457

Steven C. Berman
Stoll Berne
209 SW Oak St., Ste. 500
Portland, OR 97204

BALLOT TITLE

Repeals law requiring adoption of standards for low carbon fuel to reduce greenhouse gas emissions

Result of “Yes” Vote: “Yes” vote repeals law requiring Environmental Quality Commission to adopt rules for low carbon fuel standards to reduce greenhouse gas emissions; invalidates rules already adopted.

Result of “No” Vote: “No” vote retains law requiring Environmental Quality Commission to adopt rules for low carbon fuel standards to reduce greenhouse gas emissions; leaves current rules intact.

Summary: Current law requires Environmental Quality Commission (EQC) to adopt low carbon standards for gasoline, diesel, and substitute fuels. In adopting rules, EQC must evaluate the reduction of greenhouse gases, cost-effectiveness, possible adverse effects on public health, ways to minimize costs of complying with fuel standards; EQC must adopt rules for managing costs of complying with fuel standards. EQC may phase in rules to achieve 10% reduction in greenhouse gas emissions below 2010 levels, and may adopt rules allowing all types of low carbon fuels; fuels used in certain vehicles exempt from standards. Initiative repeals law requiring EQC to adopt rules for low carbon fuel standards to reduce greenhouse gas emissions. Repeal invalidates rules for fuel standards already adopted by EQC under current law.

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on September 28, 2015, I directed the original Respondent's Answering Memorandum to Petition to Review Ballot Title Re: Initiative Petition No. 47 to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and served upon Paul R. Romain, petitioner, and upon Steven C. Berman, attorney for Amicus Curiae, by using the court's electronic filing system.

I further certify that on September 28, 2015, I directed the original Respondent's Answering Memorandum to Petition to Review Ballot Title Re: Initiative Petition No. 47 to be served upon Lila Leathers-Fitz and Charles Ireland, chief petitioners, by mailing a copy, with postage prepaid, in an envelope addressed to:

Lila Leathers-Fitz
255 Depot Street
Fairview, OR 97024

Charles Ireland
P.O. Box 815
Myrtle Creek, OR 97457

/s/ Jeff J. Payne

JEFF J. PAYNE #050102
Senior Assistant Attorney General
jeff.j.payne@doj.state.or.us

Attorney for Respondent
Ellen F. Rosenblum, Attorney General,
State of Oregon