IN THE SUPREME COURT OF THE STATE OF OREGON

NIK BLOSSER,

Petitioner,

v.

ELLEN ROSENBLUM, Attorney General, State of Oregon,

Respondent.

No.

**PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL FOR INITIATIVE PETITION NUMBER 45 (2016)**

Petition to Review Ballot Title for Initiative Petition No. 45 for the General Election of November 8, 2016.

Ballot title certified by the Attorney General on August 21, 2015.

**Chief Petitioners:**

Lila Leathers-Fitz
255 Depot Street
Fairview, OR 97024

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

Steven C. Berman, OSB No. 951769
Stoll Stoll Berne Lokting & Shlachter, P.C.
209 SW Oak Street, Fifth Floor
Portland, Oregon 97204
Telephone: (503) 227-1600
Facsimile: (503) 227-6840
Email: sberman@stollberne.com

**Attorneys for Petitioner Nik Blosser**

Ellen Rosenblum, OSB No. 753239
Attorney General of the State of Oregon
Office of the Solicitor General
400 Justice Building
1162 Court Street, N.E.
Salem, Oregon 97301-4096
Telephone: (503) 378-6002
Facsimile: (503) 378-6306
Email: ellen.f.rosenblum@doj.state.or.us

**Attorneys for Respondent**

## I. PETITIONER'S INTEREST IN THIS MATTER

Pursuant to ORS 250.085 and ORAP 11.30, petitioner Nik Blosser seeks review of the certified ballot title for Initiative Petition No. 45 for the General Election of November 8, 2016 (the "Initiative"). Mr. Blosser is an elector in the State of Oregon who filed timely written comments concerning the draft ballot title pursuant to ORS 250.067(1).[1]

Mr. Blosser objects to the phrase "commercially available" in the result of yes statement, and "'available in commercial quantities' (defined)" in the summary.[2] As is set forth below, the Initiative defines "available in commercial quantities" in a misleading manner that is contrary to how that phrase is commonly understood. That phrase appears to have been used by the Initiative's drafters to engineer a favorable ballot title, but actually obfuscates the major effect of the Initiative. The use of "commercially available" to describe and summarize "available in commercial quantities" is equally misleading.

## II. THE INITIATIVE

During the 2015 session, the Oregon legislature strengthened Oregon's Clean Fuels law through Senate Bill 324.[3] The Initiative makes significant

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[1]A copy of the Initiative is attached as Exhibit 1. A copy of the draft ballot title is attached as Exhibit 2. A copy of Mr. Blosser's comments filed with the Secretary of State regarding the draft ballot title is attached as Exhibit 3. A copy of the Attorney General's response to the comments received regarding the draft ballot title is attached as Exhibit 4. A copy of the certified ballot title is attached as Exhibit 5.

[2]Neither phrase appeared in the draft ballot title. Accordingly, Mr. Blosser's challenge is properly before the court. ORS 250.085(6).

[3]SB 324 has been designated Or Laws 2015, ch 4.

changes to SB 324 that would undermine Oregon's Clean Fuels law. The background of Oregon's Clean Fuels law and the scope of the changes the Initiative would make to that law are set forth in detail in the Mr. Blosser's comments regarding the draft ballot title. Ex. 3 at 1-4. Mr. Blosser's petition focuses on the certified ballot title's description of the Initiative's provisions regarding fuels "available in commercial quantities" and how the ballot title describes those provisions. Accordingly, this petition addresses those sections of the Initiative.

The Initiative increases the amount of greenhouse gasses and carbon that may be emitted in Oregon. Specifically, the Initiative eliminates the requirement that greenhouse gas emissions must be at least 10% below 2010 levels by 2025. The Initiative replaces that requirement with a substantially weaker requirement for a 5% reduction in "carbon intensity" from gasoline and diesel output, with myriad qualifications. Initiative, § 1(6)(2)(b)(A). The Initiative sets no timeline for meeting those requirements. Initiative, §§ 1(6)(1)(b), 1(6)(2)(b)(a).

Of significance here, the Initiative provides that its "carbon intensity" reduction adjustments cannot occur unless the Environmental Quality Commission ("EQC") determines that "sufficient" low carbon intensity fuels are "available in commercial quantities.'" Initiative, §§ 1(6)(1)(d); 1(6)(4). As is discussed below, the Initiative requires the EQC to conduct a detailed, multi-factored analysis to determine whether "low carbon intensity" liquid fuels are "available in commercial quantities." Initiative, § 1(6)(4)(a). If those fuels are

not available at a cost less than or equal to conventional "petroleum products" (meaning gasoline and diesel), then those low carbon intensity fuels are "not available in commercial quantities." Initiative, § 1(6)(4)(b). Similarly, if the EQC determines that the infrastructure to distribute those fuels is insufficient, those fuels cannot be considered "available in commercial quantities." Initiative, § 1(6)(4)(c).

In summary, the Initiative effectively guts Oregon's Clean Fuels law. As is pertinent here, the Initiative sets a series of significant obstacles – under the guise of "available in commercial quantities" – that eviscerate the likelihood that the Initiative's weakened "carbon intensity" standards go into effect. "Available in commercial quantities" is defined in the Initiative in an uncommon, unique and misleading way. "Commercially available" similarly is an inaccurate description of the phrase "available in commercial quantities" as that term is used and defined in the Initiative. Neither phrase should appear in the ballot title.

## III. ARGUMENTS AND AUTHORITIES

### A. The Result of Yes Statement in the Certified Ballot Title Does Not Comply With the Requirements of ORS 250.035(2)(b).

ORS 250.035(2)(b) requires that the ballot title contain a "simple and understandable statement of not more than 25 words that describes the result if the state measure is approved." 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, 320 P3d 548 (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, 312 P3d 529 (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 v. Kroger*, 350 Or 559, 564, 258 P3d 1194 (2011) (emphasis in original). The result of yes statement cannot create even an "erroneous inference" of current law or the impact an initiative would have on current law. *McCormick v. Kroger*, 347 Or 293, 300, 220 P3d 412 (2009).

The certified result of yes statement provides:

> "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.

Ex. 5 (emphasis added).

It is well-settled that "[p]roponents of a measure are not entitled to engineer a favorable ballot title by incorporating politically inflated terms or phrases in the text of a measure in order to advance its passage." *Earls v. Myers*, 330 Or 171, 176, 999 P2d 1134 (2000). A ballot title cannot use a word or term from the text of an initiative, if the initiative "uses the term with a very different and uncommon meaning." *Witt v. Kulongoski*, 319 Or 7, 15, 872 P2d 14 (1994). Rather, the Attorney General must "go beyond the words of the measure" when "the proponents of an initiative measure either intentionally or unintentionally * * * use words in the measure that obfuscate the subject, chief

purpose, summary, or major effect of the measure." *Bernard v. Keisling*, 317 Or 591, 596, 858 P2d 1309 (1993).

"Available in commercial quantities" as used in the Initiative has a very different meaning than would be commonly understood. "Commercial" means "of, in, or relating to commerce." *Webster's Third New Int'l Dictionary* 456 (unabridged ed 2002). Electors would read the phrase "available in commercial quantities" as describing a commodity or good that can be obtained for money in an open, legal marketplace.

That understanding is at substantial variance with how the Initiative defines "available in commercial quantities." The Initiative explicitly defines "available in commercial quantities" to *exclude* fuels that are, in fact, commercially available. For example, the Initiative provides that if low carbon intensity fuels are not available in the commercial marketplace at a cost equal to or less than "base petroleum products," those fuels "*will not be considered available in commercial quantities.*" Initiative, § 1(6)(4)(b) (emphasis added). Section 1(6)(4)(c) of the Initiative provides that if infrastructure is insufficient to distribute low carbon fuels to all "volumes and types of low [carbon intensity] fuels" those fuels "*will not be considered available in commercial quantities*." Initiative, § 1(6)(4)(c) (emphasis added).

In other words, under the Initiative, unless alternative fuels are less expensive than petroleum based products – such as traditional gasoline – those alternative fuels cannot be considered "available in commercial quantities" even if those alternative fuels can be legally manufactured, sold and purchased.

Under the Initiative, if non-petroleum based fuels can be manufactured, sold and purchased in the marketplace and cost only $^{1}/_{1000}$ of a cent per gallon more than "base petroleum products," those non-petroleum based fuels are not "available in commercial quantities." Similarly, if consumer demand for "low carbon intensity fuels" exceeds availability, then under the Initiative those fuels also would not be considered "available in commercial quantities."

The Initiative sets a series of additional hurdles for alternative fuels to be considered "available in commercial quantities." For example, the Initiative dictates that before the EQC can determine that a "low carbon intensity fuel" is "available in commercial quantities," the commission must conduct a detailed, multi-factored analysis. The factors that the EQC must weigh, which comprise the bulk of the changes the Initiative makes to extant law, include:

- Production facility capacity and construction;
- The "[d]ate that feedstock was first introduced to the process."
- The "[d]ate that commercial quantities of on-specification product was first purchased."
- "Highest utilization demonstrated in a consecutive three-month period" with "utilization" defined as "production rate divided by design capacity, inclusive of downtime."
- "Percent of product that was produced on-specification,"
- Duration of plant operation "in days, of longest continuous period."
- "[U]tilization during the last calendar year."
- "[P]ercent of product that was produced on-specification without reprocessing or blending" during the prior calendar year and in a consecutive three-month period;

- High, medium and low production forecasts for the coming three years based on "historic production," "technical issues to date," and "variations based on projected feedstock availability."

Initiative, §§ 1(6)(4)(a)(A)-(J). Those are complex, intricate factors to weigh. "Available in commercial quantities" does not accurately capture or address those standards. The phrase is used in a particularly unique, misleading and obscure way in the Initiative.

*Tauman v. Myers*, 343 Or 299, 170 P3d 556 (2007) is instructive here. At issue in *Tauman*, was the ballot title for Initiative Petition No. 85 (2008). IP 85 (2008) would have limited recovery of economic and noneconomic damages from any "charity." The measure defined "charity" more broadly than the word is used or understood. An elector challenged the certified ballot title, arguing that simply placing "defined" after "charity" in the caption and results statements was insufficient because the word "charity" as used in the Initiative was both confusing and misleading. The court agreed. As the court explained:

> "In common parlance, a 'charity' is 'an organization or institution engaged in the free assistance of the poor, the suffering, or the distressed.' *Webster's Third New Int'l Dictionary* 378 (unabridged ed 2002). By contrast, the proposed measure would include in its definition of a 'charity' numerous nonprofit organizations engaged in a variety of other endeavors, including 'recreational' and 'fraternal activities.' That definition is broad enough potentially to include a symphony association, the Boy Scouts, a private college, and some fraternities, none of which is commonly understood to be a charity. Because the proposed measure defines the term 'charity' more broadly than the term commonly is understood, the caption's use of the term has the potential to leave petition signers and voters with a false impression of the proposed measure's subject matter. A reasonable person reading the caption likely would understand, mistakenly, that the proposed measure would affect only those organizations that aid the poor, the suffering, and the distressed when, in fact, the proposed measure could affect a variety of other

> tax-exempt organizations as well. This court has required that the caption be modified in similar circumstances. *See Sager v. Myers*, 328 Or 528, 531-33, 982 P2d 1104 (1999) (court modified caption when the proposed measure defined terms in an 'uncommon, if not unique,' way); *Chase v. Myers*, 328 Or 518, 521-23, 982 P2d 1099 (1999) (same); *Witt v. Kulongoski*, 319 Or 7, 14-17, 872 P2d 14 (1994) (court modified caption when the proposed measure gave a term 'a very different and uncommon meaning'); *see also Bernard v. Keisling*, 317 Or 591, 596, 858 P2d 1309 (1993) (court will not hesitate to look beyond words of measure if those words obfuscate measure's subject).
>
> "The Attorney General maintains that no modification is necessary here because the caption places the word 'defined' in parentheses after the term 'charity.' We reach a different conclusion. Although 'this court has approved the use of specially defined terms in quotation marks, followed by the word "defined" in parentheses, to signal that the proposed measure specially defines [a] term and uses it in that specially defined sense,' *Carley/Towers v. Myers*, 340 Or 222, 229, 132 P3d 651 (2006), this court has never held that the use of such signals is always sufficient to ensure compliance with statutory standards. Rather, the court has approved those signals when, for example, the meaning of the disputed term was ambiguous and the proposed measure defined the term in a manner generally consistent with an accepted meaning of the term. *See, e.g.*, *Carley/Towers*, 340 Or at 232-33, 132 P3d 651 (illustrating proposition); *Wilkeson v. Myers*, 329 Or 540, 544-45, 992 P2d 456 (1999) (same); *Huss v. Kulongoski*, 323 Or 266, 917 P2d 1018 (1996) (same). Here, by contrast, the proposed measure gives the term 'charity' a unique definition that is significantly broader than its common definition. Under those circumstances, the signals described in *Carley/Towers* do little to cure the confusion caused by the caption's use of the term. Following *Sager*, *Chase*, and *Witt*, we conclude that the caption in this case is impermissibly confusing despite the presence of the word 'defined' after the word 'charity.' Accordingly, we refer the caption to the Attorney General for modification."

*Tauman*, 343 Or at 302-304.

The proponents of the Initiative at issue here have been even more duplicitous in their drafting than the proponents of the initiative at issue in *Tauman*. The Initiative defines "available in commercial quantities" in an

extremely unique and confusing way. Under the Initiative, a determination of whether something is "available in commercial quantities" is astoundingly complex, and means something other than whether low carbon intensity fuels are available in the marketplace to consumers who want to (and can) purchase them or to manufacturers, wholesalers and retailers who want to (and can) market them.

"Commercially available" is a similarly inaccurate and confusing way to summarize the misleading phrase "available in commercial quantities." "Commercially" is defined as "in a commercial manner." *Webster's* at 457. Voters reasonably would understand the phrase "commercially available" to mean available for purchase in commerce. "Commercially available" emphasizes the confusion created by Initiative's unique, and deliberately misleading, definition of "available in commercial quantities." *Tauman* is directly on point. The phrase "commercially available" cannot appear in the result of yes statement, or elsewhere in the ballot title.

### B. The Summary in the Certified Ballot Title Does Not Comply With the Requirements of ORS 250.035(2)(d).

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." The summary provides, in relevant part: "Measure * * * provides that adopted standards * * * cannot require any reductions unless low carbon fuel needed for blending requirements is 'available in commercial quantities' (defined)." For the reasons set forth above, "available in commercial quantities" as used in the Initiative is misleading, is included in the

Initiative for the apparent purpose of engineering a favorable ballot title, and obfuscates the subject matter and effect of the Initiative. That phrase cannot appear in the summary unless it is described with additional and accurate clarifying language. *Tauman*, 343 Or at 558. The parenthetical "defined" and the language "costs no more than the gasoline or diesel into which it is blended" that follow do not eliminate the confusion for voters, because that language addresses only one of the multiple factors under the Initiative that goes into the analysis of whether low carbon intensity fuels are "available in commercial quantities."

## IV. CONCLUSION

Mr. Blosser respectfully requests that the court certify to the Secretary of State a ballot title that complies with the requirements of ORS 250.035(2) in lieu of the ballot title certified by the Attorney General or, alternatively, refer the ballot title to the Attorney General for modification.

DATED this 3rd day of September, 2015.

Respectfully submitted,

STOLL STOLL BERNE LOKTING & SHLACHTER, PC

By: /s/ Steven C. Berman
Steven C. Berman, OSB No. 951769

**Attorneys for Petitioner Nik Blosser**

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.**

(B) Standards for greenhouse gas emissions attributable to the fuels throughout their lifecycles, including by 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.I. 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.

## 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.

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

Re: Initiative Petition No. 45 for the General Election of November 8, 2016

Dear Secretary Atkins:

I represent Nik Blosser regarding the ballot title for Initiative Petition No. 45 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 recognizes the difficult task the Attorney General faces in drafting a ballot title for an initiative as convoluted as this one. Mr. Blosser believes that, for the most part, the draft ballot title accurately describes the Initiative. However, Mr. Blosser respectfully submits that certain aspects of the caption, results statements and summary for the draft ballot title do not meet the requirements of ORS 250.035(2). 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. 45

The Initiative is the first of three initiatives filed by the same chief petitioners this election cycle that attacks Oregon's recently amended Clean Fuels law. Mr. Blosser also is providing comments regarding the draft ballot titles for the other two initiatives, Initiative Petitions Nos. 46 and 47. 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 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 the 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(2)(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

The Initiative makes significant changes to Oregon's low carbon fuel standards. The changes will allow significantly more greenhouse gas emissions in Oregon than under current law.

First, the Initiative increases the amount of greenhouse gasses and carbon that may be emitted in Oregon. Specifically, the Initiative eliminates the requirement that greenhouse gas emissions be at least 10% below 2010 levels by 2025. The Initiative replaces that requirement with a substantially weaker requirement for a 5% reduction in "carbon intensity" from gasoline

and diesel output, with myriad qualifications. The Initiative sets no timeline for meeting those requirements. Initiative, §§ 1(1)(b), 1(2)(b)(a).

Second, the Initiative provides that only liquid fuels – rather than all alternative fuels – may be used to meet the low carbon fuel standards. Initiative, §§ 1(1)(b), 1(2)(a)(C). As a result, the Initiative converts Oregon's Clean Fuels program into a biofuels blending program, and excludes natural gas, electricity (and electric vehicles) and other clean fuel options from consideration (including many options that represent the lowest cost carbon fuels, such as biogas, and can be made in Oregon, rather than imported).

Third, the Initiative provides that "carbon intensity" reduction adjustments cannot occur unless the EQC determines that "sufficient" low carbon intensity "biofuel blend stocks are available in commercial quantities.'" Initiative, § 1(2)(a)(A). The Initiative requires the EQC to conduct a detailed, multi-factored analysis to determine whether "low carbon intensity" liquid fuels are "available in commercial quantities." Initiative, § 1(4)(a). If those fuels are not available at a cost less than or equal to conventional "petroleum products" (meaning gasoline and diesel), then they are considered unavailable. Initiative, § 1(4)(b). Similarly, if the EQC determines that the infrastructure to distribute those fuels is insufficient, the fuels cannot be considered "available in commercial quantities." Initiative, § 1(4)(c). Finally, if the EQC determines that there are an insufficient number of "commercially produced vehicles" available to use low carbon intensity fuels, then the fuels will not be considered "available in commercial quantities." Initiative, § 1(4)(d).

Fourth, the Initiative prohibits the Clean Fuels program from requiring more than a 10% ethanol blend in gasoline and a 5% biodiesel bend in diesel, essentially replicating extant Oregon law. Initiative, § 1(2)(c)(A). The Initiative prohibits biofuel blending unless those biofuels cost less than gasoline or diesel. Initiative, § 1(2)(c)(B). The Initiative otherwise eliminates the cost containment provisions in the Clean Fuels law. Initiative, § 1(2)(d).

Fifth, the Initiative eliminates the opportunity to trade credits for using gasoline and diesel fuel alternatives. Initiative, § 1(2)(d).

Finally, the Initiative prohibits the EQC from evaluating different levels of carbon pollution that come from different kinds of crude oil. Initiative, § 1(2)(f). In other words, the Initiative mandates that the EQC ignore available science when adopting applicable standards.

In summary, the Initiative effectively guts Oregon's Clean Fuel Program. It eliminates the existing low carbon fuel standards. Instead, it sets a much weaker standard – 5% in "carbon intensity" reduction with no set timeline. It reduces the fuel alternatives that may be considered to only liquid biofuels and eliminates the opportunity for exchanging credits for use of gasoline and diesel alternatives. The Initiative provides that biofuel blending may only be required to meet the Initiative's low "carbon intensity" goals if those biofuels cost less than gasoline or diesel. The Initiative sets a series of significant obstacles – under the guise of "available in commercial quantities" – that eviscerate the likelihood that the weakened "carbon intensity" standards go into effect.

## 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:

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

Mr. Blosser respectfully submits that the caption accurately describes the subject matter of the Initiative, and the changes that the Initiative would have on current law, with one exception. The caption 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. That elimination of multiple alternative fuels (for example, biogas, natural gas, liquefied petroleum gas, hydrogen and electricity) should be made clear to voters. That can easily be accomplished with only minor modifications to the caption, by deleting the second (and redundant) "fuel" in the first clause, deleting the conjunction "and" in the second clause, and adding of the phrase "alternative fuels" to the second clause.

A caption that complies with the statutory requirements would provide:

**Low carbon fuel standards can only require blends; carbon reduction, alternative fuels, blend requirements limited**

### 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 provides low carbon fuel standards for reducing greenhouse gas emissions can only require liquid fuel blends; limits permissible blend requirements, carbon reduction requirements.
>
> "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."

Mr. Blosser respectfully submits that the draft result of yes statement is flawed for the reasons set forth above.

The draft yes statement also is underinclusive, because it addresses only some, but not all, of the most significant results if the Initiative is approved. *See Towers v. Myers*, 341 Or 357, 361 (2006) ("[w]hen the Attorney General chooses to describe the subject matter of a proposed measure by listing some of its effects, [s]he runs the risk that the caption will be underinclusive and thus inaccurate"); *Towers*, 341 Or at 362 (referring results statements to Attorney General for modification because they were "underinclusive and thus inaccurate"); *Hunnicut v. Myers*, 340 Or 83, 89 (2006) (same). The result of yes statement 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, and establishes new, lower emissions requirements with a succession of caveats that may well prevent those weakened standards from going into effect. The result of yes statement also does not inform voters that the Initiative amends, and severely limits, the cost containment provisions in the 2015 Clean Fuels law. The yes statement must be revised to address those additional results discussions above.

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 provides low carbon fuel standards can only require liquid fuel blends, disallows other fuels; increases allowable greenhouse gas emissions; limits cost containment requirements.

"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." The summary is flawed for the reasons set forth above. Mr. Blosser respectfully submits that the summary is flawed for the following additional reasons:

- The summary should inform voters that the Initiative replaces Oregon's current low carbon fuel standards to reduce greenhouse gas emissions with substantially weaker emissions standards.

- The term "carbon intensity" is unique. It does not have a generally understood meaning, and it is undefined in the Initiative. Accordingly, the phrase "carbon intensity" should appear in the summary in quotation marks followed by the word "undefined" in parenthesis. *Wolf v. Myers*, 343 Or 494, 501 (2007).

- The summary should specify the alternative fuels that cannot 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, and the Initiative limits the standards to only liquid blends "available in commercial quantities." Voters should be informed of the options that are being eliminated from consideration, including "natural gas, liquefied petroleum gas and electricity."

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

Steven C. Berman

SCB:jjs
cc: client

ELLEN F. ROSENBLUM
Attorney General

FREDERICK M. BOSS
Deputy Attorney General

**DEPARTMENT OF JUSTICE**
APPELLATE DIVISION



August 21, 2015

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'



1162 Court Street NE, Salem, OR 97301-4096
Telephone: (503) 378-4402 Fax: (503) 378-3997 TTY: (800) 735-2900 www.doj.state.or.us

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.*).

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[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

MJL:aft/6746263

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

Certified by Attorney General on August 21, 2015.

## 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.

# CERTIFICATE OF FILING AND PROOF OF SERVICE

I hereby certify that on September 3, 2015, I electronically filed the original PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL FOR INITIATIVE PETITION NUMBER 45 (2016), and accompanying exhibits, with the Appellate Court Administrator.

I further certify that on September 3, 2015, I served the foregoing PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL FOR INITIATIVE PETITION NUMBER 45 (2016), and accompanying exhibits, by regular first class mail on:

Lila Leathers-Fitz
255 Depot Street
Fairview, OR 97024

**Chief Petitioner**

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

**Chief Petitioner**

Ellen Rosenblum
Attorney General of the State of Oregon
Office of the Solicitor General
400 Justice Building
1162 Court Street, N.E.
Salem, OR 97301-4096

**Respondent**

Jeanne Atkins
Secretary of State
255 Capitol Street NE, Suite 501
Salem, OR 97310

DATED this 3rd day of September, 2015.

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.

By: /s/ Steven C. Berman
Steven C. Berman, OSB No. 951769

**Attorneys for Petitioner Nik Blosser**