



DEPARTMENT OF JUSTICE
APPELLATE DIVISION

September 25, 2015

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

Re: *Nik Blosser v. Ellen F. Rosenblum*
SC S063527 (Control), S063531

Dear Chief Justice Balmer:

Petitioners Nik Blosser and Paul Romain have filed ballot title challenges 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/ Matthew J. Lysne

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

MJL:aft/6812825

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

IN THE SUPREME COURT OF THE STATE OF OREGON

NIK BLOSSER,

Petitioner,

v.

ELLEN ROSENBLUM, Attorney
General, State of Oregon,

Respondent.

Supreme Court No. S063527 (Control)

PAUL ROMAIN,

Petitioner,

v.

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

Respondent.

Supreme Court No. S063531

RESPONDENT'S ANSWERING
MEMORANDUM TO PETITIONS TO
REVIEW BALLOT TITLE RE:
INITIATIVE PETITION NO. 45

Pursuant to ORS 250.085, petitioners seek review of the Attorney General's certified ballot title for Initiative Petition 45 (2016) (IP 45). Petitioner Blosser challenges the "yes" vote result statement and the summary. Petitioner Romain challenges all parts of the ballot title. This court reviews ballot titles for "substantial compliance with the requirements of ORS 250.035." ORS 250.085(5). The Attorney General submits this answering memorandum pursuant to ORAP 11.30(6). As explained below, the Attorney General's ballot title for IP 45 substantially complies with ORS 250.035.

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

Petitioner Romain objects to the caption. The caption must reasonably identify the "subject matter" of the measure and contain no more than 15

words. ORS 250.035(2)(a). The “subject matter” of a ballot title is “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).” *McCann v. Rosenblum*, 354 Or 701, 706, 320 P3d 548 (2014) (quoting *Lavey v. Kroger*, 350 Or 559, 563, 258 P3d 1194 (2011)). The caption states:

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

Petitioner Romain contends that the caption is deficient in one respect: “it only addresses the liquid fuels restriction and lumps all of the other changes—which are at least as significant as the liquid fuels limitation—into ‘other limits.’” (Romain Petition, 5). He proposes that the caption should instead read: “Low carbon fuel standards require liquid fuel blends; eliminates fuel credits; requires commercially available alternatives.” (*Id.*). That objection lacks merit.

To the extent that the elimination of fuel credits and the requirement concerning “commercially available alternatives” are significant effects of IP 45, they are not “actual major effects” that must be specifically and individually identified within the caption. Instead, the caption appropriately notes their existence and leaves their description to other parts of the ballot title. The primary actual major effect of IP 45 is a fundamental legal change in the scope

and breadth of the low carbon fuel standards—eliminating numerous alternative fuels (with or without the use of a credit system) from those standards and substituting standards that concern only the blending of fuels with gasoline or diesel. The other changes identified by petitioner Romain are part of that primary change, but not independently significant changes that must be specifically and individually identified as an “actual major effect” of IP 45.

The proposed language offered by petitioner demonstrates the problem with individually identifying other effects of IP 45 given the word limitations for the caption and the requirements of ORS 250.035(2)(a). The phrase “requires commercially available alternatives” is potentially misleading because in the context of petitioner Romain’s proposal, it suggests that the measure requires alternative fuels like natural gas or electricity to be available to consumers. That is not at all what the measure does. The context that suggests this effect is the proposed phrase “Low carbon fuel standards require liquid fuel blends.” Because that phrase is ambiguous with regard to whether the requirement is a current requirement or would be the result of adopting the proposed measure, the overall impression is that the main effect of the measure is to “require[] commercially available alternatives.” Similarly, the phrase “eliminates fuel credits” is misleading in that it could be misunderstood to mean

that the measure would nullify existing credits held by individuals or businesses, rather than eliminating a credit *system*, which is the actual effect of the measure in this regard.

The word limits make it impossible to accurately and clearly explain in the caption what the measure is proposing with regard to commercially available fuels and the effect of the measure on the existing fuel credit system. The Attorney General’s certified caption for IP 45 appropriately captures the primary and actual major effect of IP 45—the requirement for blends of fuels with gasoline or diesel—and appropriately identifies that there are other new limits to the low carbon fuel standards. That language satisfies ORS 250.035(2)(a).

B. The “yes” and “no” vote result statements comply with ORS 250.035(2)(b) and ORS 250.035(2)(c).

Both petitioners challenge the vote result statements. A ballot title must contain “[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). “[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.” *Novick v. Myers*, 337 Or 568, 574, 100 P3d 1064 (2004). A “no” vote

result statement describes the result if the proposed measure is rejected. ORS 250.035(2)(c). The “yes” and “no” vote result statements should be read together. *Potter v. Kulongoski*, 322 Or 575, 582, 910 P2d 377 (1996). The vote result statements read:

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.

Petitioners Blosser and Romain raise three objections to the vote result statements. None of those arguments have merit.

1. The phrase “restricts standards to requiring gasoline/diesel blends with commercially available fuels” in the “yes” vote result statement is accurate.

First, petitioner Blosser argues that the phrase “restricts standards to requiring gasoline/diesel blends with commercially available fuels” in the “yes” vote result statement is inaccurate because the term “commercially available” is not necessarily accurate and because IP 45 further restricts the standards by requiring those “commercially available” fuels to also be the same price (or cheaper) than the gasoline or diesel they are mixed into (and meet other

potential restrictions). (Blosser Petition, 4-9). However, the phrase “commercially available fuels,” as used in context, is accurate and proper.

The challenged phrase is accurate as it identifies the broadest and most predominant legal restriction regarding the possible fuels that may be blended with gasoline or diesel if IP 45 is approved. IP 45 changes the low carbon fuel standards it to make them applicable to only “the blending of liquid fuel available in commercial quantities in this state.” IP 45, § 1(6)(b). IP 45 defines “available in commercial quantities” to mean 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.” IP 45, § 1(6)(d).

Relying on *Tauman v. Myers*, 343 Or 299, 302-03, 170 P3d 556, 557 (2007), petitioner argues that the ballot title’s use of the term “commercially available” identifies a class of eligible fuels that is broader than what would actually be allowed under IP 45. He points out that what is “commercially available” under IP 45 is complicated, suggesting that the definition is not consistent with what a voter might understand from that phrase. Specifically, petitioner Blosser argues that a voter would mistakenly understand that IP 45

would allow fuels “available for purchase in commerce” even though the requirements of the measure are more restrictive.

Petitioner Blosser relies on *Tauman* to support this argument. But the case is inapposite. In that case, this court considered whether the caption term “charity (defined)” was proper for a measure that defined a “charity” as “a nonprofit organization that is organized for the conduct of charitable, benevolent, humane, patriotic, religious, philanthropic, recreational, social, educational, medical, eleemosynary, civic or fraternal activities * * * [.]” This court compared that definition with a common dictionary definition of the term “charity”—that is, an organization that helps “the poor, the suffering, or the distressed”—and concluded that the caption was inaccurate because a voter could mistakenly believe the measure was limited to such organizations (when it was not). *Tauman*, 343 Or at 303; *see id.* (explaining that the measure’s definition of a “charity” could apply to “a symphony association, the Boy Scouts, a private college, and some fraternities, none of which is commonly understood to be a charity”). This court was concerned that the caption might give voters the mistaken impression that the proposed measure’s scope was far *narrower* than it actually was, that is, that the caption understated the scope of that measure. *See Kain v. Myers*, 337 Or 36, 40, 93 P3d 62 (2004 (“the caption

must use terms that reasonably identify the proposed measure’s subject matter and do not understate or overstate the scope of the legal changes that the proposed measure would enact”).

The proposed ballot title does not implicate the concerns identified in *Tauman*. The complete phrase, “restricts standards to requiring gasoline/diesel blends with commercially available fuels,” makes it clear that the fuels in question must be available *for purposes of blending them with gasoline or diesel*. That context makes it sufficiently clear that the fuels must be “commercially available” to those who blend fuels. That impression, in turn, is consistent with the actual definition IP 45 gives to the phrase “available in commercial quantities. Consequently, the term “commercially available fuels” does not “understate or overstate the scope of the legal changes that the proposed measure would enact.” Petitioner Blosser has not shown that the “yes” vote result statement fails to comply with ORS 250.035(2)(b).

2. The phrase “limits low carbon fuel standards’ carbon reduction requirements” in the “yes” vote result statement is not misleading.

Petitioner Romain argues that the phrase “limits low carbon fuel standards’ carbon reduction requirements” in the “yes” vote result statement is misleading because the 10% carbon reduction standard under existing law “is a

goal, not a mandate” and that gasoline or diesel producers may buy carbon credits to satisfy the 10% goal. (Romain Petition, 5-6). Petitioner is incorrect, because even though 10% may only be a *permissible* amount of reduction under current law, the measure would make any carbon reduction requirement in excess of 5% *impermissible*. That is clearly a limit that the measure would impose on the carbon reduction requirements of the low carbon fuel standards. The “yes” vote result statement accurately and properly identifies that effect of IP 45.

3. The phrase “require rules to control costs” in the “no” vote result statement is not misleading.

Petitioner Romain argues that the “no” vote result statement is misleading because it implies that IP 45 “eliminates rules to control costs of compliance” and that a “no” vote will “retain those cost control provisions”, and because it implies that the rules “will actually control costs.” (Romain Petition, 6-7). Neither argument is correct.

The phrase “require rules to control costs” is accurate description of existing law. Under existing law, the EQC is required to “adopt by rule provisions for managing and containing the costs of compliance with the standards[.]” Or Laws 2015, ch 3, § 3; Or Laws 2009, ch 754, § 6(1)(2)(d). IP 45 would eliminate that provision in existing law. IP 45, § 1. Thus, to the

extent the “no” vote result implies an elimination of that existing requirement, that is not inaccurate.

To the extent that petitioner Romain urges that the “no” vote result statement implies more than that, *i.e.* that IP 45 “eliminates rules to control costs of compliance,” that is similarly incorrect. Accurately stating that current law “require rules to control costs” does not imply that cost controls would be lacking under IP 45. What either a yes vote or a no vote would “actually” mean with regard to costs is a political question that the proposed ballot title does not address. That question is properly left to proponents, opponents, and voters to decide.

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

ORS 250.035(2)(d) provides that a ballot title summary be “[a] concise and impartial statement of not more than 125 words summarizing the state measure and its major effect.” The function of the summary is “to provide voters with enough information to understand what will happen if the measure is approved.” *Caruthers*, 347 Or at 670. That information may include a description of the effect of the measure at issue on other laws, so long as the description is accurate. *Berman v. Kroger*, 347 Or 509, 514, 225 P3d 32 (2009). In all events, the information must pertain to an identified, actual

“effect” of enacting the measure; it is not permissible to “speculate about the possible effects of a proposed measure.” *Pelikan/Tauman v. Myers*, 342 Or 383, 389, 153 P3d 117 (2007). The Attorney General’s summary provides:

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/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.

Petitioner Blosser raises a similar argument made with respect to the “yes” vote result statement, that the summary’s description of the phrase ““available in commercial quantities’ (defined)” is inaccurate or incomplete because it fails to describe the numerous considerations the EQC must consider in determining whether a fuel is “available in commercial quantities.” (Blosser Petition, 9-10). However, this court has explained that the use of specially defined terms in quotation marks is an appropriate signal to show that a measure “specially defines the term and uses it in that specially defined sense.” *Carley/Towers v. Myers*, 340 Or 222, 229, 132 P3d 651 (2006). The

summary need not “set out the special definition that the proposed measure would create.” *Id.* Moreover, since the summary does not describe a definition that is “significantly broader than its common definition[,]” *Tauman*, 343 Or at 303, this court should conclude that the summary’s use of the phrase “‘available in commercial quantities’ (defined)” is proper and in compliance with ORS 250.035(2)(d).

Petitioner Romain raises two arguments against the summary. First, he argues that the phrase “Commission must adopt rules to control costs, must allow compliance by obtaining credits from lower carbon fuel providers” is misleading for the same reasons provided concerning the “no” vote result statement. (Romain Petition, 8). Second, he argues that the summary does not describe the impacts of IP 45 for the same reasons raised concerning the caption and “yes” vote result statement. (*Id.*). However, the summary does explain both that the proposal would eliminate the credit system and that it would require gasoline and diesel to be blended with commercially available fuels. Thus the arguments he raised with regard to the caption are largely inapplicable to the summary; to the extent that they are applicable, the arguments are incorrect for the reasons explained above. With respect to the arguments petitioner Romain made regarding the “yes” and “no” statements, they lack

merit for the reasons discussed above. The summary properly identifies and describes the effects of IP 45.

E. Conclusion

For the reasons discussed above, the Attorney General's ballot title substantially complies with ORS 250.035(2). 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/ Matthew J. Lysne

MATTHEW J. LYSNE #025422
Senior Assistant Attorney General
matthew.j.lysne@doj.state.or.us

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

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on September 25, 2015, I directed the original Respondent's Answering Memorandum to Petitions to review Ballot Title Re: Initiative Petition No. 45 to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and served upon Steven C. Berman, attorney for petitioner Nicholas Blosser; and served upon Paul R. Romain, attorney for petitioner; by using the court's electronic filing system.

I further certify that on September 25, 2015, I directed the Respondent's Answering Memorandum to Petitions to review Ballot Title Re: Initiative Petition No. 45 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/ Matthew J. Lysne

MATTHEW J. LYSNE #025422
Senior Assistant Attorney General
matthew.j.lysne@doj.state.or.us

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

IN THE SUPREME COURT OF THE STATE OF OREGON

NIK BLOSSER,

Petitioner,

v.

ELLEN ROSENBLUM, Attorney
General, State of Oregon,

Respondent.

Supreme Court No. S063527 (Control)

PAUL ROMAIN,

Petitioner,

v.

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

Respondent.

Supreme Court No. S063531

RESPONDENT'S ANSWERING
MEMORANDUM TO PETITIONS TO
REVIEW BALLOT TITLE RE:
INITIATIVE PETITION NO. 45

Pursuant to ORS 250.085, petitioners seek review of the Attorney General's certified ballot title for Initiative Petition 45 (2016) (IP 45). Petitioner Blosser challenges the "yes" vote result statement and the summary. Petitioner Romain challenges all parts of the ballot title. This court reviews ballot titles for "substantial compliance with the requirements of ORS 250.035." ORS 250.085(5). The Attorney General submits this answering memorandum pursuant to ORAP 11.30(6). As explained below, the Attorney General's ballot title for IP 45 substantially complies with ORS 250.035.

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

Petitioner Romain objects to the caption. The caption must reasonably identify the "subject matter" of the measure and contain no more than 15

words. ORS 250.035(2)(a). The “subject matter” of a ballot title is “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).” *McCann v. Rosenblum*, 354 Or 701, 706, 320 P3d 548 (2014) (quoting *Lavey v. Kroger*, 350 Or 559, 563, 258 P3d 1194 (2011)). The caption states:

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

Petitioner Romain contends that the caption is deficient in one respect: “it only addresses the liquid fuels restriction and lumps all of the other changes—which are at least as significant as the liquid fuels limitation—into ‘other limits.’” (Romain Petition, 5). He proposes that the caption should instead read: “Low carbon fuel standards require liquid fuel blends; eliminates fuel credits; requires commercially available alternatives.” (*Id.*). That objection lacks merit.

To the extent that the elimination of fuel credits and the requirement concerning “commercially available alternatives” are significant effects of IP 45, they are not “actual major effects” that must be specifically and individually identified within the caption. Instead, the caption appropriately notes their existence and leaves their description to other parts of the ballot title. The primary actual major effect of IP 45 is a fundamental legal change in the scope

and breadth of the low carbon fuel standards—eliminating numerous alternative fuels (with or without the use of a credit system) from those standards and substituting standards that concern only the blending of fuels with gasoline or diesel. The other changes identified by petitioner Romain are part of that primary change, but not independently significant changes that must be specifically and individually identified as an “actual major effect” of IP 45.

The proposed language offered by petitioner demonstrates the problem with individually identifying other effects of IP 45 given the word limitations for the caption and the requirements of ORS 250.035(2)(a). The phrase “requires commercially available alternatives” is potentially misleading because in the context of petitioner Romain’s proposal, it suggests that the measure requires alternative fuels like natural gas or electricity to be available to consumers. That is not at all what the measure does. The context that suggests this effect is the proposed phrase “Low carbon fuel standards require liquid fuel blends.” Because that phrase is ambiguous with regard to whether the requirement is a current requirement or would be the result of adopting the proposed measure, the overall impression is that the main effect of the measure is to “require[] commercially available alternatives.” Similarly, the phrase “eliminates fuel credits” is misleading in that it could be misunderstood to mean

that the measure would nullify existing credits held by individuals or businesses, rather than eliminating a credit *system*, which is the actual effect of the measure in this regard.

The word limits make it impossible to accurately and clearly explain in the caption what the measure is proposing with regard to commercially available fuels and the effect of the measure on the existing fuel credit system. The Attorney General’s certified caption for IP 45 appropriately captures the primary and actual major effect of IP 45—the requirement for blends of fuels with gasoline or diesel—and appropriately identifies that there are other new limits to the low carbon fuel standards. That language satisfies ORS 250.035(2)(a).

B. The “yes” and “no” vote result statements comply with ORS 250.035(2)(b) and ORS 250.035(2)(c).

Both petitioners challenge the vote result statements. A ballot title must contain “[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). “[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.” *Novick v. Myers*, 337 Or 568, 574, 100 P3d 1064 (2004). A “no” vote

result statement describes the result if the proposed measure is rejected. ORS 250.035(2)(c). The “yes” and “no” vote result statements should be read together. *Potter v. Kulongoski*, 322 Or 575, 582, 910 P2d 377 (1996). The vote result statements read:

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.

Petitioners Blosser and Romain raise three objections to the vote result statements. None of those arguments have merit.

1. The phrase “restricts standards to requiring gasoline/diesel blends with commercially available fuels” in the “yes” vote result statement is accurate.

First, petitioner Blosser argues that the phrase “restricts standards to requiring gasoline/diesel blends with commercially available fuels” in the “yes” vote result statement is inaccurate because the term “commercially available” is not necessarily accurate and because IP 45 further restricts the standards by requiring those “commercially available” fuels to also be the same price (or cheaper) than the gasoline or diesel they are mixed into (and meet other

potential restrictions). (Blosser Petition, 4-9). However, the phrase “commercially available fuels,” as used in context, is accurate and proper.

The challenged phrase is accurate as it identifies the broadest and most predominant legal restriction regarding the possible fuels that may be blended with gasoline or diesel if IP 45 is approved. IP 45 changes the low carbon fuel standards it to make them applicable to only “the blending of liquid fuel available in commercial quantities in this state.” IP 45, § 1(6)(b). IP 45 defines “available in commercial quantities” to mean 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.” IP 45, § 1(6)(d).

Relying on *Tauman v. Myers*, 343 Or 299, 302-03, 170 P3d 556, 557 (2007), petitioner argues that the ballot title’s use of the term “commercially available” identifies a class of eligible fuels that is broader than what would actually be allowed under IP 45. He points out that what is “commercially available” under IP 45 is complicated, suggesting that the definition is not consistent with what a voter might understand from that phrase. Specifically, petitioner Blosser argues that a voter would mistakenly understand that IP 45

would allow fuels “available for purchase in commerce” even though the requirements of the measure are more restrictive.

Petitioner Blosser relies on *Tauman* to support this argument. But the case is inapposite. In that case, this court considered whether the caption term “charity (defined)” was proper for a measure that defined a “charity” as “a nonprofit organization that is organized for the conduct of charitable, benevolent, humane, patriotic, religious, philanthropic, recreational, social, educational, medical, eleemosynary, civic or fraternal activities * * * [.]” This court compared that definition with a common dictionary definition of the term “charity”—that is, an organization that helps “the poor, the suffering, or the distressed”—and concluded that the caption was inaccurate because a voter could mistakenly believe the measure was limited to such organizations (when it was not). *Tauman*, 343 Or at 303; *see id.* (explaining that the measure’s definition of a “charity” could apply to “a symphony association, the Boy Scouts, a private college, and some fraternities, none of which is commonly understood to be a charity”). This court was concerned that the caption might give voters the mistaken impression that the proposed measure’s scope was far *narrower* than it actually was, that is, that the caption understated the scope of that measure. *See Kain v. Myers*, 337 Or 36, 40, 93 P3d 62 (2004 (“the caption

must use terms that reasonably identify the proposed measure’s subject matter and do not understate or overstate the scope of the legal changes that the proposed measure would enact”).

The proposed ballot title does not implicate the concerns identified in *Tauman*. The complete phrase, “restricts standards to requiring gasoline/diesel blends with commercially available fuels,” makes it clear that the fuels in question must be available *for purposes of blending them with gasoline or diesel*. That context makes it sufficiently clear that the fuels must be “commercially available” to those who blend fuels. That impression, in turn, is consistent with the actual definition IP 45 gives to the phrase “available in commercial quantities. Consequently, the term “commercially available fuels” does not “understate or overstate the scope of the legal changes that the proposed measure would enact.” Petitioner Blosser has not shown that the “yes” vote result statement fails to comply with ORS 250.035(2)(b).

2. The phrase “limits low carbon fuel standards’ carbon reduction requirements” in the “yes” vote result statement is not misleading.

Petitioner Romain argues that the phrase “limits low carbon fuel standards’ carbon reduction requirements” in the “yes” vote result statement is misleading because the 10% carbon reduction standard under existing law “is a

goal, not a mandate” and that gasoline or diesel producers may buy carbon credits to satisfy the 10% goal. (Romain Petition, 5-6). Petitioner is incorrect, because even though 10% may only be a *permissible* amount of reduction under current law, the measure would make any carbon reduction requirement in excess of 5% *impermissible*. That is clearly a limit that the measure would impose on the carbon reduction requirements of the low carbon fuel standards. The “yes” vote result statement accurately and properly identifies that effect of IP 45.

3. The phrase “require rules to control costs” in the “no” vote result statement is not misleading.

Petitioner Romain argues that the “no” vote result statement is misleading because it implies that IP 45 “eliminates rules to control costs of compliance” and that a “no” vote will “retain those cost control provisions”, and because it implies that the rules “will actually control costs.” (Romain Petition, 6-7). Neither argument is correct.

The phrase “require rules to control costs” is accurate description of existing law. Under existing law, the EQC is required to “adopt by rule provisions for managing and containing the costs of compliance with the standards[.]” Or Laws 2015, ch 3, § 3; Or Laws 2009, ch 754, § 6(1)(2)(d). IP 45 would eliminate that provision in existing law. IP 45, § 1. Thus, to the

extent the “no” vote result implies an elimination of that existing requirement, that is not inaccurate.

To the extent that petitioner Romain urges that the “no” vote result statement implies more than that, *i.e.* that IP 45 “eliminates rules to control costs of compliance,” that is similarly incorrect. Accurately stating that current law “require rules to control costs” does not imply that cost controls would be lacking under IP 45. What either a yes vote or a no vote would “actually” mean with regard to costs is a political question that the proposed ballot title does not address. That question is properly left to proponents, opponents, and voters to decide.

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

ORS 250.035(2)(d) provides that a ballot title summary be “[a] concise and impartial statement of not more than 125 words summarizing the state measure and its major effect.” The function of the summary is “to provide voters with enough information to understand what will happen if the measure is approved.” *Caruthers*, 347 Or at 670. That information may include a description of the effect of the measure at issue on other laws, so long as the description is accurate. *Berman v. Kroger*, 347 Or 509, 514, 225 P3d 32 (2009). In all events, the information must pertain to an identified, actual

“effect” of enacting the measure; it is not permissible to “speculate about the possible effects of a proposed measure.” *Pelikan/Tauman v. Myers*, 342 Or 383, 389, 153 P3d 117 (2007). The Attorney General’s summary provides:

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/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.

Petitioner Blosser raises a similar argument made with respect to the “yes” vote result statement, that the summary’s description of the phrase ““available in commercial quantities’ (defined)” is inaccurate or incomplete because it fails to describe the numerous considerations the EQC must consider in determining whether a fuel is “available in commercial quantities.” (Blosser Petition, 9-10). However, this court has explained that the use of specially defined terms in quotation marks is an appropriate signal to show that a measure “specially defines the term and uses it in that specially defined sense.” *Carley/Towers v. Myers*, 340 Or 222, 229, 132 P3d 651 (2006). The

summary need not “set out the special definition that the proposed measure would create.” *Id.* Moreover, since the summary does not describe a definition that is “significantly broader than its common definition[,]” *Tauman*, 343 Or at 303, this court should conclude that the summary’s use of the phrase “‘available in commercial quantities’ (defined)” is proper and in compliance with ORS 250.035(2)(d).

Petitioner Romain raises two arguments against the summary. First, he argues that the phrase “Commission must adopt rules to control costs, must allow compliance by obtaining credits from lower carbon fuel providers” is misleading for the same reasons provided concerning the “no” vote result statement. (Romain Petition, 8). Second, he argues that the summary does not describe the impacts of IP 45 for the same reasons raised concerning the caption and “yes” vote result statement. (*Id.*). However, the summary does explain both that the proposal would eliminate the credit system and that it would require gasoline and diesel to be blended with commercially available fuels. Thus the arguments he raised with regard to the caption are largely inapplicable to the summary; to the extent that they are applicable, the arguments are incorrect for the reasons explained above. With respect to the arguments petitioner Romain made regarding the “yes” and “no” statements, they lack

merit for the reasons discussed above. The summary properly identifies and describes the effects of IP 45.

E. Conclusion

For the reasons discussed above, the Attorney General's ballot title substantially complies with ORS 250.035(2). 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/ Matthew J. Lysne

MATTHEW J. LYSNE #025422
Senior Assistant Attorney General
matthew.j.lysne@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: Tuesday, September 08, 2015 10:49 AM
To: THOMAS Alicia F
Subject: Initiative Petition #45 Appealed
Attachments: 045dbt.pdf; 045cbt.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 8, 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 Steven Berman on Initiative Petition **2016-045**. 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 **2016-045** Draft Ballot Title

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

Caption

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

Chief Petitioners

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

Comments

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

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

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

| Comments Due | How to Submit | Where to Submit |
|--------------|---------------|-----------------|
|--------------|---------------|-----------------|

| | | |
|----------------|----------------|---|
| August 6, 2015 | Scan and Email | irrlstnotifier.sos@state.or.us |
| | Fax | 503.373.7414 |
| | Mail | 255 Capitol St NE Ste 501, Salem OR 97310 |



DEPARTMENT OF JUSTICE
APPELLATE DIVISION

July 23, 2015

RECEIVED
2015 JUL 23 PM 4 29
SECRETARY OF STATE

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

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

Dear Mr. Williams:

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

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

A copy of the draft ballot title is enclosed.

Alicia Thomas
Legal Secretary

AFT/6678870

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

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.

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
DANIELLE ROMAIN
DROMAIN@THEROMAINGROUP.COM

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

RECEIVED
2015 AUG 6 PM 1 45
SECRETARY OF STATE

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

Dear Secretary Atkins:

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

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

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

The draft caption states:

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

ORS 250.035(2)(a) provides that the ballot title caption must contain "not more than 15 words that reasonably 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 *Hunnicuttt/Stacey v. Myers*, 343 Or 387, 391, 171 P3d 349 (2007)).

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

For this reason, we suggest the caption should read:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The draft summary states:

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

ORS 250.035(2)(d) requires that a ballot title contain "[a] concise and impartial statement of not more than 125 words summarizing the state measure and its major effect." The purpose of an initiative ballot summary "is to help voters understand what will happen if the measure is approved, and ...[it] should ...be worded so that voters will understand the breadth of its impact." *Wyant v. Myers*, 336 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.

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

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

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

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

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

For these reasons, we propose the following summary.

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

Thank you for your consideration of these comments.

by Paul R. Romain

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 3 58
SECRETARY OF STATE

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: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 **2016-045** Certified Ballot Title

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

Caption

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

Chief Petitioners

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 4 44
SECRETARY OF STATE

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

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

Dear Mr. Williams:

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

A. The caption

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

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

1. Comments

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

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

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

2. Our response to the comments

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

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

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

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

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

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

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

1. Comments

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

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

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

2. Our response to the comments

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

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

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

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

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

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

C. The summary

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

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

1. Comments

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

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

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

2. Our response to the comments

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

Accordingly, we certify the following summary:

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

August 21, 2015

Page 7

E. Conclusion

We certify the attached ballot title.

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

MJL:aff/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

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.

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on September 25, 2015, I directed the original Respondent's Answering Memorandum to Petitions to review Ballot Title Re: Initiative Petition No. 45 to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and served upon Steven C. Berman, attorney for petitioner Nicholas Blosser; and served upon Paul R. Romain, attorney for petitioner; by using the court's electronic filing system.

I further certify that on September 25, 2015, I directed the Respondent's Answering Memorandum to Petitions to review Ballot Title Re: Initiative Petition No. 45 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/ Matthew J. Lysne

MATTHEW J. LYSNE #025422
Senior Assistant Attorney General
matthew.j.lysne@doj.state.or.us

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