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## FISCAL IMPACT REPORT

ORIGINAL DATE 01/28/13  
 SPONSOR Egolf LAST UPDATED 02/01/13 HB 136/aHENRC  
 SHORT TITLE Disclosure of Fracturing Fluid Composition SB \_\_\_\_\_  
 ANALYST McCoy

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY13	FY14		
	NFI		

(Parenthesis ( ) Indicate Expenditure Decreases)

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY13	FY14	FY15	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>		\$100.0	\$100.0	\$200.0	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

New Mexico Environment Department (NMED)  
 Energy, Minerals and Natural Resources Department (EMNRD)  
 Department of Health (DOH)  
 Attorney General's Office (AGO)

### SUMMARY

#### Synopsis of HENRC Amendment

The House Energy and Natural Resources Committee amendment to House Bill 136 (HB 136) proposes to require disclosure at least 30 days prior to hydraulic fracturing. The amendment requires the disclosure form be provided to the landowner and adjacent landowners on which the well is located and to the nearest Oil Conservation Division (OCD), as well as the publication of a notice, in a newspaper of general circulation in the relevant county, as to the availability the disclosure form.

Synopsis of Original Bill

House Bill 136 (HB 136) proposes to add a new section to the Oil and Gas Act to require the Oil Conservation Commission to adopt rules, effective on January 1, 2014, to require disclosure of the composition of hydraulic fracturing fluids used in hydraulic fracturing treatments in wells. The rules shall require a well operator who has hydraulically fractured a well to post the hydraulic fracturing chemical registry form on web sites of the Ground Water Protection Council and Interstate Oil and Gas Compact Commission. HB 136 specifies the form would require reporting of total volume of water and each chemical ingredient. Additionally, the bill stipulates that if the above mentioned websites are no longer available the information shall be posted on another public website, and the form shall be provided to the commission with the well completion report for each well.

HB 136 also requires the Oil Conservation Commission to enact rules which specify that a service company that performs a hydraulic fracturing treatment on a well or a supplier of an additive would be required to provide the well operator with the information necessary to complete the form, prescribe a process by which an entity may designate certain information confidential per trade secret and create a process to challenge the trade secret. A trade secret may only be challenged by certain landowners, the state, and the federal government. Finally, HB 136 stipulates the rules must prescribe an efficient process for an entity to provide information, including trade secret information, to a health professional or emergency responder.

**FISCAL IMPLICATIONS**

The Energy, Minerals and Natural Resources Department (EMNRD) notes, the the Oil and Gas Conservation Division (OCD) of the EMNRD currently tracks wells by the American Petroleum Institute (API) number number, a unique number assigned by one of the four district offices in the state. The OCD district offices (boundaries are indicated in the map below) are responsible for oversight and approval of all activities associated with the well.



The well's API number indicates the county in which the well is located. According to the EMNRD, the HENRC amendments to the bill would require an additional tracking system for the forms to be filed by the nearest location to a district office, rather than a well number. As shown on the map, a well may be located in district 1, but the physical location may actually be closer to Artesia than to Hobbs. The additional tracking system would require forms to be filed in the incorrect district, which would lead to confusion, or a separate simultaneous database would have to be constructed. The OCD estimates, compliance with the amendments including filing and tracking the additional submittals in all offices, working with operators to ensure compliance and responding to any public inquiries will necessitate at least one additional FTE as well as additional computers and scanners. Depending on the additional workload, additional people may need to be hired at several districts.

The OCD of the EMNRD estimates full compliance with HB 136 will require the hiring of an additional attorney which would cost an estimated \$100,000 per year for salary and benefits. There is an additional cost for the commission and the division to develop and promulgate new rules, but that cost is minimal.

### **SIGNIFICANT ISSUES**

Both the Attorney General's Office (AGO) and the EMNRD note, requiring an operator to submit a hydraulic fracturing chemical registry form 30 days prior to fracture stimulation would result in inaccurate information being filed because because the determination as to which chemicals to use in the fracking fluid mix is sometimes made based on site-specific circumstances just prior to drilling (*i.e.*, less than 30 days prior to drilling).

The EMNRD also notes, by requiring disclosure prior to the fracturing treatment, the HENRC amendment conflicts with language in the original bill. Sections A(1) and B require disclosure of materials "used" in the treatment and Section A (3) requires submittal of the form with the well completion report. That occurs within 45 days after the well is completed. The second category for form submittal is the OCD office nearest the property upon which the well is located. The EMNRD reports, by regulation, an operator already must file a hydraulic fracturing fluid disclosure form to the OCD within 45 days of completion of the well. The form is filed electronically and is posted on the OCD website in the well file. Public access is already available by website or by contacting any OCD office for information on any well in the state.

The AGO reports, hydraulic fracturing, commonly referred to as "fracking," has taken on growing significance for energy use and the environment in the United States in recent years because of new technologies that allow for horizontal drilling, the use of great volumes of water for drilling, and the use of chemical additives, under significant pressure, to stimulate oil and gas production. The fracturing fluids are pumped deep into wells at pressures sufficient to create or restore small fractures in reservoir rock needed to make oil or gas production possible. Older formations, including shale plays with high permeability and porosity, previously considered to be inaccessible, may now be accessed. Water and sand make generally make up over 98 to 99.5 percent of the fracturing fluids, and chemical additives are used. (<http://fracfocus.org/hydraulic-fracturing-how-it-works/hydraulic-fracturing-process> (accessed Jan. 23, 2013)). New Mexico has shale plays that may be explored. Because of the potentially harmful nature of some of the chemical additives used in hydraulic fracturing, there has been concern from the public about potential ground water contamination as a result of "fracking." The extent to which ground water contamination presents a risk is the subject of much debate nationally and, in particular, in those states that have shale plays that are subject to hydraulic fracturing treatment.

Currently, there is no comprehensive federal regulatory scheme for the regulation of hydraulic fracturing, and presently much of the regulation is being conducted at the state level. The AGO reports, as a result of public concern, many states in which hydraulic fracturing is taking place have passed laws or regulations governing hydraulic fracturing treatment, including laws and regulations requiring public disclosure of the chemical additives in the fracturing fluids. States in the West enacting such laws include Colorado, Texas, and Wyoming. The AGO notes, the Colorado, Texas and Wyoming regulations provide for disclosure of all chemical additives in the fracking fluids, protection of chemical additives or concentrations considered to be “trade secret” by oil and gas operators, and an opportunity for challenge to a claim of trade secret. (See 2 CO Code of Reg. § 404-1:205A; 16 Tex. Adm. Code Part 1, § 3.29 & Tex. Govt. Code, ch. 552; Wyo. Adm. Code, ch. 3, § 44 & Wyo. Stat. Ann, § 16-4-203(f).)

The New Mexico Oil Conservation Commission promulgated regulations, effective February 2012, governing disclosure of chemicals used in hydraulic fracturing. See 19.15.16.19.B NMAC. The Oil Conservation Commission’s rule requires an operator to complete the EMNRD’s form and file it with the EMNRD’s OCD. The rule allows an operator to report to non-governmental entities such as the Ground Water Protection Council and the Interstate Oil and Gas Compact Commission if they so choose. The EMNRD notes, the division maintains “cradle to grave” files on all wells in New Mexico which contain all information pertaining to the well, such as spud date, casing and cement and when the well has been plugged and abandoned. According to the EMNRD, by including the hydraulic fracture fluid disclosure within this file set the public has a complete view of the well. The EMNRD also notes, the division controls its own database, but has no control over a third party non-governmental entity database, which may change their forms or processes without having to go through the governmental rulemaking process.

The EMNRD reports, the Oil Conservation Commission’s rule 19.15.16.19(B) NMAC requires chemical ingredients to be disclosed, as well as a significant amount of detail including, but not limited to, American Petroleum Institute (API) number, location by unit, lot, section, township, range; surface and bottom hole locations, the gross fractured interval, the total volume of fluid pumped (not just water pumped) a description of the composition and concentration of each ingredient, the trade name, supplier, purpose, maximum concentrations per mass and certification by the operator that the provided information is true and correct.

According to the AGO, the Oil Conservation Commission regulations do not require disclosure of all chemical additives, but only those that are required to be disclosed under Occupational Health and Safety Administration regulations (OSHA) for which material safety data sheets are required. See 19.15.16.19.B NMAC (referring to 29 CFR § 1910.1200).

Both the AGO and the EMNRD report, the Oil Conservation Commission rules do not require an operator to report information which is trade secret. “Proprietary, trade secret and confidential business information” are not defined terms in the regulations, and there is no opportunity to challenge a claim of trade secret under Oil Conservation Commission’s regulations. The AGO notes, according to Pivot Upstream’s D-Frac database, 84 percent of fracking fluid disclosures in New Mexico claim trade secret protection. This level of non-disclosure is higher than, for example, Pennsylvania (38 percent), Colorado (50 percent), and Wyoming (73 percent).

The AGO notes, HB 136 would require the Oil Conservation Commission to amend its current regulations to require disclosure of all chemical additives in fracturing fluids, not just those that are required for OHSA purposes, to designate certain information as a trade secret, to allow for disclosure of chemical additives claimed to be trade secret to health professionals and emergency responders under circumstances outlined in OSHA regulations, 29 CFR § 1910.1200(i) (in an emergencies and where necessary for public health reasons in non-emergencies).

HB 136 also allows landowners on whose property a well is located and adjacent landowners to challenge a claim of trade secret with the commission. According to the EMNRD, this challenge process would be a burden upon the commission because the commission would be required to conduct hearings and interpret federal trade secret laws.

The Department of Health (DOH) notes, while the Center for Disease Control (CDC) has indicated there is not enough information determine with certainty whether natural gas extraction and production activities including hydraulic fracturing pose a threat to public health, the CDC does state that further study is warranted to fully understand potential public health impacts. Additionally, the U.S. Environmental Protection Agency (EPA) is undertaking a national study to understand the potential impacts of hydraulic fracturing on drinking water resources, and part of this study requires understanding the components of fracking fluids.

## **PERFORMANCE IMPLICATIONS**

HB 136 places all duties on the Oil Conservation Commission, a three member body that hears adjudicatory matters appealed from the division examiners as well as all rulemaking. According to the EMNRD, it will be difficult for the commission to handle many of the duties under HB 136 by itself, so the commission may decide by rule to delegate certain activities (e.g., receipt of forms, initial review of trade secret claims and challenges, etc.) to the OCD. The Oil and Gas Act provides for concurrent jurisdiction between the Oil Conservation Commission and the OCD. (Section 70-2-6 NMSA 1978)

## **ADMINISTRATIVE IMPLICATIONS**

The HENRC amendments to HB 136 would requires the OCD offices to maintain a file for disclosure forms.

HB 136 would require the Oil Conservation Commission to conduct a public rulemaking. Additionally, the EMNRD notes HB 136 may result in the commission being required to segregate a significant amount of information that is claimed to be a trade secret. According to the EMNRD, the administration of trade secret information and any challenges to trade secret designations would require additional legal staffing for the agency. The volume of information generated by hydraulic fracturing disclosure is considerable. A very high percentage of new wells incorporate the hydraulic fracturing process; last year, over 1600 new wells were completed. The implementation of the trade secret provisions, including challenges, will require legal expertise to deal with federal trade secret laws. Finally, the EMNRD notes, by requiring agency employees to handle trade secret information, the employees are exposed to potential criminal liability for disclosure under Section 71-2-8 NMSA 1978.

## **OTHER SUBSTANTIVE ISSUES**

The EMNRD notes, the HENRC amendments to HB 136 duplicate the Surface Owners Protection Act (SOPA). SOPA requires “sufficient disclosure of the planned oil and gas operations to enable the surface owner to evaluate the effect of the operations on the property.” This notice is due within 30 days before entering the property. A landowner, pursuant to SOPA, may negotiate disclosure of hydraulic fluid chemicals before and after fracture stimulation.

The EMNRD points out, HB 136 uses the term “entity” in several places. In subsection F, it is unclear which “entity” is required to provide information to health professionals.

## **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

The Oil Conservation Commission regulations discussed above will remain in effect, which, according to the AGO, do not require disclosure of all chemical additives, do not define “trade secret,” do not allow for disclosure of trade secret information for public health purposes, and do not allow for any challenge to a claim of trade secret by potentially affected land owners.

## **AMENDMENTS**

The EMNRD notes, the new subsection A (5) in HENRC amendment number 2 is likely intended to refer to an OCD office but the word “office” is never used in this subsection. It is used in the next subsection. The EMNRD proposes the following changes to the HENRC amendment:

In amendment 2, the second line of subsection A(5) should insert “office of the” before “oil”.

The AGO notes, other states that have enacted pre-drilling disclosure requirements, also require post-drilling disclosure. These states include Arkansas, Idaho, Indiana, West Virginia and Wyoming. To address this issue, HB 136 could be amended to require that a corrected form be filed if it turns out that the mix is changed just prior to drilling based on site-specific circumstances.

The AGO notes the following amendments may improve the bill:

1. A number of other states’ regulations allow for a challenge to a claim of trade secret by any person, not just potentially affected landowners.
2. A number of other states’ regulations allow for disclosure of the “chemical family” of the chemical ingredient for which trade secret is claimed, unless the “chemical family” is trade secret. One definition for “chemical family” is “a group of chemicals that share similar chemical characteristics and have a common general name.” 2 CO Code of Reg. § 404-1:100.
3. Section 1.A(1) of HB 136 requires the Oil Conservation Commission to promulgate rules for disclosure of “each chemical ingredient” used in hydraulic fracturing treatment and for completion of the “hydraulic fracturing registry form” on the websites of the Ground Water Protection Council and the Interstate Oil and Gas Compact Commission (each of which uses FracFocus Chemical Disclosure Registry at <http://fracfocus.org/>). While the FracFocus form requires disclosure of the maximum concentration of each chemical ingredient, HB 136 does not

expressly require disclosure of the concentration. The concentration of a chemical provides information as to potential risk. HB 136 could be clarified to require disclosure of “the actual or maximum concentration of each chemical ingredient.”

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