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## FISCAL IMPACT REPORT

ORIGINAL DATE 1/28/18

SPONSOR Brown LAST UPDATED \_\_\_\_\_ HB 125

SHORT TITLE Corrective Fund to Carlsbad Brine Well Fund SB \_\_\_\_\_

ANALYST Jorgensen

### REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY18	FY19	FY20		
	(\$3,000.0)	(\$3,000.0)	Recurring 4 Years	Corrective Action Fund
	\$3,000.0	\$3,000.0	Recurring 4 Years	Carlsbad Brine Well Remediation Fund

(Parenthesis ( ) Indicate Revenue Decreases)

Duplicates SB62 and Relates to, HB121, HB123, HB124, and HB126

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Energy, Minerals and Natural Resources Department (EMNRD)

New Mexico Environment Department (NMED)

### SUMMARY

#### Synopsis of Bill

House Bill 125 appropriates \$3 million from the corrective action fund (CAF) of the NMED to the Carlsbad brine well remediation fund for the purpose of remediation of the Carlsbad brine well.

### FISCAL IMPLICATIONS

The CAF is supported by the petroleum products loading fee imposed on motor vehicle fuel. The loading fee is \$150 per 8 thousand gallons of gasoline or special fuels. NMED anticipates FY19 revenue generated by the fund to be \$19.6 million. HB125 would transfer \$3 million from the CAF to the brine well remediation fund. This transfer would reduce revenue available to NMED for salaries and remediation work.

Additionally, NMED uses CAF revenue to provide a state match for federal funds for multiple bureaus that address water quality needs. The department stated that in FY18, the CAF provided \$2.1 million to provide matching funds for \$4.8 million of federal funds. See Attachment 2.

The LFC has concerns with including continuing appropriation language in the statutory provisions as earmarking reduces the ability of the legislature to establish spending priorities.

### **SIGNIFICANT ISSUES**

The purpose of the CAF is to provide financial assurance coverage for fuel tank owners and is used to take corrective action in response to release of petroleum products from fuel tanks and to match federal funds. NMED stated that “a reduction of CAF funds would also limit the Department’s ability to fulfill the fund’s statutory purpose to investigate and characterize existing and new releases and ensure that all owners and operators contain and clean up releases as required by both state and federal law.”

NMED did not provide an estimate of how many remediation projects would be delayed or any potential adverse impacts to staffing such as furloughs.

Attachment 1 shows a CAF revenue forecast provided by NMED which shows a \$22.9 million deficit in the fund at the end of FY22 and attributes \$12 million of the deficit to the transfers resulting from enactment of SB62.

### **PERFORMANCE IMPLICATIONS**

NMED notes the corrective action fund pays staff salaries 42 FTE in the petroleum storage tank bureau (PSTB) as well as for an additional 116 FTE not related to petroleum storage tank remediation. While NMED stated that the reduction of CAF funding “will negatively impact operations throughout the department”, the department did not estimate the impact on remediation projects or staff. However, NMED did report that a \$5 million sweep from the fund in FY17 led to a 50 percent reduction in remediation efforts, but did not cause furloughs or other adverse impacts on existing employees.

### **ADMINISTRATIVE IMPLICATIONS**

NMED stated “the proposed diversion will jeopardize the state’s compliance with federal underground storage tank regulations, including Corrective Action Fund and financial responsibility requirements.” In January 2015, the Environmental Protection Agency (EPA) advised NMED that a \$500 thousand diversion could compromise New Mexico’s compliance with the Underground Storage Tank Act, but took no further action.

### **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

HB125 is related to, HB121, HB123, HB124, and HB126 in that all bills provide appropriations to the Carlsbad brine well remediation fund.

HB125 duplicates SB62.

## OTHER SUBSTANTIVE ISSUES

According to EMNRD:

The “Carlsbad brine well” refers to an underground cavern located in the southern portion of the City of Carlsbad that was created by the historic operation of a brine well. A “brine well” is a solution mining operation where fresh water is injected into salt formations to produce saturated brine which is extracted for use in oil and gas drilling operations. Brine wells result in underground caverns, with the stability of the caverns depending on their depth, width, and the strength of the overlying formations. Following the collapse of two brine wells in 2008, OCD examined the causes of the collapses and identified the Carlsbad brine well as having similar features to the wells that collapsed.

Unlike the brine wells that collapsed, the Carlsbad brine well is located in a developed urban area and the nearby infrastructure and facilities that could be impacted by a collapse include a mobile home park, a place of worship, a feed store, two highways (US 285 and US 180/62), a BNSF Railway facility, and Carlsbad Irrigation District’s Southern Main canal. Both highways are designated Waste Isolation Pilot Plant (WIPP) transportation routes. A collapse of the brine well will also adversely impact groundwater, surface habitat, and a vital aquifer.

The Carlsbad Brine Well Remediation Fund (Fund) was established by the Legislature in 2017. NMSA 1978, §75-11-2. The Fund is administered by EMNRD and is to be used by the EMNRD Oil Conservation Division (OCD) “to remediate the Carlsbad brine well”. The Legislature also established the Carlsbad Brine Well Remediation Advisory Authority (Advisory Authority) to advise the OCD on the remediation of the brine well. NMSA 1978, §75-11-1(B).

CJ/jle

FY19 Budget Request  
Special Revenue Fund Forecast

<b>Special Revenue Fund: 990 Corrective Action Fund</b>					
NM Statute 74-6B-7					
Revenue Type: The Petroleum Products Loading Fee Act (Section 7-13A NMSA 1978) establishes the funding source.	FY18 Opbud	FY19 Request	FY20 Projection	FY21 Projection	FY22 Projection
Beginning Balance Due To Adjustment	\$ 10,312.0	\$ 5,764.1	\$ (1,409.0)	\$ (8,582.1)	\$ (15,755.2)
<b>Beginning Balance</b>	<b>\$ 10,312.0</b>	<b>\$ 5,764.1</b>	<b>\$ (1,409.0)</b>	<b>\$ (8,582.1)</b>	<b>\$ (15,755.2)</b>
Revenues Received Revenues Adjustment* Budgeted Revenues Additional Projected Revenues Projected Revenues** Refund	\$ 19,127.8	\$ 19,663.3	\$ 19,663.3	\$ 19,663.3	\$ 19,663.3
<b>Revenue</b>	<b>\$ 19,127.8</b>	<b>\$ 19,663.3</b>	<b>\$ 19,663.3</b>	<b>\$ 19,663.3</b>	<b>\$ 19,663.3</b>
Contracts (Fd 990) Utilities (Fd 990) Subscriptions & Dues (Fd 990) Misc Expenditures (Fd 990) Prior Yr Expenditures (Fd 990) Ln 555106 Expenditures (Fd 064 used 55106 for FY17 - new account code)	\$ (3,500.0)	\$ (3,500.0)	\$ (3,500.0)	\$ (3,500.0)	\$ (3,500.0)
Fund Sweep Due Back to the Fund Transfer to Carlsbad Brine Well	\$ (11,000.0)	\$ (11,000.0)	\$ (11,000.0)	\$ (11,000.0)	\$ (11,000.0)
	\$ (9,175.7)	\$ (9,336.4)	\$ (9,336.4)	\$ (9,336.4)	\$ (9,336.4)
		\$ (3,000.0)	\$ (3,000.0)	\$ (3,000.0)	\$ (3,000.0)
<b>Expenditures</b>	<b>\$ (23,675.7)</b>	<b>\$ (26,836.4)</b>	<b>\$ (26,836.4)</b>	<b>\$ (26,836.4)</b>	<b>\$ (26,836.4)</b>
<b>Ending Balance</b>	<b>\$ 5,764.1</b>	<b>\$ (1,409.0)</b>	<b>\$ (8,582.1)</b>	<b>\$ (15,755.2)</b>	<b>\$ (22,928.3)</b>
<b>Net Change to Fund Balance</b>	<b>\$ (4,547.9)</b>	<b>\$ (7,173.1)</b>	<b>\$ (7,173.1)</b>	<b>\$ (7,173.1)</b>	<b>\$ (7,173.1)</b>

\* Projected period 12 distribution from Tax & Rev

\*\* FY19-20 projections were calculated using an 11 month actual distributions from Tax & Rev (July 2016 through May 2017) total of \$18,024.7 with the addition of projected period 12 based on prior 11 month average in the amount of \$1,638.6 Total



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**J. C. BORREGO**  
 Deputy Secretary

January 18, 2018

David Abbey  
 Director  
 Legislative Finance Committee  
 325 Don Gaspar Ave #101  
 Santa Fe, NM 87501

Dear Mr. Abbey:

I am writing in response to Legislative Finance Committee analyst Connor Jorgensen’s email dated December 18, 2017 related to Corrective Action Fund (“CAF”) monies. The following answers are provided to Mr. Jorgensen’s queries.

*1. Over the past three years how much state funding was for federal match and how much federal funding was secured?*

The table below summarizes the amount of CAF funds used for federal match requirements and the federal funds that were secured correlated with the specific match. Please note that the New Mexico Environment Department (“Department” or “NMED”) minimizes the use of the CAF for this purpose by providing in-kind matches when allowed, or accessing other state funds when available. Currently, NMED utilizes 30% of the CAF to match federal funds and to support multiple bureaus that address water quality needs throughout the state. The programs supported by the CAF are vital to the protection of human health and the environment, are mandated by state and/or federal law, and, also, directly and indirectly support economic development and vitality throughout the state. I understand this question as directly related to CAF monies and not all state funds used for federal match.

Fiscal Year	CAF Funding	Federal Funding
FY16	\$ 1,498,557	\$ 3,463,874
FY17	\$ 2,011,253	\$ 4,166,177
FY18	\$ 2,138,554	\$ 4,872,780

## 2. *What are the specific federal restrictions on use of CAF funds?*

Diversions from the CAF could result in a loss of federal funds that support both the corrective action and petroleum release prevention efforts of the Petroleum Storage Tank Bureau. In addition, diversions from, or reductions to, the fund would threaten New Mexico's primacy over the federal underground storage tank program granted to it by the U.S. Environmental Protection Agency ("EPA"), the compliance status of approximately 700 tank owners, 220 tank operators, and 1,768 facilities in relation to the financial assurance requirements found in both state and federal regulations, and corrective action efforts at approximately 900 release sites, as discussed below. The upcoming year, 2018, is a critical year for New Mexico's primacy over the underground storage tank program, as the state is required to apply for primacy by October in accordance with the federal regulations. The following federal statutory provisions specifically address either primacy, financial responsibility, or state fund balances.

- 40 C.F.R. §281.60 states that "[t]he [EPA] Administrator may withdraw program approval when the Agency determines that a state no longer has adequate regulatory or statutory authority or is not administering and enforcing an approved program in accordance with this part. The state must have adequate capability to administer and enforce the state program. In evaluating whether such capability exists, the Agency will consider whether the state is implementing an adequate enforcement program by evaluating the quality of compliance monitoring and enforcement actions."
- As detailed in 40 C.F.R. §281.11(a)(viii), the state must demonstrate that its program meets the substantive elements, including requiring financial responsibility, for UST systems. NMSA 1978 Section 74-6B-7 established the CAF to provide financial assurance for tank owners and operators in the state, in compliance with 40 C.F.R. §281.11(a)(viii).

Similarly, 40 C.F.R. §281.11(a)(vii) requires that the state have provisions in place for release response and corrective action. NMSA 1978 Section 74-6B-7 also established the CAF to make payments to or on behalf of tank owners and operators for corrective action at releases from a regulated petroleum storage tank. This provision has successfully facilitated the investigation and clean-up of over 1800 releases. CAF is still necessary to clean up the contamination from the remaining 900 release sites and any new release sites to ensure they do not pose an actual or imminent threat to human health. EPA also reviews New Mexico's progress in reducing the number of release sites as part of its oversight responsibilities. A reduction of CAF funds will limit the Department's ability to fulfill the fund's statutory purpose by continuing to investigate and characterize existing and new releases and ensure that all owners and operators contain and clean up unreported spills and overfills as required by both state and federal law.

- The Underground Storage Tank Compliance Act, codified at 42 U.S.C. § 6991, provides that federal funds shall not be distributed for enforcement by a state or local government for regulation of underground storage tanks if the state has "diverted funds from a State

fund or State assurance program for purposes other than those related to the regulation of underground storage tanks . . . .” 42 U.S.C. § 6991c(f)(2)(B).

In January 2015, EPA advised the Department of its concern that the diversion of \$500,000 in FY14 and proposed diversion in FY15 could compromise the states compliance with the Underground Storage Tank Act and has since been scrutinizing the soundness of the CAF associated with legislative diversions from the fund.

- EPA Guidance for Regional Office Review of State Underground Storage Tank Financial Assurance Funds (January 2012) outlines the process for withdrawing state fund approval as a financial assurance mechanism. The process requires that the state notify all tank owners and operators, within 30 days after publication of the notice withdrawing EPA approval in the Federal Register, that the effective date of withdrawal will be no sooner than 120 calendar days after publication in the Federal Register and that the tank owners and operators are required to obtain an alternative financial assurance mechanism.

Of particular concern, should the EPA withdraw its approval of the CAF as a financial assurance mechanism, is that approximately 45% of the tanks in New Mexico were installed over 20 years ago and 80% of the storage tanks were installed prior to 2008, the effective date of the secondary containment requirements for underground storage tanks, thereby creating a situation in which many tanks in New Mexico are out of compliance with mandatory federal and state requirements. Thus, a majority of tank owners and operators would likely not be able to secure private insurance in order to meet the federal financial assurance requirements due to the unwillingness of insurance companies to insure entities that are out of compliance, or afford coverage with insurance companies offering insurance at extremely high rates for out of compliance systems. This could adversely reduce the availability of fuel throughout the state, with the rural areas being the most severely impacted.

*3. If CAF funds were reduced, what is the amount NMED could absorb before layoffs occurred?*

There are too many variables to accurately answer this question.

*3a. What are the impacts of reducing CAF on ongoing clean-up efforts?*

The recent diversion of over \$5 million from the CAF in FY17 resulted in more than a 50% reduction in expenditures at sites with continued corrective action compared to the preceding years. Remediation, including monitoring activities, were reduced in scope, delayed, or even suspended pending additional distribution of revenue to the CAF subsequent to the diversions. Similarly, this slowdown in remediation directly impacted on-going work at Priority 1 sites<sup>1</sup> where an actual or imminent threat to human health has been identified, including sites where

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<sup>1</sup> Pursuant to 20.5.15.12.A(1) NMAC, Priority 1 sites are sites “where the release of a regulated substance from a storage tank system has created an actual or imminent hazard to public health, safety and welfare or the environment...”

municipal, community, and water supply wells are contaminated. Conversely, the injection into the CAF of \$3.75 million from a settlement agreement in FY14 facilitated corrective action at sites that previously had no corrective action for over 3 years, and 100 more sites in both FY14 and FY15 than in previous and subsequent years. Existing funding levels support corrective action at less than 50% of the identified release sites per year. The table below provides supporting detail.

Fiscal Year	Number of Sites where corrective action work was approved.	Amount Obligated	Amount expended	Average obligation per month.
FY13	272	\$14,745,522	\$14,033,609	\$1,228,793
FY14	387	\$13,363,068	\$9,138,307	\$1,113,589
FY15	325	\$13,907,669	\$11,665,376	\$1,158,972
FY16	242	\$12,272,918	\$14,131,774	\$ 1,022,743
FY17	121	\$ 7,129,358	\$10,271,494	\$ 594,113

Additional diversions from the CAF will also limit the Department's ability to address sites where the tank owners are unknown, unwilling, or unable to conduct required corrective action work. Over the last year, the Department classified approximately 12 state lead sites where the tank owner or operator died or is no longer able to perform oversight responsibilities. In addition, tanks that have not been registered continue to be identified by new or unsuspecting landowners and the tank owners and operators are unknown or unable. Access to the CAF is one of the primary incentives for tank owners to comply with the regulations, as compliance is a pre-condition for eligibility for reimbursement for corrective action activities.

A further consideration of tank owners' and operators, viability to perform corrective action without the CAF is that approximately one third of the owners and operators with sites that require corrective action qualified, based upon an inability to pay means test found in 20.5.17.20 NMAC, for a reduced or zero deductible of the \$10,000 minimum site assessment cost that is otherwise required to be paid under NMSA 1978, Section 74-6b-13.

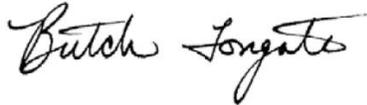
It should be noted that the CAF also promotes economic development by fostering the redevelopment of petroleum-contaminated sites. Prospective purchasers, developers and lenders are assured that there is a dedicated mechanism to address contamination at release sites and existing petroleum storage tank facilities that have the potential to become release sites. Numerous existing and former release sites have been redeveloped and serve a beneficial use (restaurants, pharmacies, grocery stores and new retail gas stations), and, thereby, provide services and income in the communities in which they are located. Diversions from the CAF will reduce the confidence of investors, which may result in blighted and unproductive properties.

Mr. Jorgensen also inquired about usage of the CAF in funding the Carlsbad Brine Well abatement efforts, which was previously addressed in a letter to Senator Carlos Cisneros on August 18, 2017. The Legislative Finance Committee was copied on that correspondence and, as a courtesy, I've attached it for your reference.

In summary, existing legislation established the authorized uses of the CAF. Any reduction or diversion of the CAF from its intended uses will adversely reduce the Department's effectiveness in protecting human health and the environment, restoring resources to beneficial use, and promoting economic development in the state and affect over 157 Department employees.

Thank you for your continued interest in understanding the benefits and importance of the CAF, and the role it plays fulfilling the legislative mandates and mission of the New Mexico Environment Department. Please let me know if you have any further questions, or require additional information.

Sincerely,

A handwritten signature in cursive script that reads "Butch Tongate".

Butch Tongate  
Cabinet Secretary  
New Mexico Environment Department

cc: Legislative Finance Committee Members  
Connor Jorgensen, Analyst, Legislative Finance Committee  
Andrew Miner, Analyst, Department of Finance and Administration