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FISCAL IMPACT REPORT

SPONSOR Ortiz y Pino DATE TYPED 02/16/05 HB _____

SHORT TITLE Oil Conservation Division Appeals SB 777

ANALYST Ford

APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY05	FY06	FY05	FY06		
	See Narrative				Oil and Gas Facilities Fund

(Parenthesis () Indicate Expenditure Decreases)

Duplicates
HB 871

REVENUE

Estimated Revenue		Subsequent Years Impact	Recurring or Non-Rec	Fund Affected
FY05	FY06			
	See Narrative			Oil and Gas Facilities Fund

(Parenthesis () Indicate Revenue Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Energy, Minerals and Natural Resources Department (EMNRD)
Environment Department (NMED)
Office of the State Engineer (OSE)

SUMMARY

Synopsis of Bill

Senate Bill 777 amends the New Mexico Oil and Gas Act and the Geothermal Resources Conservation Act to clarify the authority of the Oil Conservation Division (OCD) to regulate discharges and potential discharges of water contaminants at oil and gas production and processing facilities, to increase penalties for certain violations, and to clarify and streamline provisions for appeals from decisions of the Oil Conservation Commission (OCC). The bill creates a new fund, the oil and gas facilities fund to be administered by EMNRD. Money is appropriated from the fund to ENMRD for administering the program.

Significant Issues

Discharge Permits: The bill would consolidate the authorization to issue discharge permits and collect fees, currently issued under authority of both the Water Quality Act (WQA) and the Oil and Gas Act, under the Oil and Gas Act. The fees collected would be deposited in the newly created Oil and Gas Facilities Fund, analogous to the Water Quality Fund, which would be appropriated to defray the costs of administering the program.

According to EMNRD, the provisions of the bill regarding permits and fees are not designed to change existing OCD regulatory practices, but are designed to consolidate OCD regulation of the disposition of contaminants under the Oil and Gas Act. Issues have arisen as to whether certain facilities can properly be regulated using current law, and whether the discharge permit requirements of the WQA apply to potential or unintended discharges of water contaminants. The bill would specifically authorize OCD to adopt, under the Oil and Gas Act, permitting requirements analogous to those it now administers under the WQA.

The bill would further authorize OCD to charge permitting fees for discharge permits specifically authorized by the bill, which are currently authorized by the WQA. The bill limits OCD to charging fees sufficient to defray the estimated cost of investigation, issuance, modification and renewal of such permits.

Penalties: The penalty provisions with respect to the Oil and Gas Act and the Geothermal Act make the following changes in existing law:

1. OCD will no longer have to prove that a violator acted "knowingly and willfully" in order to assess civil penalties,
2. Maximum civil penalties for violations which result in the unauthorized release of water contaminants are increased from \$1,000 per day (\$2,500 per day under the Geothermal Act) to \$10,000 per day,
3. OCD will have express power to assess civil penalties by administrative hearing, and will not have to sue violators in court, except to collect penalties already assessed, and
4. Penalties for criminal violations are increased from \$10,000 per day to \$15,000 per day.

According to EMNRD, the Oil and Gas Act was enacted in 1935 and the provision for civil penalties for violations of the Act not exceeding \$1,000 per offense, per day, limited to "knowing and willful" violations, was part of the original act. The provision for "recovery" of civil penalties by suit in district court led one district court recently to conclude that the OCD cannot assess

civil penalties by administrative process. The penalty provisions of the Geothermal Act provide for a \$2,500 per day maximum, but otherwise track the Oil and Gas Act.

Much has changed since 1935. At that time the principal purpose of oil and gas regulation was to control competitive practices within the industry that resulted in wasteful methods of production. Increasingly in recent years the focus has shifted to protection of the environment. The OCD and the rules it adopts under the Oil and Gas Act are now the primary means by which the State of New Mexico protects its water resources from deterioration that could result from imprudent oil and gas industry activity. Also the years since the Legislature adopted the \$1,000 per day maximum penalty for violations of the Oil and Gas Act have witnessed an increase in the market price of crude oil from less than \$1 per barrel to more than \$40 per barrel. To perform its responsibility to protect New Mexico's environment and water resources under present day economic conditions OCD needs enforcement tools comparable to those provided in other environmental laws.

Other New Mexico environmental statutes uniformly provide for strict liability for civil penalties. That is, a violator is subject to penalty for any violation regardless of knowledge or intent, thereby placing affirmative responsibility upon industry to conduct its activities in such a way as to prevent violations from occurring. Virtually all such statutes provide for higher penalties than does the Oil and Gas Act and for assessment of civil penalties by administrative process.

Appeals: The appeal provisions in the bill clarify the time when an appeal from a decision of the OCC must be filed in district court, eliminate provisions of existing law mandating the filing of a motion for rehearing with the OCC as a prerequisite to appeal to district court, and repeal a provision for appeal of OCC decisions to the Secretary of Energy Minerals and Natural Resources.

According to EMNRD, the provision that allows appeals of final decisions of the OCC to the Secretary has been used only once in 28 years. The Oil and Gas Act already allows for two administrative hearings. The bill also improves administrative efficiency by eliminating requirements that parties desiring to appeal OCC decisions must first file applications for rehearing. These provisions have made it necessary for parties to OCC proceedings to file such motions, and for the OCC to address them, even when OCC had already fully considered all issues.

FISCAL IMPLICATIONS

The discharge and permit fee provisions of the bill will maintain the current funding level to OCD. Currently, the authority to charge these fees is derived from the WQA. If some permitted facilities are successful in establishing that they are not subject to the WQA, OCD would lose some operational funding. The penalty provisions will obviate the need for OCD to go to court to enforce its rules and orders, thereby avoiding possible costs of increased staff.

Continuing Appropriations

This bill creates a new fund and provides for continuing appropriations. The LFC objects to including continuing appropriation language in the statutory provisions for newly created funds. Earmarking reduces the ability of the legislature to establish spending priorities.

ADMINISTRATIVE IMPLICATIONS

Senate Bill 777 streamlines much of OCD's operations and should therefore result in improved administrative efficiency.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

This bill is a duplicate of House Bill 871

TECHNICAL ISSUES

NMED raises a possible technical issue, noting that the term "water contaminant" is not defined. NMED suggests an amendment to use the definition of "water contaminant" that is contained in the WQA.

In Section 4 of the bill, subsection B establishes that the civil penalty for unauthorized discharge of any water contaminant into the environment *shall be* \$10 thousand per day. In subsection C, the bill provides that the OCD or the OCC shall take into account the seriousness of the violation and any good-faith efforts to comply with the applicable requirement when assessing the penalty. These two sections seem to conflict. Subsection B establishes a mandatory penalty while subsection C seems to imply that the OCD or OCC shall have some discretion in assessing penalties.

EF/lg