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FISCAL IMPACT REPORT

ORIGINAL DATE 1-22-09
 LAST UPDATED 1-23-09 HB _____

SPONSOR Leavell

SHORT TITLE Oil and Gas Operation Jurisdiction SB 17

ANALYST Woods

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY09	FY10		
NFI	NFI		

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

New Mexico Oil and Gas Association (NMOGA)
 Energy, Minerals and Natural Resources Department (EMNRD)
 State Land Office (SLO)
 New Mexico Environment Department (NMED)
 New Mexico Association of Counties (NMAC)

No Response Received From

Municipal League

SUMMARY

Synopsis of Bill

Senate Bill 17 makes the jurisdiction of the Oil Conservation Division (OCD) over oil and gas operations exclusive and provides that political subdivisions and other “instrumentalities of the state” shall have no jurisdiction over oil and gas operations “except those specifically provided by law.” There is no appropriation attached to this legislation.

FISCAL IMPLICATIONS

NMED suggests that if the legislation applies to other state agencies, its fiscal implications on the Environment Department would be significant; public health impacts resulting from unregulated air pollution from oil and gas operations would exacerbate health problems for

citizens of the state, particularly those suffering from cardio-pulmonary disease and those with respiratory issues, as well as the very young and the very old. Additionally, USEPA has approved the state's implementation plan for regulation of air quality by the New Mexico Environment Department. Unregulated sources of air pollution in the state would jeopardize that approval and likely lead to disapproval of the state's implementation plan, ultimately resulting in loss of federal grant funding to the Department.¹

SLO advises that regulation at the county/municipality level has the potential to create significant barriers to oil and gas exploration, especially in frontier areas. The large initial monetary investment coupled with the significantly higher risk associated with frontier exploratory operations could make it too prohibitively expensive and risky for frontier area exploration with county by county and city by city regulations to contend with. Oil and gas are depleting assets and without new sources the state will eventually run out of hydrocarbon revenues which would have a significant negative effect on the state's fiscal position.²

SIGNIFICANT ISSUES

The New Mexico Association of Counties (NMAC) notes that this bill would remove all local authority and the authority of other instrumentalities of the state relating to oil and gas operations "except those specifically provided pursuant to law." This clause is vague and its intention and application confusing and unclear. The bill does raise the issue of whether local government authority regarding oil and gas operations would be eliminated and preempted. In fact, NMAC adds, the bill might preempt other state agencies, such as the Environment Department, from administering air quality and other health and safety regulations relative to oil and gas operations. One possible interpretation of SB17 is that all jurisdiction to enforce the Oil and Gas Act would belong exclusively to the oil conservation division of the Energy, Minerals & Natural Resources Department so that counties, municipalities, and other state agencies would not have any authority or any input on oil and gas permits, applications, and operations. In this case, local government would be stripped of its ability to protect wells, waterways, and other infrastructure related to the delivery of potable water in oil and gas operations. Similarly, NMAC concludes, the Environment Department's ability to protect air quality regarding oil and gas operations would be eliminated. This is a significant health, safety, and welfare concern, and could substantially compromise water and air quality in the state.

EMNRD states that recent years have witnessed proposals by oil and gas operators to extend oil and gas development to areas of the state not previously explored. Local groups opposed to such development have sought protection from local government, resulting in proposal or adoption of local ordinances (e.g. in Santa Fe County and Rio Arriba County) to comprehensively regulate oil and gas development. The oil and gas industry questions the appropriateness of local government regulation of oil and gas operations, in view of the existence of state regulatory jurisdiction. EMNRD further states that, "No statute or court decision in New Mexico expressly addresses the power of local governmental units over oil and gas operations. The New Mexico Oil and Gas Act assigns responsibility for regulating oil and gas operations to the Oil Conservation Division (OCD) of the Energy, Minerals and Natural Resources Department (EMNRD), but does not state that OCD's powers are exclusive. Court decisions relating to conflicts between state and local jurisdiction over other activities indicate that, in the absence of

¹ EMNRD does not provide any estimates of costs.

² SLO does not provide any fiscal impact projections.

a specific legislative prohibition, local governments generally may regulate any activity (presumably including oil and gas operations) within their jurisdiction, as long as their requirements do not conflict with state law or state regulatory requirements.”

EMNRD indicates that the legislation bill would also limit the power of “other instrumentalities of the state” to regulate oil and gas operations. The phrase “instrumentalities of the State” does not have an established meaning, so it is not clear whether or not the bill would exclude other agencies of State government from regulating oil and gas operations. This is significant because the Environment Department (ED) current administers air quality statutes applicable to oil and gas operations, and the bill could be construed to interfere with ED’s functioning in this area.

NMOGA supports the legislation stating that believes that the proposed amendment to the Oil and Gas Act in SB 0017 is to reiterate the following language which is currently in statute:

70-2-11. Power of commission and division to prevent waste and protect correlative rights.

A. The division is hereby empowered, and it is its duty, to prevent waste prohibited by this act and to protect correlative rights, as in this act provided. To that end, the division is empowered to make and enforce rules, regulations and orders, and to do whatever may be reasonably necessary to carry out the purpose of this act, whether or not indicated or specified in any section hereof.

B. The commission shall have concurrent jurisdiction and authority with the division to the extent necessary for the commission to perform its duties as required by law.

70-2-12. Enumeration of powers.

B. Apart from any authority, express or implied, elsewhere given to or existing in the oil conservation division by virtue of the Oil and Gas Act or the statutes of this state, the division is authorized to make rules, regulations and orders for the purposes and with respect to the subject matter stated in this subsection:

NMOGA adds that recently adopted ordinances “while not outright prohibiting oil and gas exploration (to circumvent a possible takings lawsuit) have made it impossible to explore for proven or unproven reserves, thereby causing waste of the state’s natural resources. NMOGA strongly believes that the regulation of oil and gas exploration does and should reside with the Oil Conservation Division and the Oil Conservation Commission as clearly stated in the Oil and Gas Act.”

NMED suggests that the legislation would pre-empt the Environment Department’s regulatory authority under the Air Quality Control Act. The Air Quality Control Act (AQCA) has authority to prevent and abate air pollution. The AQCA specifies that the regulations adopted by the Environmental Improvement Board shall maintain national ambient air quality standards, prescribe emission and other broad authority regarding air quality. The AQCA does not specify its authority to regulate air quality over oil and gas operations. Since the AQCA’s authority is not “specifically provided pursuant to law,” air pollution from the oil and gas industry would be unregulated. NMED further opines that OCD does not have authority to regulate air pollution caused by oil and gas operations, nor does the Division have the personnel and expertise to

analyze air pollution. The AQCA specifically gives authority to the Environmental Improvement Board and the local authority to prevent or abate air pollution. NMED states, “If oil and gas operation are exempted from regulation except by the OCD and the OCD does not have authority to regulate air quality, then the oil and gas industry will be unregulated for air pollution. The loophole created by SB 17 would seriously degrade the health of all New Mexicans, but particularly the very young and old, who are much more susceptible to these impacts.”

SLO states that the legislation may prevent the State Land Office from enforcing or promulgating its own regulations concerning oil and gas operations on state trust lands and potentially affect the authority of the Commissioner of Public Lands as trustee for those lands under the state’s statutory lease. Alternatively, SLO adds that the bill would remove county and municipal authority over local land use issues. Decisions on local land suitability for oil and gas development would be made at the state level by the Oil Conservation Commission three member panel with appointees by the Governor (2) and State Land Commissioner (1). Currently the state’s statutory oil and gas lease requires oil and gas lessees to “... comply with all laws, regulations, rules, ordinances, and requirements of the city, county, state, federal authorities and agencies, in all matters and things affecting the premises and operations thereon which may be enacted or promulgated under the governmental police powers pertaining to public health and welfare”

ADMINISTRATIVE IMPLICATIONS

EMNRD states that OCD is in the process of developing rules to regulate oil and gas development in particular areas of the state, and experience, to date, indicates that state and local regulatory proposals are generally compatible.

NMED notes that the legislation may have a slight impact on the administrative duties of the Environment Department, because more air pollution may cause more areas of the state to become “non-attainment.” This may result in a requirement for more air pollution controls for other industrial sectors, but would likely result in the regulation of the air pollution from all industrial facilities, including oil and gas operations in New Mexico, by the federal government.

SLO states, “The OCD and the OCC already regulate oil and gas operations in New Mexico, so this bill would neither conflict with, nor duplicate their current authority.”

TECHNICAL ISSUES

EMNRD addresses a number of considerations associated with the legislation:

Presumably the bill is intended to confine the authority of local government over oil and gas operations within narrow limits. It is unclear, however, what these limits will be.

Senate Bill 17 limits political subdivisions to exercising “those [powers] specifically provided by law.” The phrase “specifically provided by law” is inherently vague. It raises the question, how specific would a legislative grant of power have to be in order to authorize application of a local ordinance to oil and gas operations. The bill leaves considerable scope for varying judicial constructions.

At least three widely divergent approaches suggest themselves. The courts could give the bill an extremely narrow effect by interpreting it as only precluding home-rule municipalities from exercising power over oil and gas operations beyond those that a political subdivision established pursuant to general law could exercise. This interpretation could be squared with the language of the bill because subdivisions established by general law have only those powers conferred by particular statutes, whereas home-rule cities have general legislative power, except as prohibited by particular statutes. This interpretation of the bill, however, would give it very limited practical effect, because general law municipalities and county governments in New Mexico have extremely broad statutory authority to exercise the “police power” (i.e., the power of government to protect public health, safety and welfare). New Mexico’s appellate courts have specifically held that the “police power” authorizes local governments to regulate business activities local regulation of which is not otherwise expressly authorized by any statute.

A second possible approach would be that the bill pre-empts regulation of oil and gas operations where authority for that regulation depends on the local government’s “police power,” but does not pre-empt application to oil and gas operations of ordinances authorized by statutes providing for local power over particular subjects, such as land use planning or protection of municipal water sources. This interpretation would preserve very significant local authority over oil and gas operations, including, presumably, the power to direct where wells and other facilities could be located, if not the details of their operation.

A third approach would be that the bill pre-empts all local ordinance power over oil and gas operations unless that power is authorized by a statutory provision that expressly refers to oil and gas operations or to a particular activity that is part of oil and gas operations. If this approach were adopted, the bill would pre-empt most local regulation of oil and gas operations.

The second and third approaches suggested above would entail further uncertainty of application in particular cases. For example, it might be held that the bill did not preclude application of land use power to oil and gas operations, but would preclude local government from prohibiting oil and gas operations in areas where other industrial activity was permitted. Furthermore, there are doubtless other approaches the courts might take to interpreting “specifically provided by law,” in addition to the three suggested above.

In view of these varying possibilities, it is extremely difficult to predict the probable effect of passage of this bill.

NMED and SLO do not comment on technical issues associated with the legislation.

OTHER SUBSTANTIVE ISSUES

NMED advises that the Environment Department is the state air pollution control agency for all purposes under federal law. NMSA 1978, §74-2-5.2. The Department has the expertise to carry out the regulations promulgated by the Environmental Improvement Board; further that “SB17 will give the oil and gas industry a pass on complying with the air pollution requirements.”

ALTERNATIVES

SLO states, “The specific removal of the State Land Office from this bill would confirm the authority of the Commissioner of Public Lands to enact regulations in conformity with the statutory oil and gas lease for management of state trust lands.”

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

NMED indicates that the consequences of not enacting SB17 “would mean the Environment Department would continue to regulate air quality for oil and gas operations as well as other sources of air pollution in the state. This would ensure that the health of New Mexicans would remain protected.”

EMNRD notes that OCD and local regulation of oil and gas operations will continue to coexist except where the regulatory requirements conflict. In that case the local ordinances will be pre-empted to the extent of the conflict. If the existence of a conflict is disputed, the courts will have to resolve the issue.

SLO suggests that, if the legislation is not enacted, counties may continue promulgating rules which can conflict with OCD requirements for oil and gas operations, and State Land Office responsibilities for support of the Trust. Counties or other political subdivisions have already developed regulations negatively impacting development of trust lands for oil and gas, thereby affecting potential revenues for support of the 22 beneficiaries.

AMENDMENTS

None suggested by any responding agency.

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