

SIGNIFICANT ISSUES

The Energy Minerals and Natural Resources Department (EMNRD) notes that SB 463 seeks to preclude efforts by county and municipal governments to regulate any aspect of the oil and gas industry. In recent years, several counties have adopted, and several more counties and municipalities are considering the adoption of, ordinances that address the siting, approval and operation of oil and gas activities within their jurisdiction. For example, Santa Fe County requires a “special use and development permit” to construct and operate an oil and gas facility. The permit regulates aspects of the operation of the facility, requires financial assurance and establishes setbacks.

The Oil and Gas Act provides broad regulatory authority to the state government over oil and gas operations. The Oil Conservation Commission (OCC) and the Oil Conservation Division (OCD) of the EMNRD (OCD) are given a long list of areas in which to adopt rules governing various aspects of oil and gas drilling and operation including remediation of sites impacted by oil and gas activities.

SB 463 is an attempt to establish express, field preemption of local government regulation of oil and gas activities. Express and field preemption are legal concepts recognized by courts. Courts look for either express preemption (which is specifically expressed in a statute) or implied preemption (where there is an actual conflict between local regulation and state statute or regulation). *San Pedro Mining Corp. v. Board of County Commissioners of Santa Fe County*, 121 N.M. 194 (Ct. App. 1995). “[T]he intention of the legislature to preempt local control must be clearly stated if express preemption is to result”. 121 N.M. at 198. SB 463 seems to clearly establish express preemption.

SB 463 also uses the language of “field” preemption. (Oil and Gas Act and OCD rules “are intended to exclusively occupy the field”). Field preemption occurs when a state regulatory scheme is so pervasive that “it effectively precludes the co-existence of municipal regulation” in the same area. *San Pedro*, 121 N.M. at 198.

However, if SB 463 were enacted, there would be some room for argument about its application and the courts may ultimately decide the scope of the law. SB 463 specifically preempts the “jurisdiction of county or municipal zoning authorities.” Local governments could seek to regulate some oil and gas activities under other authorities, such as fire protection and water supply. Local governments possess general police power to regulate for the health and safety of their citizens. See Section 4-37-1 NMSA 1978. There may even be a debate about the scope of the preemption of zoning requirements since local ordinances often focus on setbacks for oil wells (distance from residences, schools, water wells, etc.), while current OCD rules generally do not require setbacks except for pits. In the *San Pedro* decision, the Court of Appeals rejected what appeared to be a preemption provision in the Mining Act (Section 69-36-4(B): until state rules are adopted, county mining ordinances shall apply) and instead focused on implied conflict preemption and allowed County regulation in areas which the state mining rules did not address. 121 N.M. at 199.

The New Mexico Association of Counties (NMAC) writes that:

“State legislatures throughout the United States have uniformly delegated authority over planning and zoning issues to local government. The reason for this is obvious: zoning

decisions often have a major impact on local communities, and county and municipal officials are the most knowledgeable and sensitive to the needs of residents in the community. All municipalities and counties are unique, and what is an acceptable development pattern in one city or county may be totally inappropriate in another. Local governments are charged with determining how to best safeguard the character of the local community and to make decisions that best protect the health, safety and welfare of its citizens. Residents elect local officials to represent their interests and to make decisions that affect their community.

While we understand some of the concerns raised by the oil and gas industry, it should be pointed out that there are sufficient safeguards built into the OCD and local ordinances and regulations to prevent local governments from making arbitrary and capricious decisions. Any local zoning decisions affecting the oil and gas industry that are arbitrary and not supported in law can be challenged in court.

SB 463 would totally remove local government from decisions that could have a major impact on a local community. Local governments have the unique ability to tailor regulations and decisions to meet the needs of the local community. By removing this safeguard, SB 463 will abrogate a community's voice in decisions that could have a major impact on its citizens."

In the same vein, the New Mexico Municipal League (NMML) states that:

"This bill terminates the ability of local governments to determine how best to protect the environment and their citizens within municipal boundaries. At times, local governments do not believe that adequate protection is being provided under the statutes and regulations promulgated at the state level. This bill would cut off the ability for local governments to impose stricter, but fair and uniform and locally tailored restriction of oil and gas production activities within municipal limits. It is an important right to preserve."

Does the bill meet the Legislative Finance Committee tax policy principles?

1. **Adequacy:** Revenue should be adequate to fund needed government services.
2. **Efficiency:** Tax base should be as broad as possible and avoid excess reliance on one tax.
3. **Equity:** Different taxpayers should be treated fairly.
4. **Simplicity:** Collection should be simple and easily understood.
5. **Accountability:** Preferences should be easy to monitor and evaluate

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