

Fiscal impact reports (FIRs) are prepared by the Legislative Finance Committee (LFC) for standing finance committees of the NM Legislature. The LFC does not assume responsibility for the accuracy of these reports if they are used for other purposes.

Current and previously issued FIRs are available on the NM Legislative Website (www.nmlegis.gov) and may also be obtained from the LFC in Suite 101 of the State Capitol Building North.

FISCAL IMPACT REPORT

ORIGINAL DATE 3/12/19
LAST UPDATED _____

SPONSOR HENRC **HB** 680/HENRCS

SHORT TITLE Public Peace, Health, Safety & Welfare **SB** _____

ANALYST Glenn

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY19	FY20	FY21		
See Fiscal Implications			Recurring	Current School Fund
			Recurring	General Fund

(Parenthesis () Indicate Revenue Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY19	FY20	FY21	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total			Indeterminate		Recurring	See Fiscal Implications

(Parenthesis () Indicate Expenditure Decreases)

Relates to SB186, SB361

Conflicts with SB186, SB459, HB546

SOURCES OF INFORMATION

LFC Files

Responses Received From

Energy, Minerals and Natural Resources Department (EMNRD)
 New Mexico Attorney General (NMAG)
 State Land Office (SLO)

SUMMARY

Synopsis of Bill

The House Energy, Environment and Natural Resources Committee Substitute for House Bill 680 makes changes in the Oil and Gas Act and the powers and duties of the Oil Conservation Commission (OCC) and the Oil Conservation Division (OCD) of EMNRD to address violations of the act.

The bill amends the Oil and Gas Act to provide that when a person violates the Act or any rule, order, permit or authorization issued under the Act, the OCD may seek compliance and civil penalties by:

- (1) Issuing a notice of violation;
- (2) Commencing a civil action in district court for appropriate relief; or
- (3) Issuing a temporary cessation order, if OCD determines the violation is causing or will cause an imminent danger to public health or safety or a significant imminent environmental harm. The cessation order remains in effect until the earlier of when the violation is abated or 30 days, unless OCD holds a hearing and a new order is issued.

If a notice of violation is not resolved informally within 30 days after the notice is served, OCD must hold a hearing and determine whether the violation should be upheld and whether any sanctions, including civil penalties, should be assessed. In assessing a penalty, OCD must consider the seriousness of the violation, any good faith efforts to comply, any history of noncompliance with the Oil and Gas Act, and other relevant factors. A party of record adversely affected by OCD's decision has the right to a de novo appeal before the OCC.

Civil penalties assessed after a hearing may not exceed \$2,500 per day of noncompliance for each violation, unless the violation presents a risk to the health or safety of the public or a risk of causing significant environmental harm, or the noncompliance continues beyond a time specified in the notice of violation or order. Under those circumstances, the civil penalty may not exceed \$10 thousand per day of violation.

The bill requires OCD to provide an annual report to the legislature and the governor regarding the number of notices of violation, the total amount of penalties collected, specific information for each penalty collected, and the number and nature of lawsuits filed.

The effective date of HB680 is January 1, 2020.

FISCAL IMPLICATIONS

EMNRD states OCD's increased ability to assess administrative penalties may result in increased costs to investigate issues, prepare compliance orders, conduct hearings, and recruit and retain competent attorneys to litigate compliance and enforcement actions.

SLO states that, since the New Mexico Supreme Court's 2009 decision in *Marbob* (see discussion under Significant Issues), OCD has significantly reduced the number of compliance orders issued and penalties assessed. From FY07 through FY09, OCD collected an average of \$507 thousand annually in penalties. The amount fell from \$735.5 thousand in FY09 to \$14 thousand in FY10. SLO notes that, according to OCD's statistics, OCD collected \$20.5 thousand in penalties in 2016 and, in 2017, collected penalties against one operator in the amount of \$30 thousand. SLO reports no fines have been collected since January 20, 2017. See OCD website, www.emnrd.state.nm.us/OCD/statis-tics.html.

SLO notes that any fines collected by OCD are deposited in the current school fund, as required by Article 12, Section 4, of the New Mexico Constitution. At the end of each month, balances in

the current school fund are transferred to the public school fund. Money in the public school fund is then distributed to appropriations for public schools, including the state equalization guarantee distribution and other categorical appropriations. Balances remaining in the public school fund revert at the end of the year to the general fund.

SIGNIFICANT ISSUES

HB680's provisions allowing OCD to assess civil penalties and increasing penalty amounts are intended to provide more effective enforcement of the Oil and Gas Act. SLO notes that OCD's inability to impose administrative penalties has hindered the agency's enforcement abilities, which, in turn, impacts state trust lands, including cleanup efforts, keeping wells active, plugging wells, remediating wells, and filing reports with OCD that SLO needs for lease purposes.

Under the Oil and Gas Act's current provisions, OCD, through NMAG, brings enforcement actions for the assessment of penalties in court. EMNRD states HB680 responds to a New Mexico Supreme Court decision which, based on the current provisions of the Oil and Gas Act, overturned agency rules allowing for administrative enforcement. See *Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013. The court found that the Oil Conservation Commission (OCC) and OCD did not have authority under the Act to enforce civil penalties. The Court was sympathetic to the OCC's "need for greater enforcement authority," but concluded that "any enhancements to [OCC's] authority" must come from the Legislature. *Id.* ¶ 23.

EMNRD notes the bill removes the existing law's requirement that a person "knowingly and willfully" violate the Oil and Gas Act before civil penalties may be imposed. As a result, HB680 brings New Mexico's laws in line with the requirements of the federal Safe Drinking Water Act (SDWA). EMNRD explains New Mexico's laws must be consistent with federal requirements because OCD issues permits for injection wells under a delegation from the U.S. Environmental Protection Agency (EPA) and must comply with EPA rules. EPA requires that the "burden of proof and degree of knowledge or required under State law ... shall be no greater than" EPA's requirements under the SDWA. "[T]his requirement is not met if State law includes mental state as an element of proof for civil violations." 40 CFR 145.13(b)(2).

EMNRD states the bill also makes the enforcement procedures of the Oil and Gas Act more consistent with those of other New Mexico environmental and natural resource statutes, such as the Mining Act, the Air Quality Control Act, the Water Quality and the Hazardous Waste Act. According to EMNRD, each of those statutes provides for administrative enforcement of violations and none of them requires intent on the part of the violator. EMNRD also points out that HB680's penalty provisions are more in line with penalties imposed under other laws. See, e.g., Mining Act (\$10 thousand per day), Air Quality Control Act (\$15 thousand/\$25 thousand per day), Hazardous Waste Act (\$10 thousand per day); and Water Quality Act (\$10 thousand/\$15 thousand per day).

In addition to making enforcement procedures under the Oil and Gas Act more consistent with other state laws, EMNRD states the bill brings the act's enforcement procedures in line with other oil and gas states. Each of the following states provide for administrative penalties and do not require proof of intent: Colorado (\$15 thousand per day), Texas (\$1,000/\$10 thousand per day), Wyoming (\$5,000 per day), and North Dakota (\$12.5 thousand per day).

ADMINISTRATIVE IMPLICATIONS

EMNRD states HB680 would initially require OCD to develop procedures, and possibly regulations, to implement the new administrative enforcement process.

SLO notes that if the OCD is authorized to issue administrative penalties, operators would likely be more inclined to comply with the Oil and Gas Act's requirements, which would enable SLO to focus on more egregious non-compliant operators and work with OCD to bring those operators into compliance.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Relates to SB186 Oil Conservation Division Powers & Duties, SB361 Limit Use of Oil and Gas Fund for Salaries

Conflicts with SB186, which also amends Section 70-2-31.

SB186, SB459 Hydraulic Fracturing Permits & Reporting & HB546 Fluid Oil & Gas Waste Act, which also amend Section 70-2-33 NMSA 1978.

BG/gb/sb