# F I S C A L   I M P A C T   R E P O R T

**ORIGINAL DATE** 3/06/19
**SPONSOR** Munoz **LAST UPDATED** **HB**

**SHORT TITLE** Wind Energy Production Tax Act **SB** 399

**ANALYST** Graeser

## REVENUE (dollars in thousands)

| Estimated Revenue | | | | | Recurring or Nonrecurring | Fund Affected |
|---|---|---|---|---|---|---|
| FY19 | FY20 | FY21 | FY22 | FY23 | | |
| | | $2,000.0 | $2,200.0 | $2,400.0 | Recurring | Tax Stabilization Reserve (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** | | $1,250.0 | | $1,250.0 | Nonrecurring | TRD Operating |

Parenthesis ( ) indicate expenditure decreases

The operating budget impact reported here is for Information Systems development costs for a new tax program. This estimate does not include any additional legal resources to defend against a lawsuit alleging violation of the U.S. Constitutional commerce clause.

**SOURCES OF INFORMATION**
LFC Files

Responses Received From
Taxation and Revenue Department (TRD)
Energy, Minerals and Natural Resources Department (EMNRD)

**SUMMARY**

Synopsis of Bill

Senate Bill 399 creates the Wind Energy Production Tax Act and makes amendments to the Tax Administration Act (7-1-2 NMSA 1978). SB399 imposes a $1 per MWh (megawatt hour) production tax on all wind generated electric energy produced in New Mexico and exported out of the state. This production tax commences on January 1, 2020. SB399 exempts from the Wind Energy Production Tax electricity produced by the U. S. government, state of New Mexico or any of its political subdivision, Indian nation, tribe or pueblo on its sovereign territory, any foreign nation when required by a treaty in which the United States is a part and producers supplying wind power for personal consumption. The receipts from the new tax are distributed to the tax stabilization reserve.

This bill adds a new section to the TAA to specify the distribution from this act shall be made to the tax stabilization reserve.

The effective date of the tax is January 1, 2020, and is applicable for the production of electricity from wind resources beginning on or after January 1, 2020. The tax is due by February of the year following the year of production, so there would be no revenue distributed to the Tax Stabilization Reserve until January 2021.

There is no delayed repeal date but LFC recommends adding one.

**FISCAL IMPLICATIONS**

EMNRD provides the following information:

> An estimated 4,595.000 MWh of electricity was generated from wind generators in 2017. (Based on information related to 2017 New Mexico renewable energy production data from the US Energy Information Administration (EIA) and 2017 Renewable Portfolio Standard (RPS) compliance data from Lawrence Berkley National Laboratory). There is no readily available data source for determining what power is used in state and what is exported.

TRD provides similar commentary:

> The Taxation and Revenue Department (TRD) began with estimates from the U.S. Energy Information Agency (EIA) on the size of overall electrical generation and consumption in New Mexico. As New Mexico produces more electricity than it uses, this gave a percentage of generation capacity which is sold outside the state. Averaging estimates for wind generation capacity from several sources shows an annual growth percentage for electricity production from wind of about 10%. Using this generation capacity and a capacity factor of 34% (typical for wind energy) gave the overall wind generation per year. The previously calculated percentage of electricity sold outside the state was then used, and the excise rate of $1 per kilowatt-hour applied. As the revenue for a given calendar year is not realized until payment is made in February of the following year, all revenue was then delayed by a year.

**SIGNIFICANT ISSUES**

EMNRD points out that the proposed tax may violate the commerce clause of the US Constitution:

TRD provides similar insights:

> Wind energy in New Mexico is a growing industry, with a growth rate of 10% and possibly more depending on the time frame used. The Public Regulation Commission has recently approved construction of what would be the largest wind farm in the western

hemisphere for an area near Corona (although a needed transmission line has yet to be approved). This alone would more than double the states capacity. The National Renewable Energy Laboratory shows the wind energy potential for New Mexico is about 50-100 times the state's current total electricity consumption.
Demand for renewable energy is climbing, as several states and other governments have mandated renewable energy usage minimums. This could push the percentage of renewable energy sold outside the state above the average for other types of electricity production.

Unlike some other energy-generation technologies, wind production does not consume limited natural resources, but uses a renewable resource. Nor does wind production impose significant externalized costs, such as pollution. It therefore makes sense to incentivize wind production. Taxes increase the costs of production and therefore have the opposite effect, helping to de-incentivize renewable power generation.

If the purpose of the bill is to take advantage of the growing demand for renewable generation, to maintain equitability, it should consider taxing other forms of renewable generation as well, including solar and geothermal.

**PERFORMANCE IMPLICATIONS**

The LFC tax policy of accountability is met with the bill's requirement to report the amount of this annual tax in the regular process of tax administration. Although the Tax Stabilization Reserve is the beneficiary of any collected revenues, the Tax Stabilization Reserve is considered a reserve account of the general fund. Thus, full disclosure will be met with each Consensus Revenue Estimating Group's update on revenues and general fund balances.

**ADMINISTRATIVE IMPLICATIONS**

TRD points out difficulty in determining the wind energy exported, " In order to verify sales outside the state, TRD will need to interface with the various electricity markets around the country. This is something that the department has not done before."

TRD also reports this is a new tax and there will be a high impact on the Information Technology Division. Implementation by the effective date of January 1, 2020, is not feasible. A more feasible date is April 1, 2020. However, LFC notes, although the tax is imposed on production beginning January 1, 2020, the first returns are not due until January 2021. This one-year delay should be sufficient for TRD to implement the new tax.

LFC staff also note TRD would be the agency to defend a lawsuit alleging violation of the constitutional commerce clause. (See commentary below at "TECHNICAL ISSUES." TRD might need additional legal resources in this defense.)

**TECHNICAL ISSUES**

Both TRD and EMNRD point out that a tax on exported electricity is probably unconstitutional:

[TRD] Importantly, there is a constitutional issue with the bill as the bill would only tax sales outside the state. The Commerce Clause of the U.S. Constitution prohibits certain state actions that discriminate against interstate commerce. See *Maryland v. Louisiana*, 451 U.S. 725 (1981) holding that a tax imposed primarily on exported natural gas produced in Louisiana was unconstitutional.

[EMNRD] Assessing an export tax on wind generated in New Mexico but sold outside of New Mexico creates legal challenges. A tax that by its terms or operation imposes greater burdens on out-of-state goods or activities than on competing state goods or activities will be struck down as discriminatory under the Commerce Clause. *Maryland v. Louisiana*, 451 U.S. 725, 753–760 (1981). A specific federal law prohibits taxation on electricity which discriminates against out-of-state consumers:

> "No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For purposes of this section, a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce." 15 U.S.C. § 391

See *Arizona Pub. Service Co. v. Snead*, 441 U.S. 141 (1979) (striking down a New Mexico law under 15 USC 391).

This bill does not contain a delayed repeal date. LFC recommends adding a delayed repeal date.

LG/sb