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FISCAL IMPACT REPORT

ORIGINAL DATE 3/06/19

SPONSOR SJC LAST UPDATED _____ HB _____

SHORT TITLE Oil Conservation Division Powers & Duties SB CS/CS/186/SCONCS/SJCS

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 SB 361

Conflicts with SB 459

SOURCES OF INFORMATION

LFC Files

Responses Received From

State Land Office (SLO)

New Mexico Attorney General (NMAG)

Energy, Minerals and Natural Resources Department (EMNRD)

SUMMARY

Synopsis of Bill

The Senate Judiciary Committee substitute for the Senate Conservation Committee substitute for Senate Bill 186 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 the Energy Minerals and Natural Resources Department (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 that 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 thirty 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 service, the 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 the OCD's decision order 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 either to the health or safety of the public or 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 \$10,000 per day of violation. No penalty, unless assessed by a court, may exceed \$250,000.

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 SB 186 is July 1, 2020.

FISCAL IMPLICATIONS

EMNRD states that 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 \$735,500 in FY09 to \$14,000 in FY10. SLO notes that, according to OCD's statistics, OCD collected \$20,500 in penalties in 2016 and, in 2017, collected penalties against one operator in the amount of \$30,000. SLO reports that no fines have been collected since January 20, 2017. See OCD website, www.emnrd.state.nm.us/OCD/statis-tics.html.

According to SLO, 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

SB 186'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 issue 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 act's current provisions, enforcement actions for the assessment of penalties are brought by OCD, through NMAG, in court. EMNRD states that SB 186 responds to a New Mexico Supreme Court decision that, based on the current provisions of the 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 that 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, SB186 brings New Mexico's laws in line with the requirements of the federal Safe Drinking Water Act (SDWA). EMNRD explains that 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 that the bill also brings the enforcement procedures under the Oil and Gas Act in line with 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 points out that SB 186's penalty provisions bring those in the act 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 that 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).

ENMRD notes that the SJC substitute establishes a unique mechanism to limit the total amount of penalties available in an administrative proceeding, which forces OCD to file suit in district court if it wishes to pursue higher penalties. This cap is not found in other states or other New Mexico environmental laws.

SLO states that the SJC substitute does not address a deficiency in the existing law pertaining to criminal penalties. Under existing law, a person who knowingly and willfully commits specified violations is subject to a criminal penalty of “not more than” \$5,000 per day. Section 70-2-31(B), (C) NMSA 1978. The EPA requirement for state-delegated enforcement of the SWDA (applicable to OCD’s regulation of Class II wells for injection of fluids related to oil and gas production) is that criminal fines must be “at least” \$5,000 per day. 40 C.F.R. § 145.13(a)(3)(ii). SLO suggests that, to bring the penalties in compliance with the federal regulations, the existing law should be amended to provide for a criminal penalty of \$5,000 per day, or not less than \$5,000 per day up to a maximum amount determined by the Legislature.

ADMINISTRATIVE IMPLICATIONS

EMNRD states that SB 186 would initially require OCD to develop procedures, and possibly regulations, to implement the new administrative enforcement process.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Relates to SB 361 Limit Use of Oil and Gas Fund for Salaries

Conflicts with SB 459 Hydraulic Fracturing Permits & Reporting, which also amends Section 70-2-33 NMSA 1978.

OTHER SUBSTANTIVE ISSUES

SLO notes that, by allowing OCD to assess administrative penalties, SB 186 would likely enable SLO to focus on more egregious noncompliant operators and work with the OCD to bring those operators into compliance.

BG/gb