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FISCAL IMPACT REPORT

ORIGINAL DATE 2/20/17
LAST UPDATED 3/15/17 **HB** _____

SPONSOR Martinez

SHORT TITLE Oil & Gas Act Powers & Penalties **SB** 307/aSJC

ANALYST Armstrong

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY17	FY18	FY19		
	\$0.0-\$600.0	\$0.0-\$600.0	Recurring	Current School / General Fund

(Parenthesis () Indicate Revenue Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
	Minimal				Recurring	EMNRD, OAG, AOC, AODA budgets

(Parenthesis () Indicate Expenditure Decreases)

Relates to Appropriation in the General Appropriation Act

SOURCES OF INFORMATION

LFC Files

Responses Received From

Office of the Attorney General (OAG)
 Energy, Minerals and Natural Resources Department (EMNRD)
 Administrative Office of the Courts (AOC)
 Administrative Office of the District Attorneys (AODA)

SUMMARY

Synopsis of SJC Amendment

The Senate Judiciary Committee amendments remove the option to bring suit for Oil and Gas Act violations in the First Judicial District, unless a defendant resides in or the alleged violation occurred in Santa Fe County. The amendments also strike language providing that remedies in

Section 1 do not otherwise limit any other rights or remedies of OCD or OCC, and that OCD or OCC may consider the seriousness of the violation and any good-faith efforts to comply with the applicable requirement. Finally, the amendments restore the standard of proof for criminal penalties to “knowingly and willfully.”

Synopsis of Bill

Senate Bill 307 (SB307) amends several sections of the Oil and Gas Act (“the Act”) concerning enforcement and record keeping. The bill:

- Adds the violation of “permits” issued under the Act as a violation subject to suit with a maximum penalty of \$1,000 per violation
- Provides the First Judicial District as a venue in which suit may be brought
- Clarifies that remedies in Section 1 do not otherwise limit any other rights or remedies of EMNRD’s Oil Conservation Division (OCD) or the Oil Conservation Commission (OCC)
- Eliminates the requirement that a person act “knowingly and willfully” in determining a violation of the Act or any OCD rule, order, or permit issued under the Act
- Clarifies that each day of a violation shall be a separate violation subject to civil penalty
- Imposes a maximum penalty of \$10 thousand for violations of the Act that pollute or threaten to pollute groundwater
- Grants OCD or OCC authority to assess civil penalties, after notice and an opportunity for a public hearing, and consideration of “the seriousness of the violation and any good-faith efforts to comply with the applicable requirement”
- Eliminates the existing criminal provision of the Act and makes it a third degree felony if a person knowingly violates the Act or falsifies, omits, or destroys required records and
- Adds annual reporting requirements for OCD, including the number of violations investigated, the total amount of penalties imposed for violations, the amount of penalties collected, and the name, location, length, and penalty amount for each violation.

SB307 has an effective date of July 17, 2017.

FISCAL IMPLICATIONS

From FY07 through FY09, OCD collected an average of \$597 thousand annually in penalties. The amount collected fell from \$735.5 thousand in FY09 to \$14 thousand in FY10, presumably due to the New Mexico Supreme Court’s 2009 ruling that OCD is not authorized to assess administrative civil penalties for Oil and Gas Act violations and must file a lawsuit in court. SB307 provides OCD with this administrative authority and could result in penalties similar to the years before the court’s ruling.

Such revenues would be dependent on OCD’s enforcement efforts. Pursuant to Article 12, Section 4, of the New Mexico Constitution, all fines are deposited in the current school fund which reverts to the general fund. General appropriations acts from 2005 to 2009 included language allowing OCD to request budget increases between \$100 thousand and \$300 thousand from revenues from Oil and Gas Act penalties.

Additionally, OCD notes SB307 will have an impact on operations due to the record keeping requirements; however, because the agency is currently tracking violations and fines, the estimated fiscal impact of the additional requirements is minimal.

AODA analysis states:

The district attorneys and the attorney general may have increased costs, if more cases are pursued by them. However, giving the division and commission tools to enforce the Oil and Gas Act administratively makes it likely that more actions will be taken by the division and commission, without resort to the other enforcement provisions in the statute.

SIGNIFICANT ISSUES

In 2009, the New Mexico Supreme Court held that OCD is not authorized to assess administrative civil penalties for Oil and Gas Act violations and must file a lawsuit in court. The court noted that while the statute is “undeniably outdated, and perhaps inadequate to face the contemporary challenges” the agency faces, it is up to the Legislature to amend the law. Since this decision, the agency significantly reduced the number of compliance orders issued and penalties assessed. Although the Act provides for both civil and criminal penalties, both have the same standard of proof, requiring OCD to show a violation was done “knowingly and willfully.” SB307 grants OCD the authority to impose administrative penalties for any violation of the Act and includes a “knowingly” standard for criminal penalties.

As noted above, SB307 retains the maximum penalty of \$1,000 for each violation and provides that each day qualifies as a separate violation. The bill also allows for penalties up to \$10 thousand if the violation pollutes or threatens to pollute groundwater, the same amount as allowed for Water Quality Act violations. Section 74-6-10.1 NMSA 1978. Texas allows for penalties up to \$10 thousand for each day of an oil and gas violation, and Colorado increased its maximum daily penalty from \$1,000 to \$15 thousand in 2014. Oklahoma allows fines up to \$5,000 per violation of oil and gas regulations, however many types of violations are set at lesser amounts.

According to EMNRD:

By allowing for jurisdiction in the First Judicial District, both the Attorney General’s Office, or EMNRD attorneys acting through a special commission, will have a venue closer to OCD and OCC and closer to where some illegal filings occur. By granting OCD and OCC authority to administratively assess fines, a significant administrative enforcement expense will be reduced that is currently being incurred by OCD.

While SB307 strives to increase the importance of the protection of water in the state, the bill creates some ambiguity. First, in Section 2, subpart B, SB307 suggests a penalty of up to \$10,000 per day for an unauthorized discharge that “threatens to pollute” water. SB307 fails to include a definition of what it means to “threaten to pollute”, and, thus, the potential exists for every discharge to threaten to pollute water, despite best science showing to the contrary. Neither the Safe Drinking Water Act or the Water Quality Act define or otherwise provide guidance regarding what it means to “threaten to pollute”; SB307 thus burdens the Division and Commission with interpreting the phrase “threaten to pollute” perhaps in contravention to the legislative intent. Furthermore, absent a definition, the Division and Commission’s enforcement efforts will be subject to judicial review, leaving to the judiciary to define the phrase. Because of this ambiguity, subpart B can have the practical effect of mandating a higher penalty on each and every oil and gas-related discharge in the State of New Mexico.

SB307 also proposed to include an optional matrix the Commission and Division may consider in assessing a penalty—the seriousness of the violation and any good-faith efforts. While the consideration of mitigating and/or aggravating circumstances are beneficial in assessing a penalty, the factors should likely be mandatory, in order to promote consistency for the future. Further, the factors that are to be considered in Subpart C may prove inconsistent with some of the reporting requirements of Section 4.

ADMINISTRATIVE IMPLICATIONS

Under existing law, civil suits to enforce penalties are brought by the Attorney General representing OCC, and must be brought in the district of the county where the violation occurred. SB307 would provide optional jurisdiction in the first judicial district. This could reduce costs and increase convenience for OAG in bringing such actions. In discussing the 2009 Supreme Court ruling, OAG analysis also noted that both the civil and criminal penalties provided by the bill are within the legislature’s authority to impose.

TECHNICAL ISSUES

EMNRD analysis raises concern that the reporting requirements could be clarified, specifically:

- Section 4.A.(1) requires OCD to report the number of violations investigated. The Division conducts well inspections as part of its quarterly performance measures and communicates with operators if there is a violation. OCD is uncertain if a routine well inspection constitutes an “investigation” for purposes of Section 4.A(1);
- For each penalty assessed, SB307 requires the name and location of the person being penalized. Section 4.A(4)(a) fails to indicate if the name and location is the location of the site or spill, or the location of the registered entity with OCD or the Secretary of State, and if the name is the name of the registered operator or the person who is responsible for the wrongdoing;
- Section 4.A(4)(c) uses the term “mitigating circumstances”, but it is unclear if mitigating circumstances should only include those listed in the new Subsection C of SB307.
- Section 4.A(4)(d) asks OCD to identify if the violations were part of a “pattern of violations”, however, SB307 is silent as to what sort of violations should be considered part of the “pattern”; for example, if a person is a day late filing a report, is such violation included in the “pattern; and
- Section 4.A(4)(e) requires OCD to make a hypothesis of whether an act was negligent, knowing, or willful, when the knowing and willful standards were eliminated from the non-criminal portions of the bill; such hypothesis in such a report, especially when the report is made public, seems without basis. Further, OCD is unclear as to why the willful standard appears only in this reporting element.