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## FISCAL IMPACT REPORT

SPONSOR Ivey-Soto ORIGINAL DATE 2/02/18  
LAST UPDATED \_\_\_\_\_ HB \_\_\_\_\_  
SHORT TITLE Oil & Gas Act Penalties & Protests SB 135  
ANALYST Daly

### REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY18	FY19	FY20		
	Indeterminate but Positive Impact	Indeterminate but Positive Impact	Recurring	General Fund

(Parenthesis ( ) Indicate Revenue Decreases)

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY18	FY19	FY20	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>		\$176.4	\$171.2	\$347.6	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Administrative Hearings Office (AHO)  
New Mexico Attorney General (NMAG)

### SUMMARY

#### Synopsis of Bill

Senate Bill 135 grants new power to the Oil Conservation Division (OCD) of the Energy, Minerals and Natural Resources Department (EMNRD) to administratively impose civil penalties for a violation of the Oil and Gas Act or rule, order or permit issued under that Act. It provides for appeal of any penalties imposed to the AHO. The bill authorizes appeal of any decision by that office to the district court. Penalties for knowing and willful violations, as defined in Section 6, are recoverable in a court action brought by the NMAG. In Section 7, certain violations are subject to criminal penalties as a misdemeanor. A specified discharge that

causes water to exceed a contaminant standard constitutes a fourth degree felony.

The civil penalty established in this bill of no more than \$1 thousand for each violation and, in the case of a continuing violation a provision recognizing each day as a separate violation, are the same as in existing law. The criminal penalties under existing law for knowing and willful violations are subject to a fine not to exceed \$5 thousand or a three year term of imprisonment or both.

The civil penalty for certain administratively imposed violations may not exceed \$25 thousand for one site inspection, operational event or incident. Its imposition must be based on a person's history of compliance or violation of the Act or any rules, orders, or permits issued under the Act, the seriousness and cause of the violation, and good faith efforts to achieve compliance or remediation. Prior to appeal from such a penalty, the cited person may request a reconsideration hearing of that penalty by OCD.

The effective date of this bill is July 1, 2018.

## **FISCAL IMPLICATIONS**

AHO reports that, after consulting with EMNRD about the potential workload under SB 135, there is significant uncertainty about the potential number of administrative civil penalties that could be imposed and appealed under this bill. Under current applicable state case law, EMNRD is not allowed to pursue an administrative civil penalty under the Oil and Gas Act without going to court, something that has only rarely occurred and only for the most egregious violations. Because of this history, there is no historical data about the number of administrative cases that might result from this bill. Its administrative penalty provisions under this bill would allow EMNRD to pursue more potential violations administratively than if it had to go to court. According to AHO, EMNRD reports there are two main circumstances where EMNRD anticipates a civil administrative penalty might be issued: 1) issues involving required bonding for drilling; and 2) instances where there has been 15 months of inaction after the stoppage of well production. EMNRD indicated that while there are very few potential cases of the former, there is a significant volume of the latter cases currently at EMNRD and this bill would provide a mechanism to pursue those cases. In light of this information, LFC staff notes the impact on general fund revenues to be indeterminate but positive.

AHO projects it will need up to 1 FTE new Administrative Law Judge (ALJ) to handle this new docket, particularly because this will be a new area of law for AHO and will likely require specialized knowledge and experience with oil and gas law and engineering, which none of AHO's current ALJs possess. In addition, this will be the first instance in which AHO will directly receive the protest from the petitioner, unlike appeals from tax decisions, where TRD handles intake and other administrative activities prior to referring a case to AHO for a hearing setting. As a result, AHO anticipates a need for 1 new FTE legal support position.

AHO provides this breakdown of the increase in costs under SB 135:

Salary and Benefits	151,565.15
SHARE - HCM Assessment	770.00
Car/Gas	2,700.00
Insurance	18.75
State Bar Dues	500.00
Mandatory Training	500.00
Indirect (office space etc.)	13,600.00
Travel	1,500.00
<b>Recurring Expenses</b>	<b>171,153.90</b>
<b>(Non-recurring Expense)</b>	<b>5,200.00</b>
(Initial Office set-up)	
<b>Grand Total</b>	<b>176,353.90</b>

These numbers appear in the estimated operating budget impact table above. AHO does suggest, however, that a process by which OCD receives the protest, prepares the file and conducts any reconsideration proceedings before submitting the hearing file and referral to AHO could be a more efficient and economical process.

### SIGNIFICANT ISSUES

NMAG comments that the modification of the Oil and Gas Act to permit OCD to administratively impose civil penalties without having to file a civil suit through the NMAG appears to be in keeping both with the purposes of that Act and with the New Mexico Supreme Court's dicta in *Marbob Energy Corp. v. New Mexico Oil Conservation Commission*, 2009-NMSC-013, 146 N.M. 24. In that opinion, the Supreme Court held that the oil conservation commission ("OCC") and the OCD lacked statutory authority to impose civil penalties for violations of the Oil and Gas Act without first filing suit through the NMAG. The Oil and Gas Act already allows OCC/OCD to obtain these penalties; SB135 changes how they may impose those penalties for strict liability violations up to a specified maximum. Injunctive relief for current and future violations can still only be obtained by bringing suit through the NMAG.

AHO points out that while SB 135 refers to "timely receipt" of a protest or appeal of a penalty imposed by OCD, the bill does not establish a deadline by which such a protest or appeal must be filed with or received by AHO. (See Section 3) Timeliness is a critical question in determining jurisdiction to adjudicate a dispute. AHO notes that all other instances in which the AHO adjudicates cases contain a clear statutory period for filing of a protest, hearing request or appeal.

As to amendments to the AHO Act, AHO calls attention to the changes in Section 2(E) limiting its confidentiality provisions to Tax Administration Act, and advises that property tax hearings under the Property Tax Code also require adherence to strict confidentiality provisions. AHO raises another issue related to these confidentiality provisions: the application of the Open Meetings Act (OMA) to the adjudicatory hearings from penalties administratively imposed by OCD. It notes that no AHO hearings are currently subject to the OMA in terms of publication of

notice of hearing rather than serving a notice of hearing directly on the parties involved in the protest.

AHO raises another issue that arises under the AHO Act. It advises that the subpoena power provision in Section 1 lacks any clear enforcement mechanism in the event of a party's non-compliance. That leads to potential administrative challenges, inefficient delays, and extra costs to all parties and AHO to address issues of subpoena non-compliance. The Tax Administration Act specifies subpoena enforcement in the event of non-compliance with a TRD subpoena: TRD can petition the district court for enforcement. A similar clause could be added to the AHO Act, allowing the subpoenaing party to seek enforcement of a subpoena before the district court, staying the proceeding before AHO. NMAG similarly notes that AHO lacks OCC's statutory ability to compel compliance with subpoenas and issue contempt rulings, Section 70-2-9, as well as the absence of any provision comparable to OCC's perjury punishment statute, Section 70-2-10.

In its analysis, NMAG raises these issues as to the amendments concerning administrative imposed penalties:

Section 6 removes the existing law requirement that civil penalties may be incurred only on a showing of "knowing and willful" conduct, instead allowing penalties for "strict liability" violations and imposing criminal penalties for "knowing and willful" conduct listed in Section 7. However, it is not clear that all possible violations of the Oil and Gas Act can trigger strict liability without any further showing. *Cf.* NMSA 1978 § 70-2-21 (stating that the sale, purchase, etc. of oil or gas in excess of statutorily-allowed amounts is prohibited); NMSA 1978 § 70-2-36(A) (prohibiting the removal of identifying marks from equipment "with *the intent* to deprive its lawful owner of positive identification."). As amended, Section 6(A) and (B) seem to impose administrative penalties of up to \$25,000 for any and all violations of the Oil and Gas Act, irrespective of the offender's state of mind. If OCC/OCD wish to collect some other civil penalty or wish to impose criminal penalties, then it appears that a judicial determination of "knowingly and willfully" would be required under Subsection (C). Further, the terms "site inspection, operational event, or incident" appear in Subsection (B)(2) as a means of limiting the \$25,000 maximum administrative penalty. These terms do not appear to be defined anywhere in the Oil and Gas Act or in Chapter 70 in general. Finally, Section 6 appears to establish a civil penalty dollar amount for "strict liability" offenses but is silent on dollar amounts for "knowing and willful" violations as described in proposed subsection (C).

Section 7(B) appears to impose criminal penalties only for violations as described in proposed subsection (A)(2), and is silent on criminal penalties for violations of the much broader scope of conduct proscribed in subsection (A)(1). Further, proposed subsection (A)(1), which requires a person to act "knowingly and willfully" to trigger criminal liability, might be at odds with existing Section 70-2-36(A), which requires only "intent" and which imposes misdemeanor criminal liability similar to Section 7's subsection (B).

Section 7(B) references the Water Quality Act and appears to impose felony criminal liability for violations that are not otherwise subject to regulation under the Water Quality Act but that result in water contamination in excess of standards promulgated under the Water Quality Act. However, it is silent as to which Water Quality Act contaminant

standards it is referring, and there are many to choose from. *See, e.g.* 20.6.2.1 to .5363 NMAC. Further, premising felony criminal liability upon violation of undetermined contaminant standards that can and are administratively altered on a regular basis may raise the specter of “void for vagueness” constitutional challenges.

NMAG also notes that the administrative appeal system established in SB 135 wherein AHO would handle appeals of OCD-imposed penalties may conflict with other provisions of existing law, including Sections 70-2-25 and -26, which describe OCC’s existing appeals process which would appear to be broad enough to include appealing administrative penalties if OCC/OCD had the authority to issue them. Further, NMAG questions whether AHO’s decision will be afforded the “special weight and credence” OCC would be afforded by the reviewing court. *See McDaniel v. New Mexico Bd. of Medical Examiners*, 1974-NMSC-062. ¶ 17, 86 N.M. 447 (“special weight and credence” granted to agencies based on education, training, or experience of members). If not, AHO’s decisions may be more susceptible to reversal by the district court than if the decisions were issued by OCC.

## **ALTERNATIVES**

AHO suggests that, as was done in the legislation creating the AHO, SB 135 could transfer relevant hearing officer personnel at EMNRD to AHO for the conduct of these hearings, ensuring that hearing officers adjudicating these cases would have expertise in the subject matter and minimize the fiscal implication of the bill to the state.

MD/jle