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FISCAL IMPACT REPORT

SPONSOR <u>Jaramillo</u>	LAST UPDATED <u>3/1/23</u>
	ORIGINAL DATE <u>2/20/23</u>
SHORT TITLE <u>Oil and Gas Act Changes</u>	BILL NUMBER <u>Senate Bill 418/aSCONC</u>
	ANALYST <u>J. Torres</u>

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT* (dollars in thousands)

	FY23	FY24	FY25	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
	No fiscal impact	\$500.0	\$500.0	\$1,000.0	Recurring	EMNRD General Fund

Parentheses () indicate expenditure decreases.
*Amounts reflect most recent version of this legislation.

Sources of Information

LFC Files

Responses Received From [Prior to SCONC Amendment*]
 New Mexico Attorney General (NMAG)
 Indian Affairs Department (IAD)
 State Land Office (SLO)
 Energy, Minerals and Natural Resources Department (EMNRD)

*Because of the short timeframe between the amendment of this bill and its first hearing, LFC has yet to receive analysis from state, education, or judicial agencies. This analysis could be updated if that analysis is received.

SUMMARY

Synopsis of SCONC amendment to Senate Bill 418

The Senate Conservation Committee amendment to Senate Bill 418 clarifies that wells “upon transfer” that produce less than 60 barrels of oil per day or less than 120 cubic feet of gas per day, may qualify for a: “one-well financial assurance, in amounts determined sufficient to reasonably pay the cost of plugging and abandoning the wells and restoring and remediating the locations covered by the financial assurance.”

The amendment more clearly specifies one type of well that may qualify for financial assurance.

The division shall establish categories of financial assurance after notice and hearing. Such categories may include, for active wells, a blanket financial assurance or a one-well financial assurance and for wells that have been inactive more than one year, wells held in temporarily abandoned status for more than one year and wells upon transfer that produce less than sixty barrels of oil per day or less than one hundred twenty thousand

cubic feet of gas per day, a one-well financial assurance, in amounts determined sufficient to reasonably pay the cost of plugging and abandoning the wells and restoring and remediating the locations covered by the financial assurance.¹

Synopsis of Original Bill

Senate Bill 418 makes sweeping changes to the existing Oil and Gas Act Sections 70-2-1 through 70-2-39 NMSA 1978. That act is amended to require the oil conservation division's protection of health and the environment; promotion of the public interest, health, safety, general welfare; and the fair treatment and meaningful involvement of the public, including environmental justice communities. The bill adds definitions and now includes: "environmental justice community;" and "fair treatment and meaningful involvement" in addition to other pertinent definitions. The term "waste" under Section 70-2-3 NMSA 1978 is modified to state that: "'underground waste' does not include the nonproduction of oil and gas from a formation to protect the environment or promote the public interest, health, safety and general welfare."

The Oil Conservation Commission is reconstituted to include: a SLO employee designee; an EMNRD designee; the director; and two members appointed jointly by the speaker of the house and the president pro tempore. Commission experience is expanded to include knowledge of the regulation of petroleum oil and natural gas production including the environmental, health and social impacts caused by such production, by virtue of education, training, or experience. One member jointly appointed by the speaker and president pro tempore shall have experience in environmental law, public health law, and shall represent the state's interest in a beautiful and healthful environment. The other jointly appointed commission member will have expertise in fair treatment, meaningful involvement, and environmental justice as to the state's people and communities. Commission members will receive per diem and mileage. A quorum is based upon a simple majority.

Terms of office are specified for each commission member. The jointly designated members: "shall not have had an ownership interest in, been employed by or been under contract with an oil or gas company at any time one year prior to appointment or while serving on the commission." Oil and gas income disclosures exceeding \$10 thousand are required as of March 1 of each year.

The director's title under Section 70-2-5 (A) NMSA 1978 is revised to "state oil conservation director." Section 70-2-11(A). Section 70-2-12 NMSA 1978 is expanded to include: protection of the environment; promotion of public interest, health, safety and welfare; fair treatment, meaningful involvement, environmental justice communities; and establishing minimum setbacks for well-siting to protect the environment, public health, safety and welfare.

The financial assurance requirements under Section 70-2-14 NMSA 1978 are also modified. Amendments to that section also include financial assurance requirements for the restoration and remediation of plugged or abandoned wells. The \$250 thousand financial assurance cap is removed from that section. The \$200 thousand penalty cap is removed from Section 70-2-31 NMSA 1978. A new section creates the "environmental justice advisory council," which is administratively attached to EMNRD. Representatives include four from disproportionately

¹ SCONC Amendment is underlined.

impacted communities, appointed by the secretary of IAD; four from tribal governments or entities, appointed by the commission chair; and one local government representative, appointed by the commission chair. The council members will elect a chair and will receive mileage and per diem.

This bill does not contain an effective date and, as a result, would go into effect June 16, 2023, (90 days after the Legislature adjourns) if signed into law.

FISCAL IMPLICATIONS

IAD and NMAG did not indicate any fiscal impact.

SLO states:

Removing the bonding cap in existing law could alleviate the potential risk of the State Land Office having to finance remediation efforts on state trust land for insolvent companies.

EMNRD states:

The revisions to the act could trigger several immediate rulemakings by the Commission. Immediate changes to the financial assurance and enforcement rules would be required in light of the changes above to those provisions and the mandatory aspect of those changes. Specifically, SB418 would make certain categories of wells ineligible for blanket bonds and would remove caps on civil penalties. The Commission would need to update its rules to conform to these changes. These rulemakings would either take resources from other initiatives or require additional resources within OCD.

Unlike the financial assurance provisions, the provisions granting authority to: (1) establish setbacks for wells; (2) protect the environment; (3) promote the public interest, health, safety, and general welfare; and (4) promote the fair treatment and meaningful involvement of the public, including environmental justice communities will require significant public outreach and rulemaking processes, are discretionary, as opposed to mandatory. As result, the Commission would not be required to immediately initiate rulemaking to implement these authorities; however, it could receive petitions from third parties to proposing rules that implement these new authorities. OCD would be required to devote resources to intervene and participate in those proceedings.

Finally, the actions of the environmental justice advisory council could also trigger rule and policy changes in the longer term.

The fiscal impact above is based on the need for two new positions, one legal and one technical, to respond to the rulemakings required by some of SB418's proposed changes, and two additional FTEs, also legal and technical, to respond to an uptick in anticipated workload related to the non-mandatory, but nevertheless, new authorities added to the Act by SB418. These additional FTEs would provide ongoing support for agency rulemaking and policy development under the expand authorities provided by SB418.

SIGNIFICANT ISSUES

IAD states:

NMED defines environmental justice as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”

According to research performed by the Environmental Defense Fund, people of color, those living in poverty, elderly people and children could be affected by air pollution associated with oil and gas at a higher rate than other groups in New Mexico. Data from the San Juan Basin and the Permian Basin in New Mexico showed that large populations of “marginalized” communities live in these areas. San Juan Basin is largely populated by Indigenous individuals and sits along Native American communities within the Navajo Nation, while the Permian Basin has a high density of individuals with low education and income levels. Overall, the research showed that about 457,000 Native Americans, or about eight percent of the United States’ entire Indigenous population, live within a mile of active oil and gas wells.

Sources: [NMED](#); [Environmental Defense Fund](#); [New Mexico people of color most impacted by oil and gas, study says \(Carlsbad Current-Argus\)](#)

SLO states:

SB418 provides a much-needed update to the Oil and Gas Act by harmonizing the text of the statute with the decision making that OCD and OCC often engage in as a matter of necessity and practice. Specifically, OCD and OCC should (and sometimes do) evaluate the impact of oil and gas operations on the environment, a consideration that is reflected in many agency decisions, including whether and when inactive wells need to be plugged, whether and when to reach settlements with operators who are not in compliance with OCD environmental requirements, and considering how to avoid or mitigate environmental harms in the course of reviewing and promulgating administrative rules. At the same time, the bill would make explicit that environmental (and public health and safety) considerations are squarely within OCD’s and OCC’s jurisdiction.

While the bill adds protection of the environment and public health and safety to OCD’s and OCC’s general duties, the bill does not require the agencies to engage in any specific new activities or to employ any specific new considerations in the fulfillment of their responsibilities.

By expanding OCC’s membership to include individuals knowledgeable about the environment, public health, and environmental justice communities – constituencies that up until now have been excluded from OCC decision making – the bill would provide valuable balance to that deliberative body. The requirement that the Commissioner of Public Lands designee be a State Land Office employee aligns with current and recent past practice, and helps ensure the designee has the requisite knowledge and experience to serve. Similarly, the creation of an environmental justice task force could provide valuable feedback to OCD and OCC from communities that are disproportionately affected by oil and gas operations, but who historically have not had a seat at the regulatory table.

The removal of the arbitrary cap on blanket bond value will help ensure that financial

assurance requirements adequately protect the public, and the removal of the arbitrary cap on civil penalties will ensure that the very worst offenders are properly held to account.

According to a study released in 2021 by the Center for Applied Research, New Mexico's oil and gas industry is inadequately bonded to the tune of \$8.1 billion. This gap is the money that would be needed to fill the difference between existing oil-and-gas related bonds and the full cost to completely clean-up and remediate over 60,000 wells, 35,000 miles of pipeline, and other infrastructure. Progress in closing "the bonding gap" is supported by the State Land Office.

The bill also requires, for the first time, restoration and remediation of land.

EMNRD states:

The Oil and Gas Act was enacted in 1935 and many of the original sections of the Act remain in place. These provisions are the subject of the revisions in SB 418. Since 1935, the Act has been amended several times to expand the duties of the Commission/OCD, particularly regarding environmental issues associated with oil and gas production. SB 418 would continue this expansion by broadening the Commission's/OCD's goals and duties under the Act.

The expansion of the Act's general goals under Section 70-2-11 is the first major change to that section since the addition of the goal to protect correlative rights in the 1940s. The specific duties of the agency under 70-2-12, on the other hand, have been periodically expanded by the Legislature to add several environmental protection responsibilities – *see e.g.*, 70-2-12(B)(15) (regulating handling and disposal of produced water); (B)(18) (plugging abandoned wells and remediating well locations); (B)(21), (22) (regulating wastes generated at oil and gas sites). Adding the protection of the environment to the Act's general goals in 70-2-11 is consistent with the expanded scope of the Act as reflected in the amendments to 70-2-12. On the other hand, adding the same general goals to the list of specific duties in § 70-2-12 may be redundant.

Authorizing the Commission/OCD under new §70-2-12(B)(26) to adopt rules for minimum setbacks from wells would entail a significant rulemaking, if that discretionary authority is exercised; however, the requirement for setbacks is common in other oil and gas producing states. For example, both Colorado and Wyoming have established statewide setback provisions either by statute or rule and the Commission's existing rules have already established setbacks for certain oil and gas facilities such as pits and impoundments (19.15.17.10 NMAC).

The requirements for oil and gas financial assurance have been the subject of debate for years. The Legislature has amended the requirements twice in the past 8 years, first to increase the cap on blanket bonds and second, to allow blanket bonds for inactive wells. Currently, the required financial assurance amounts are generally inadequate to cover costs when the agency must plug an abandoned well, and the agency must use money from the oil and gas reclamation fund to cover the gap. The agency will also remediate any environmental damage at the well site and must use reclamation fund dollars to do so. SB418 proposes to require single well bonds for inactive and low producing wells and to have the required financial assurance cover the cost of remediation. These changes

will bring financial assurance more in line with actual costs.

SB418's addition of environmental justice goals and an advisory council will be a challenge to implement. SB418 does not specify how the Council will "advise" the Commission and OCD. Perhaps more important are the broad and vague definitions of "environmental justice community" and "fair treatment and meaningful involvement" in SB418 that could be subject to varying interpretations and would likely require litigation to properly define their contours. Additionally, the Council could potentially over index on tribal members when the OCD does not have jurisdiction on solely tribal minerals or sites. Finally, , the environmental justice goals raise issues beyond the core expertise of current OCD staff, which means their implementation would require additional resources. Because of uncertainty about how those broad and vague terms would be defined, it is not possible to estimate the resource needs at this time.

The changes to the composition of the Commission and to the qualifications of the OCD Director may bring additional viewpoints to the Commission and open the Director position up to additional types of qualified applicants. The issues the Commission and Director encounter, along with their duties under the Act, have expanded over the years and expertise or experience with petroleum engineering is no longer a barometer for success in the role. The Director must now handle policy, management, and technical issues that go beyond the background of a petroleum engineer. SB418 would modernize the Act to reflect those additional responsibilities and provide the necessary requirements to find qualified candidates. Similarly, expanding the Commission beyond the three members established in the 1935 Act will bring additional expertise to the body. As with the Director requirements, this additional expertise may track the additional responsibilities of the Commission.

The changes to financial assurance requirements would allow OCD to increase bonding requirements on facilities. These additional authorities would respond to the findings of repeated studies that the oil and gas industry as a whole is currently under-bonded with respect to plugging and remediation obligations. New Mexico itself has at least 1,700+ orphan wells for which it has no responsible operator or financial assurance in place to forfeit; circumstances that make these wells the OCD's responsibility to plug. Similarly, removal of the caps on enforcement penalties would enable OCD to pursue more significant penalties against repeat violators.

NMAG states:

Presently the regulatory powers of the OCC and OCD under 70-2-11 NMSA are limited to preventing waste and protecting correlative rights. SB418 would expand that by adding the powers to "protect health and the environment, promote the public interest, health, safety and general welfare and promote the fair treatment and meaningful involvement of the public, including environmental justice communities." The OCD would also be given authority to make rules and orders with respect to these objectives in the enumeration of powers in 70-2-12 NMSA. This creates the potential for environmental or public health and safety rules that conflict with or are duplicative of those promulgated by other agencies, for example NMED's regulations governing emissions of ozone precursors from oil and gas operations. *See* 20.2.50 NMAC. This potential for overlapping regulation is compounded by the existence of federal regulations for air emissions from many of the same facilities, regarding which NMED must demonstrate that its regulations are at least as stringent... Thus any air quality rules

adopted by the OCD could add a third layer of regulation, possibly creating compliance difficulties and conflicting requirements. Similar complexities may arise in the regulation of other environmental media, such as water and solid waste.

PERFORMANCE IMPLICATIONS

IAD states:

The Secretary of IAD will be responsible for appointing four representatives to the environmental justice advisory council. These four representatives must be from disproportionately impacted communities and include representatives from communities within the San Juan and Permian basins. In total, there will be nine members of this advisory council. IAD itself is not required to participate or be a member of the proposed environmental justice advisory council.

ADMINISTRATIVE IMPLICATIONS

IAD states:

SB418 does not require IAD to participate or be a member of the proposed environmental justice advisory council. Of note, while the Secretary of IAD is not responsible for choosing these representatives, four representatives will also come from tribal governments or entities.

NMAG states:

Under 70-2-4(C) NMSA, the Attorney General is counsel to the OCC. SB418's reprioritization of environmental protection and environmental justice over the OCC's traditional role in preventing waste and protecting correlative rights could lead to novel and complex issues arising in the commission and in litigation over rules adopted under the bill's provisions.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

IAD states:

There appears to be no duplication of SB418. This appears to be the first year that a bill of this kind has been introduced in either the Senate or House.

NMAG states:

May conflict with HB276, making other changes to 70-2-12.

TECHNICAL ISSUES

SLO states:

In Section 70-2-14(A), there is a reference to financial assurance instruments, including wells in "temporarily abandoned" status. The Division currently approves wells and places wells in "approved temporarily abandoned" status; a reference to just "temporarily abandoned" is analogous to "inactive", as the Division wouldn't have approved the well to be in "approved temporarily abandoned status." Therefore, the word "approved" should be added here.

OTHER SUBSTANTIVE ISSUES

NMAG states:

SB418 would provide that two members of the OCC would be jointly appointed by the speaker of the house of representatives and the president pro tempore of the senate (rather than have each leader of the legislature appoint one member). The bill provides no mechanism to address the possibility that agreement cannot be reached on the appointment, which could lead to delay and uncertainty in forming the commission. Such a *joint* appointment provision appears to be unusual if not unique in New Mexico statutes.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

IAD states:

Failure to pass this bill will result in members of impacted communities, as well as tribal governments and entities, from “identify[ing] and address[ing] current and historic environmental injustices and inequities in the operation and regulation of oil and gas.”

JT/rl/ne/rl