STATE OF COLORADO

Sally Symanski, CPA
State Auditor

OFFICE OF THE STATE AUDITOR
303.869.2800
FAX 303.869.3060

Legislative Services Building
200 East 14th Avenue
Denver, Colorado 80203-2211

Information Brief

TO: The Legislative Audit Committee
FROM: Sally Symanski, State Auditor
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SUBJECT: Information Brief on Fiscal Notes

Introduction

This brief is submitted in response to a legislative request for information on the processes used in Colorado for generating fiscal notes. This request was prompted by concerns about the accuracy of estimates of fiscal impacts that are contained in fiscal notes, in particular with respect to two bills enacted during the 2007 Legislative Session. We developed "case studies" on the fiscal notes of these two bills: House Bill 07-1341, involving the Oil and Gas Conservation Commission (OGCC) within the Department of Natural Resources (DNR), and Senate Bill 07-242, involving the Office of Health Disparities (OHD) within the Department of Public Health and Environment (DPHE). The fiscal notes for these two bills identified no or minimal anticipated fiscal impacts during Fiscal Years 2008 and 2009 for the affected departments. The departments then requested and received significant dollars and FTEs in the Fiscal Year 2009 budget cycle.

In preparing this brief, we interviewed individuals in each of the following Colorado agencies or departments and reviewed documents supplied by them: Legislative Council Staff (LCS), the Office of State Planning and Budgeting (OSPB), Joint Budget Committee (JBC) staff, DNR (including OGCC), and DPHE (including OHD). We also interviewed staff from the National Conference of State Legislatures (NCSL), as well as agencies having responsibility for generating fiscal notes in other states.

What is the process used in Colorado for generating fiscal notes?

Fiscal notes in Colorado, as in other states, are generated to provide information to legislators about the anticipated fiscal impact of proposed legislation. Fiscal impact includes anticipated changes both in revenue and costs—increases as well as decreases—affecting either state or local governments as a result of a bill.

While all bills have a fiscal note, not all bills have an identifiable fiscal impact. There are three basic types of fiscal notes:

1. Notes that identify a "Fiscal Impact" for state or local governments.
2. Notes that indicate the bill will have "No Fiscal Impact."

3. Notes that identify a "Conditional Fiscal Impact." This is used when implementation of a bill is authorized rather than mandated, is contingent upon receipt of non-state funds, or is contingent upon voter approval.

Fiscal notes on bills that have an anticipated impact will answer the following questions:

- By how much will state revenues increase or decrease as a result of the bill?
- By how much will state expenditures increase or decrease as a result of the bill?
- By how much will the number of state employees (FTEs) increase or decrease as a result of the bill?
- Will there be any fiscal impact on local governments as a result of the bill and, if so, how much?

Fiscal notes typically provide estimates in response to the above questions to cover a period of two fiscal years following the legislative session. There are exceptions to this two-year rule. For example, if a bill provides for implementation of a program over a multi-year period, the fiscal note will include information for all the years until the program is fully implemented.

In Colorado, the requirement for fiscal notes is found in Section 2-2-322, C.R.S., which requires the General Assembly to provide by rule for the "review of the fiscal impact of legislative measures." Pursuant to statute, the General Assembly has promulgated the following rules to govern the generation of fiscal notes: Joint Rule 22, House Rule 32A, and Senate Rule 25. Joint Rule 22 requires LCS to prepare a fiscal note for each bill or concurrent resolution introduced in a legislative session, except for bills that are limited to appropriations measures carrying specific dollar amounts. House Rule 32A and Senate Rule 25 provide more specifics in terms of how fiscal notes fit into the respective procedures and processes of each house.

Fiscal Note Worksheets

Prior to the start of each legislative session**,** LCS meets with each department and upon request provides the department with written guidelines on how to prepare a fiscal note worksheet. LCS also distributes a memorandum each year containing "Common Policies for Fiscal Notes." These policies include such items as how to calculate the wages of a new FTE, how much to include for computer and office equipment for each new FTE, rates for Attorney General services, and allowable costs for travel expenses. LCS begins the fiscal note process by requesting, with the approval of the bill sponsor, that the affected department(s) prepare a fiscal note worksheet, which contains the department's estimates of fiscal impact. The request for a fiscal note worksheet generally occurs before the bill is introduced. LCS requests that the department's fiscal note worksheet include the following for each section in the bill having a fiscal impact:

- An explanation of the change being proposed to current law.
- An identification of current revenues or budget resources associated with the program affected by the bill.

- A listing of all assumptions made in determining the fiscal impact (e.g., projected increase in workload, number of additional staff needed, etc.).
- Detail as to how each dollar figure is calculated.

The worksheet is also requested to include: (1) an estimate of both short- and long-term impact on local government or on the state economy; (2) any technical or mechanical deficiencies in the bill language (e.g., inaccurate statutory references); and (3) a statement of whether the estimated fiscal impact has been included in the department's budget request. Finally, the worksheet is not to include any comment or opinion as to the merits of the bill.

If there is no anticipated impact, a worksheet is not required. Instead, the department notifies LCS in writing that there is no fiscal impact. If LCS concurs in this assessment, it issues a statement of No Fiscal Impact. In the case of no fiscal impact, both the information provided by the department and the statement produced by LCS can be very cursory in nature, only a sentence or two, explaining why there is no anticipated fiscal impact.

Preparing the Fiscal Note

A department's fiscal note worksheet is taken into consideration by LCS in preparing the fiscal note. LCS consults other sources of information as well. For example, LCS may confer with the bill sponsor as well as the drafter and may look to other states, foundations, and information on websites.

According to its Fiscal Note Training Manual, LCS takes the following into account in reviewing a departmental worksheet:

- Do costs appear reasonable, for example in comparison with similar programs or information provided for other legislation? Is there adequate justification for the costs identified?
- Is the implementation plan reasonable?
- Are costs consistent with standard costs required for fiscal notes as contained in LCS's "Common Policies for Fiscal Notes"?

In preparing a fiscal note, LCS reports that it sets up its own spreadsheets and calculates costs independent of the department's calculation. LCS analysts are directed to try to resolve differences with departments as to what amounts should be included in the fiscal note. If agreement cannot be reached, the fiscal note is to reflect the fact that there are differences between LCS and the department. Each fiscal note goes through a "peer review" process within LCS, during which staff other than the analyst who prepared the note look at the strength of the fiscal analysis as well as whether the note correctly interprets the bill. Finally, each note is reviewed by the head of the LCS fiscal note section.

The essential information included in a fiscal note is located within a table on the front page of the fiscal note. This essential information includes anticipated changes in revenues, expenditures, and FTE for a two-year period. The remainder of the fiscal note consists of more detailed explanations of those elements contained within the table. Also included in the more detailed narrative is a summary of the legislation, as well as a notation of the department(s) contacted.

As bills are amended throughout the legislative process, revised fiscal notes are prepared. It is the responsibility of the LCS analyst to monitor his or her assigned bills. When an amendment that may have fiscal impact has been adopted by a committee, LCS in most cases contacts the affected department(s) for another fiscal note worksheet. LCS then prepares a revised fiscal note on the bill as amended.

There is a process for legislators to "demand" a revised fiscal note. Pursuant to House Rule 32A(c) and Senate Rule 25(e), a "demand" for a revised fiscal note prior to the second reading of a bill must be made by at least ten members in the House or five members in the Senate. Such a demand was made in the case of HB 07-1341, as discussed in the Appendix to this brief.

When any bill has a fiscal impact, it is referred to the Appropriations Committee in either house. At this point, the fiscal note undergoes further review by JBC budget analysts, who serve as staff to the Appropriations Committees. This review is discussed below under "Role of JBC staff in the Fiscal Note Process."

While there are many time frames prescribed for bills going through the legislative process, there are no specific time requirements to govern the generation of fiscal notes. The only references to fiscal note time frames are found in the LCS Fiscal Note Training Manual. These appear to be in the nature of guidelines rather than requirements. According to the Training Manual, departments are given five to seven days to prepare a worksheet. Also, the goal is for LCS to produce a fiscal note within two to three days before a hearing, but no later than 24 hours before the hearing. In practice, time frames for generating fiscal notes are at their most generous when the initial note is prepared on the bill as introduced. For notes on bills as amended, the process is accelerated, and turnaround times can be measured in hours rather than days.

Fiscal Note Statistics

In 2008, LCS produced fiscal notes on a total of 667 bills. This compares to 661 bills in 2007. Table A indicates the percentage breakdown of initial fiscal notes in 2008.

Table A
Legislative Council Staff
Initial Fiscal Notes on 2008 Session Bills

Type of Fiscal Note	Number	Percentage
Fiscal Impact	374	56%
No Fiscal Impact	233	35%
Conditional Fiscal Impact	60	9%
TOTAL	667	100%
Source: Data compiled by Legislative Council Staff from legislative database (CLICS).		

At our request, LCS conducted a manual review of the fiscal note files associated with 609 of the 667 bills with fiscal notes for 2008. Fiscal notes on the remaining 58 bills were generated by an LCS contract analyst, whose files were not readily available for review. This review indicates that there were a total of 1,473 fiscal notes generated with respect to the 609 bills, or an average of 2.4 notes per bill. Bills typically have two fiscal notes: an initial note and a final note. The final fiscal note is prepared after the bill becomes law. There are no statistics readily available to indicate the number of bills that required more than two notes. LCS indicated it could prepare statistics based on a manual review of each bill in a given session.

During its review of fiscal note files, the LCS also compiled information on the extent to which LCS disagreed with the information provided by departments. These data are set forth below in Table B.

Table B
Legislative Council Staff
Frequency of LCS Agreement with Departmental Fiscal Notes
2008 Legislative Session

Category	Number	Percentage
General agreement with department	1,151	78%
Disagreement with department	275[A]	19%
No worksheet received from department	47[B]	3%
Total	1,473	100%

Source: Legislative Council Staff manual review of files.
Notes:
[A] Disagreements with departments may be due to technical errors, or they may be more substantive in nature. The majority of disagreements are ultimately resolved.
[B] Cases where worksheets are not received typically involve bills where there is obviously no fiscal impact or bills where the fiscal impact is clearly stated in the bill itself.

LCS estimates that as many as 15 LCS analysts may have been involved in preparing fiscal notes on the 667 bills in the 2008 Session. However, almost two-thirds of the bills (424 bills) were assigned to seven "core" LCS analysts. Each of these analysts therefore had an average workload of just over 60 bills. The remainder of the bills was assigned to the LCS economic section, the policy and research section, the head of the fiscal note section, or one or more contract analysts.

<u>Role of JBC Staff in the Fiscal Note Process</u>

During the legislative session, JBC staff review the fiscal notes on bills assigned to an Appropriations Committee and prepare a separate document called a "JBC Staff Fiscal Analysis." This analysis indicates that the JBC staff either "concur" with, "do not concur" with, or "update" the LCS fiscal note. According to JBC staff, their analysis typically is confined to a review of the fiscal note document itself; the analysis is basically a "reasonability check." If the JBC analyst has concerns, he or she can check with the LCS fiscal note author to see if any disagreements can be resolved. In a minority of cases, the JBC analyst may also check with departmental staff. JBC staff produced just over 400 JBC Staff Fiscal Analyses in the 2008 session. JBC staff report that there is no data readily available to indicate how frequently these analyses concurred with, did not concur with, or updated the related fiscal notes.

<u>How are Fiscal Notes Used in the Budget Process?</u>

Both OSPB and JBC staff generally review relevant past fiscal notes when analyzing decision items in a department's budget request. Departments need to identify the statutory basis of the program for which they are requesting additional funds through the decision item request. Because only those decisions items approved by OSPB can go forward as part of the departmental submission to the JBC, OSPB's determination of the effect of a prior fiscal note is critical to a department. OSPB management reports that its policy is not to approve decision items unless they are consistent with prior fiscal notes. OSPB's "Official Budget Instructions" (Section 4.2 Criteria for Making a Change Request) state that a decision item is required for requests intended to make up for inadequately funded legislation in the previous year. The instructions note, however, that "requests to backfill missing or inadequate fiscal notes are rarely approved" by OSPB.

JBC staff typically review a prior fiscal note if a decision item refers to a statute that is relatively new or recently amended (i.e., within the past couple of years). If the request in the decision item is not consistent with a prior fiscal note, JBC staff ask the department for an explanation. Significant disparities between a current request and a prior fiscal note do not necessarily trigger a recommendation by the JBC analyst not to fund the request. However, according to JBC staff, they typically bring such disparities to the attention of the Joint Budget Committee.

<u>Summary of Case Studies on SB 07-242 and HB 07-1341</u>

SB 242 created the Office of Health Disparities (OHD) within the Department of Public Health and Environment (DPHE). Prior to SB 242, OHD had been established by the DPHE executive director and had a staff of 3.0 FTE funded by a grant from the Kaiser Permanente Foundation. HB 1341, in its final form, made changes to the composition of the Oil and Gas Conservation Commission (OGCC) and gave OGCC the authority to promulgate rules for granting oil and gas drilling permits that would take into account the protection of the environment. Complete case studies on the fiscal notes for both these bills are found in the Appendix to this brief.

As the case studies indicate, the fiscal notes for SB 242 and HB 1341 both lacked information for legislators about the <u>possible</u> or <u>potential</u> fiscal impact of the bills. In the case of SB 242, the statement of no fiscal impact indicated that there would be no fiscal impact for at least two years. The fiscal note did not disclose that the existing funding from a private source would end halfway through that two-year period. In the case of HB 1341, the information omitted was that the promulgation of rules <u>might</u> lead to a significant cost impact. Given the uncertainty as to the ultimate impact of rule-making, which would not culminate for almost two years, it might have been unreasonable for DNR to have quantified the impact on a fiscal note to HB 1341. However, some statement in the fiscal note of the potential impact could have been helpful to legislators. Our limited review of the process for preparing fiscal note worksheets at the two departments that were part of our case studies indicates that both require multiple levels of review and sign-off on all worksheets submitted to LCS. In both SB 242 and HB 1341, the problem was that the fiscal note did not provide qualitative (rather than quantitative) information relating to future uncertainty.

The OSPB, JBC, and General Assembly later approved budget requests associated with these bills. OSPB staff indicated in their briefing documents that the decision item requests for Fiscal Year 2009 were not consistent with the 2007 fiscal notes. Specifically, for SB 242, OSPB noted that DPHE had "assessed the bill (SB 242) as having no fiscal impact," and for HB 1341, OSPB pointed out the fiscal note language about the possibility of significant costs driven by rule-making that had been added after the "demand" by ten House members but was removed from later versions of the fiscal note. The discrepancies between the fiscal notes on the 2007 legislation and the decision items for

Fiscal Year 2009 were also made known to the JBC either in the budget submission or in the JBC staff write-ups for the budgets.

Does Colorado have a reasonable process in place for preparing fiscal notes?

Although fiscal notes on SB 242 and HB 1341 did not include information related to future uncertainties, our review of the process reveals that overall Colorado has a reasonable system in place for generating fiscal notes. A great deal of resources are invested in preparing and evaluating fiscal notes. In addition to the resources that departments devote to the process, a non-partisan, professional LCS plays a pivotal role in evaluating and challenging the information provided by departments, as well as relying on other sources to come up with fiscal notes. Also, non-partisan, professional JBC staff have an opportunity to further refine the fiscal note during the legislative session and scrutinize subsequent budget requests that are not consistent with prior notes.

According to staff at the National Conference of State Legislatures (NCSL) with fiscal note expertise, Colorado is regarded as having a relatively good system for producing fiscal notes. The NCSL staff member notes that a former LCS director was often asked to deliver NCSL training sessions on how to generate fiscal notes. In addition, we observed that the steps for preparing fiscal notes as set forth in the NCSL training guide closely parallel the steps that LCS uses in its own training manual. These basic steps include: carefully reading and understanding the bill; gathering information from state agencies as well as other sources; clearly stating assumptions; and making specific calculations of impact, both increases and decreases, on costs as well as revenues.

NCSL staff also referred us to five states that might be considered "models" in terms of their processes for preparing fiscal notes. These states are: Indiana, North Carolina, Tennessee, Texas, and Utah. In talking to staff at the agencies responsible for fiscal notes in these states and reviewing their documentation, we found that their systems have much in common with Colorado's. These staff cited four common factors as crucial to the accuracy of fiscal notes:

- Requiring that departments clearly set out their assumptions and calculations in support of their estimates. This provides a basis for the legislative agency to evaluate the estimates.

- Actively researching independent sources of information to complement information provided by departments, including similar bills or programs within the state, and information from other states, websites, and organizations.

- Building good working relationships with the departments, to include: acknowledging the inherent tension that may exist between the departments and the legislative agency; stressing the importance of the departments' providing full and complete information; and reminding the departments of the consequences to their credibility if they are less than forthcoming.

- Emphasizing the professional objectivity and independence of the legislative staff responsible for fiscal notes. These legislative staffs in the model states note they have worked to build and nurture their reputations for objectivity and accuracy over the years.

All these factors are in place in Colorado.

Are there opportunities for improvement in Colorado's fiscal note process?

In considering opportunities for improvement, it should be noted that there are practical limitations to any system for producing fiscal notes. Making estimates of future fiscal impact inherently involves uncertainties and assumptions. Also, there are limits to the amount of staff and time that can be devoted to the process. Fiscal note worksheets and fiscal notes are generated within relatively short time frames. Notes on bills as amended are generated in an even shorter time frame.

Notwithstanding practical limitations, and the fact that Colorado has a fiscal note process that already incorporates elements identified by other states as being critical to a strong process, there are opportunities for improvement in Colorado's system.

First, statements of no fiscal impact may warrant a more careful and complete analysis. Before saying that a bill has no fiscal impact, departments should be encouraged to consider a series of questions such as: Why is there no anticipated impact? Will there be no additional workload? Is the workload absorbable? In all cases, departments should clearly state the assumptions they are making and should affirm that they anticipate no material changes in either the assumptions, or in the bottom line conclusion of no fiscal impact, for at least two years. LCS reports that it stresses the importance of explaining estimates of no fiscal impact when it meets annually with each department. If LCS were to amend its instructions to be explicit on these matters, it might prove helpful both to the departments and LCS analysts in reviewing worksheets that indicate no fiscal impact, as well as to legislators as they consider the related bills.

Second, there may be a need to expand the use of conditional fiscal notes, in particular with regard to bills that grant expanded rule-making authority. In these cases, there is a potential for the department to promulgate rules that result in a fiscal impact. While departments may not be able to quantify that impact, departments could routinely be asked to divulge on their fiscal note worksheets what their present thinking is with respect to the fiscal impact of future rules. Departments should, where appropriate, alert legislators to the possibility of a future fiscal impact. If LCS were to amend its instructions to be explicit on this matter, it would be helpful both to the departments as well as to LCS analysts in reviewing worksheets on bills involving rule-making authority. Further, departments should continuously monitor bills and fiscal notes as they are revised to make sure that revised notes accurately reflect the impact of bills as amended.

Third, consideration could be given to systematically reviewing the predictive value of fiscal notes in subsequent years. Beginning in 2007 the Office of the Legislative Fiscal Analyst in Utah established an annual report following up on fiscal notes for a sample of bills from previous sessions. For each bill the report notes the implementation status, the accuracy of the department's estimate, and the accuracy of the fiscal note. This type of review could be beneficial in Colorado.

Fourth, expanding written guidance and training could enhance the fiscal note process. The fundamental and vital purpose of a fiscal note is to provide legislators with complete and objective information on fiscal impact to help guide their decision-making process. Departmental and legislative staffs involved in the process indicated to us that they understand, support, and are guided by this purpose. However, there is currently no single document used by all participants in the fiscal note process that provides detailed information about the purpose and nature of the process. As noted earlier, LCS does distribute or make available two documents to the departments: a template for preparing a fiscal note worksheet and an annual statement of common policies (such as how to calculate standard costs).

We also obtained information from a sample of nine departments to determine if they have written procedures or training with respect to fiscal note worksheets. Many of the departments indicated that they provide some training before each legislative session, and some ask representatives of LCS and JBC staff to participate in the training. None of the departments had detailed written procedures related to fiscal notes. We were able to find only one department in our sample that had a written statement of guiding principles. The Department of Health Care Policy and Financing has an outline that it uses for training purposes. One section of this outline sets forth four guiding principles to govern the production of fiscal notes: accuracy, consistency (with policy/precedent/published information), accountability, and transparency.

A single publication for use statewide could prove useful in emphasizing the overall importance of fiscal notes and could set forth principles to guide their preparation and enhance their predictive value. It could also be a way of addressing specific issues, such as those noted above (i.e., more emphasis and clarity with respect to statements of no fiscal impact and conditional fiscal notes), where more direction is needed or where reminders may be helpful. LCS management stated that it cannot mandate that departments use the prescribed format of the fiscal note worksheets. However, a single publication that is comprehensive and detailed could serve as a uniform point of reference and a training tool for LCS to help departments improve in areas that may have been problematic in prior legislative sessions.

Appendix A

Information Brief on Fiscal Notes
Case Studies: Senate Bill 07-242 and House Bill 07-1341

Senate Bill 07-242: Concerning the Statutory Creation of the Existing Office of Health Disparities in the Department of Public Health and Environment

SB 242 passed through both houses of the 2007 Legislature unamended in less than a month to create the Office of Health Disparities (OHD) within the Department of Public Health and Environment (DPHE). Prior to SB 242, OHD had been established by the DPHE Executive Director and had a staff of 3.0 FTE funded by a grant from the Kaiser Permanente Foundation. The statutory purpose of OHD, according to SB 242, is to work toward "eliminating racial, ethnic, and rural health disparities in Colorado by fostering systems change and capacity-building through collaboration with multiple sectors impacting minority health and with input from a variety of multicultural professionals."

At DPHE, fiscal note worksheets are prepared by staff of the affected division or agency and reviewed by a departmental coordinator, the department budget director, and the budget manager. The worksheets are then reviewed by three of four DPHE "senior staff," including the Chief Operating Officer, the Director of Policy, the Chief Medical Officer, and the Director of Environment. After sign-off from senior staff, all worksheets go to the Executive Director for approval before being submitted to LCS. On a bill where there is no anticipated fiscal impact, such as SB 242, DPHE can and does submit a short e-mail rather than a fiscal note worksheet.

Based on information provided by DPHE, Legislative Council Staff (LCS) issued a "No Fiscal Impact" statement, which read in pertinent part: "The bill codifies the current structure in the Department of Public Health and Environment and does not require additional funding. The Office of Health Disparities was allocated $276,000 from private funds and 3.0 FTE for Fiscal Year 2006-2007. Therefore, this bill is assessed as having no fiscal impact." The statement of no fiscal impact indicated that private funds were from the Kaiser Permanente Foundation.

According to our interviews with DPHE staff, when the fiscal note was issued, DPHE knew that the Kaiser Permanente grant would end on June 30, 2008. While the Department reports that it was making efforts to find replacement funds from private sources, DPHE had not identified feasible grant sources or made any grant applications. A statement in the fiscal note indicating that the private funding would run out midway through the two-year period covered by the fiscal note would have more fully informed legislators about the potential impact of the bill. Because there was no fiscal impact indicated with respect to SB 242, the bill did not go to an Appropriations Committee, and therefore no JBC Fiscal Analysis was prepared on the bill.

In its budget request for Fiscal Year 2009, submitted in the fall of 2007, DPHE included a decision item for $232,960 and 3.0 FTE entitled "Sustaining the Office of Health Disparities Infrastructure." Of the dollars requested, $58,240 would be general funds and $174,720 would be cash funds exempt from the Health Disparities Grant Fund. The Health Disparities Grant Fund receives funding from Amendment 35 taxes on tobacco products. The cash exempt funds would be offset by a decrease in the same amount from the grants line in the Health Disparities Grants Program. Grants are made under this program to support local and statewide initiatives that address cancer, cardiovascular disease (including diabetes), and pulmonary disease in minority populations. In the decision item, DPHE noted that the funding from Kaiser Permanente for OHD would end on June 30, 2008. The decision item stated: "Multiple attempts have been made to secure ongoing funding for the OHD through federal and private sources, but the response from potential funding sources has been that this is a state function that should be funded with state dollars. The program has had success in securing funding from private foundations for specific projects, but not for personnel and operating costs."

OSPB approved this budget request, while noting in its briefing document that DPHE had "assessed the bill (SB 242) as having no fiscal impact." The JBC staff analyst opposed this decision item, stating that DPHE should be held accountable for its representation of no fiscal impact in the fiscal note for SB 242. In the briefing document provided to the Joint Budget Committee, the JBC staff analyst emphasized that when DPHE said there would be no impact of SB 242, the Department knew that its private source of funding for OHD would expire. The JBC and the General Assembly voted to fund DPHE's request in full.

House Bill 07-1341: Concerning the Colorado Oil and Gas Commission, and, in connection therewith, Directing the Commission to Foster Oil and Gas Development Consistent with the Protection of the Environment, Wildlife Resources, and Public Health, Safety, and Welfare and Making an Appropriation Therefore.

As originally introduced in 2007, HB 1341 dealt primarily with changes to the composition of the Oil and Gas Conservation Commission (OGCC). The bill also made an exception to the general prohibition in existing law against the promulgation of any rule requiring restriction of an oil and gas well's production. The bill was subsequently amended to grant OGCC the authority to promulgate rules for granting oil and gas drilling permits that would take into account the protection of the environment.

At the Department of Natural Resources (DNR), fiscal note worksheets are prepared by the affected division or agency and reviewed by a departmental coordinator. In addition, the DNR Budget Director reviews all fiscal note worksheets from a budget perspective and does a "big picture" calculation, rather than recalculating the numbers in detail. The DNR Deputy Director also reviews worksheets from a policy perspective, concentrating mostly on worksheets with significant impact. After review by one or both of these DNR officials, the worksheets are submitted to LCS.

In HB 1341 as introduced, the only provision relating to rule-making authority was indirect, providing an exception to the general prohibition already in law against the promulgation of any rule restricting an oil and gas well's production. The exception would be to allow a rule restricting production where necessary to protect public health, safety and welfare, including the environment and wildlife. DNR advised LCS that HB 1341 as introduced would have no fiscal impact. LCS issued the first of six fiscal notes on the bill, which indicated no fiscal impact.

Prior to the consideration of HB 1341 on second reading, ten members of the House issued a "demand" for another fiscal note. In response to this demand, LCS's second fiscal note again found no fiscal impact but made reference to the possibility of rule-making and additional costs, stating in pertinent part: "Should the OGCC choose to promulgate rules and require additional resources to cover the associated costs, this fiscal note assumes the issue would be addressed through the annual budget process. Such costs are conditioned on the commission choosing to promulgate rules."

HB 1341 was amended on second reading in the House to require OGCC, in coordination with DPHE, to review its rules related to the protection of health, safety and welfare by July 1, 2008. LCS issued a third fiscal note to reflect this amendment. The third note still indicated no fiscal impact, and it retained the language about the possibility of new rules and associated costs related to the exception for the restriction on production.

In the Senate, the bill was amended in committee in two pertinent respects. The first of these was the deletion of the provisions relating to restriction of production. The second was the addition of specific new rule-making authority granted to OGCC. HB 1341 would now require OGCC to promulgate rules for the approval of oil and gas permits, in consultation with DPHE, which rules would take into account protection of the environment. LCS produced a fourth fiscal note reflecting the Senate committee amendments. LCS did not ask DNR for information in preparing this fiscal note and, according to LCS and DNR staff, DNR did not volunteer any additional information for the note. LCS relied instead on its own fiscal note for HB 1223 (see discussion below on HB 1223). This fourth fiscal note is particularly significant. First, it dropped the above-described language about possible additional resources that might be required should OGCC choose to promulgate rules restricting production, because the provision creating an exception to the restriction was dropped. No substitute language on the potential cost impact to OGCC of rule-making was included in the fourth fiscal note for HB 1341, notwithstanding the fact that the bill had been substantially amended to grant specific new rule-making authority to OGCC. Second, the fiscal note identified a one-time cost of $4,350 for OGCC to promulgate rules and identified anticipated costs and FTE for DPHE as a result of its new role in OGCC's rule-making authority. The estimated costs and FTE for DPHE were $56,580 and 0.8 FTE for Fiscal Year 2008 and $134,241 and 2.0 FTE for Fiscal Year 2009.

HB 1341 went on to be amended in Senate Appropriations and on the floor, but not in a manner relevant to the matters discussed in this brief. A JBC Staff Fiscal Analysis was issued that concurred with the fiscal note. A fifth and sixth fiscal note were issued, including no further changes relevant to the matters discussed here.

<u>HB 07-1223 and HB 07-1298</u>

Two other bills in the 2007 session are relevant to the fiscal note on HB 1341. The first of these is HB 1223, which was similar to HB 1341, granting new authority to OGCC for rule-making in consultation with DPHE. The second is HB 1298, which became, in effect, a companion piece to HB 1341 in terms of new rule-making authority and the subsequent budget request by OGCC for 21.0 FTE. Whereas HB 1341, as amended, required rules to protect the environment, HB 1298 required rules to protect wildlife.

DNR submitted a fiscal note worksheet on HB 1223 indicating minimal fiscal impact, but stating the following:

> This fiscal note represents the lowest end of a wide range of potential costs for the COGCC to promulgate a rule to implement the proposed legislation. This approach assumes that the COGCC would require oil and gas operators to notify the CDPHE of oil and gas permits to drill, and that there would be a time period during which the COGCC would withhold issuance of drilling permits to allow the CDPHE time to provide comments to the COGCC about proposed conditions of permit approval. <u>If a more extensive approach were taken that would include a complete revision of COGCC regulations in consultation with the CDPHE, it would likely result in new, prescriptive regulations that would call for a major modification in information technology infrastructure along with increased permitting and compliance resources, greatly increasing the implementation cost</u>. (Underscoring added.)

In addition to HB 1223, DNR submitted a fiscal note worksheet with comparable language for HB 1298. HB 1223 and HB 1341 were similar bills that would involve DPHE in the well-permitting process pursuant to rules to be promulgated by OGCC. LCS did not include this language in the fiscal note on HB 1223, HB 1298, or HB 1341.

HB 1223 was postponed indefinitely, while HB 1341 and HB 1298 were enacted.

<u>Promulgation of Rules Pursuant to HB 1341 and HB 1298 and Submission of Fiscal Year 2009 Budget Request</u>

A history of OGCC's rule-making pursuant to HB 1341 and HB 1298 is set forth in the Notice of Rule Making, dated March 31, 2008. According to this history, it appears the process for forming the vision of what the rules to be promulgated under HB 1341 and HB 1298 might look like did not begin until July 2007 and took its first form in an initial pre-draft proposal in November 2007. After a considerable degree of discussion and input by stakeholders and experts, the vision was significantly modified by the time draft rules were presented at the end of March 2008. Preliminary approval of the draft rules was given on September 23, 2008, and the OGCC unanimously approved the new rules on December 10, 2008.

Under these circumstances, it appears unlikely that OGCC or DNR could have quantified in any meaningful way the fiscal impact of the rules during the 2007 Session. The contingency language included in OGCC's fiscal note worksheets on HB 1223 and HB 1298, referred to above, might have been all that could have been reasonably provided in the fiscal note on HB 1341 to alert legislators to the possibility that rules promulgated pursuant to HB 1341 might have a significant fiscal impact.

DNR's budget request for Fiscal Year 2009, submitted to the JBC in November 2007, included a request for 9.0 new FTE for OGCC as the #1 priority. DNR justified its request on the increased workload associated with OGCC's responsibilities to review oil and gas permit applications, conduct routine inspections, and respond to complaints. No direct reference was made to any potential impact from HB 1341 or HB 1298. In January 2008 DNR submitted a budget amendment to the JBC containing an additional request for 12.0 new FTE for OGCC. Added to the 9.0 FTE originally requested, this made for a total request of 21.0 FTE. DNR's justification for this request made significant reference to HB 1341 and HB 1298, noting that "The landscape of the oil and gas regulatory environment has changed rapidly, however, due to the enactment of HB 07-1341 and HB 07-1298…." The request further noted that "The budgetary impact of the bills was not well understood during the [2007] legislative session or in time to include in the November 1, 2007 budget request." Also, DNR acknowledged that there could be additional budgetary impact from rule-making, noting that:

> Even though no rules have actually been promulgated by the date of this budget amendment, and there is a long process ahead, the initial pre-draft rulemaking proposal indicates that substantial changes to the regulatory oversight of the oil and gas industry may be on the horizon …. Additional FTE in FY 2009-10 may be required to efficiently enforce new rules at the level expected by the public, the governor, the general assembly, local governments, the oil and gas industry, and environmental and wildlife groups.

OSPB had approved DNR's budget requests for Fiscal Year 2009 prior to their submission to the JBC. OSPB made reference in its briefing document to the language about the possibility of significant costs driven by rule-making, which had been added to the fiscal note on HB 1341 after the "demand" for a new note by ten House members. OSPB noted that "this caveat fell away, however, in later versions of the bill/fiscal notes."

The JBC staff analyst's position was that DNR's request for additional funding for OGCC could be justified by increased workload irrespective of HB 1341 or HB 1298 or rules to be promulgated pursuant to these bills. JBC staff recommended the 21.0 new FTE, with some modification in salary calculations. The JBC voted to include in the Long Bill $1,723,665 in cash funds and 21.0 FTE. This provision was in the Fiscal Year 2009 Long Bill that was ultimately approved by the General Assembly during the 2008 Session.

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