

## Fiscal Impact Review 2017 General Assembly Session

**Date:** February 13, 2017

**Bill number:** HB 1678, FOIA exemptions for trade secrets submitted to Department of Mines, Minerals, and Energy

**Review requested by:** Senator Ruff, Chairman, General Laws and Technology

### JLARC Staff Fiscal Estimates

JLARC staff concur with the calculations and methods in the Department of Planning and Budget's fiscal impact statement for HB 1678, though given the associated uncertainty a range of costs is more appropriate than a single point estimate. JLARC staff's calculated range of potential fiscal impact is \$0 to \$1.125 million. It appears possible to reduce these costs by ensuring DEQ has access to the information collected by the Department of Mines, Minerals, and Energy. However, ensuring this access through either a regulatory or statutory change is beyond the scope of this fiscal impact review.

HB 1678 would amend the Virginia Freedom of Information Act to exclude from disclosure trade secrets submitted to the Department of Mines, Minerals, and Energy.

*An explanation of the JLARC staff review is included on the pages that follow.*

**Authorized for release:**



**Hal E. Greer, Director**

## Bill summary

HB 1678 would amend the Virginia Freedom of Information Act to exclude from disclosure trade secrets submitted to the Department of Mines, Minerals, and Energy (DMME). The exclusion would apply to the amount or concentration of chemicals or ingredients used to stimulate a well. The submitting company would be required to (1) invoke this exclusion, (2) identify the data or materials for protection from disclosure, and (3) state why protection is necessary.

This topic is becoming increasingly relevant because of expected, increasing use of certain types of hydraulic fracking that uses newer technology to drill deeper and cover more geographic area than fracking that has been done previously in Virginia.

## Discussion of fiscal implications for DEQ

JLARC staff concur with the calculations and methodology in the fiscal impact statement for HB 1678. Given the uncertainty associated with (1) when or whether the Department of Environmental Quality (DEQ) will need to drill monitoring wells and (2) what the actual costs of drilling may be, a range of potential costs is more appropriate than a single point estimate. It appears possible to reduce these costs by making regulatory or statutory changes granting DEQ access to the information collected by DMME.

### *DEQ's Fiscal Impact Estimate Assumes HB 1678 Removes Option Agency Planned to Use to Obtain Information*

DEQ reports it was planning to use the FOIA process to obtain the information companies submit to DMME about the type and composition of chemicals used in hydraulic fracking. It would use this information to help fulfill its responsibilities to monitor water quality. DEQ was planning to review the chemicals and composition of chemicals (and location of the drilling) to assess whether the drilling could pose a risk to human health and the environment. DEQ expects that in some instances this assessment would result in a decision to drill new wells near the fracking location to monitor water quality, but in other instances a decision that monitoring wells would not be necessary.

DEQ reports that HB 1678 would remove the option of using the FOIA process to obtain the information necessary to make this assessment. FOIA, though, "ensures the people of the Commonwealth ready access to public records in the custody of a public body ..." and is less often the means by which one state agency obtains information from another. DEQ acknowledges its plan to use FOIA is atypical, but DEQ reports it had determined the need to use this option because of recent regulatory limitations placed

on the disclosure of information submitted to DMME (4VAC25-150-365). Under this new regulation, disclosure of chemicals and composition of chemicals is only authorized "to the extent that such disclosure is necessary to assist the department in responding to an emergency ..."

Without access to this information, DEQ reports its only option will be to drill its own monitoring well each time a company engages in fracking to check for evidence of hazardous chemicals in the aquifer as a result of fracking activity.

*Regulatory or Statutory Change to Ensure DEQ Has Access Could Reduce Fiscal Impact by Allowing DEQ to Choose Not to Drill in All Cases*

The fiscal impact estimate does not consider the possibility of making a regulatory or statutory change to give DEQ express authority to access the information it needs to fulfill its statutory responsibilities to monitor water quality. Doing so could potentially reduce the estimated fiscal impact, primarily because DEQ may only need to drill new monitoring wells when the chemicals or chemical composition present a potential risk to water quality.

DEQ's existing statutory responsibility to protect high quality state waters and prevent any increase in pollution (§62.1-44.2) necessitates its ability to acquire the information about fracking activities. Furthermore, DEQ's subjectivity to the Uniform Trade Secrets Act (§59.1 *et seq.*) would allow it to protect the information from public release. DEQ could be given access to information about these mining activities by amending regulation or statute. Providing DEQ with authority to access this information, though, is beyond the scope of this fiscal impact review.

*DEQ May Still Need to Drill New Wells Whether or Not it Has Information from DMME*

Despite the above discussion, it is difficult to independently and accurately determine whether DEQ will still need to drill new monitoring wells (irrespective of whether it has access to the information collected by DMME). It may be that regardless of whether DEQ has access to information, it will eventually need to drill new wells, especially if requested fracking activity is at locations a considerable distance from existing wells and/or in substantially different parts of various aquifers. The National Groundwater Association's journal, *Groundwater*, concludes that "the rapid expansion of hydraulic fracking requires that monitoring systems be employed to track the movement of contaminants ..." (Myers, 2012).

*Fiscal Impact Calculations Are Accurate and Use A Defensible, Reasonable Methodology*

The calculations in the fiscal impact statement are accurate. Furthermore, after interviewing DEQ and reviewing the agency's calculations and supporting documentation, JLARC staff believe DEQ used a defensible method to estimate costs.

DEQ's assumption that at some point there will be requests to drill in Southwest and Coastal Virginia seems reasonable. Furthermore, not assigning the fiscal impact to a given fiscal year seems reasonable given that it cannot predict when a company will apply to DMME for permission to drill.

DEQ used a defensible methodology to estimate potential costs. DEQ used recent, similar drilling operations in Southwest Virginia as the basis for its estimate to drill new monitoring wells in that region. DEQ used the same approach for its estimate to drill in Coastal Virginia. The estimate for drilling in this region is higher due to the complexity of drilling in Coastal Virginia (more monitoring wells required due to soil conditions and deeper aquifers.) DEQ's estimate for scientific testing is based on what the Virginia Division of Consolidated Laboratories charges (to test for trace metals, etc), and travel and lodging estimates are based on recent DEQ expenditures.

*Given Uncertainty, a Range of Estimated Costs Is More Appropriate*

Though the fiscal impact estimate of \$908,692 is reasonable, a range may be more prudent than a single point estimate for two reasons. First, there may be years when no new monitoring wells are needed, or only one well is required in either Southwest or Coastal Virginia. Second, it is likely that the point estimates DEQ used for its total estimate will not be exactly correct.

A range can be constructed by assuming the lowest annual cost could be zero, and the highest annual cost could be \$1.125 million. In a given year, there may be no new requests to drill; consequently, DEQ would not need to conduct any additional monitoring and would incur no fiscal impact. However, there could be a request to drill in either or both Southwest and Coastal Virginia, and the point estimates DEQ used could be higher or lower than the actual costs (see table next page).

The largest limiting factor in developing a more likely cost estimate is that DEQ cannot be expected to predict exactly when in the future a company might request to drill, how many companies might make requests, and in what location those request(s) might be made.

**Table**  
**JLARC estimated range of costs = \$0 to \$1.125 million**

DPB fiscal impact statement	JLARC estimated range of fiscal impact				
	No requests	Request in one region		Requests in both regions	
		Low <sup>a</sup>	High <sup>b</sup>	Low <sup>c</sup>	High <sup>d</sup>
\$908,692	\$0	\$187,500	\$812,500	\$675,000	\$1,125,000

Note: JLARC staff made assumptions designed to test the sensitivity of the total cost estimate to cost changes; staff decided to use +/- 25% as the increase or decrease in costs to illustrate how costs could change.

a – Assumes (1) drilling only in Southwest Virginia and (2) actual cost would be 25 percent below DEQ’s estimate.

b – Assumes (1) drilling in only in Coastal Virginia, and (2) actual cost would be 25 percent above.

c – Assumes (1) drilling in both Southwest Virginia and Coastal Virginia, and (2) actual cost would be 25 percent below.

d – Assumes (1) drilling in both Southwest Virginia and Coastal Virginia, and (2) actual cost would be 25 percent above.

### Discussion of fiscal implications for DMME

JLARC staff concur with DMME’s conclusion that HB 1678 would have no fiscal impact on its agency operations. Even though the bill would require DMME to determine whether the information submitted is entitled to protection, the agency reports this bill would have no fiscal impact on its operations. DMME staff report being confident they will be able to determine whether the information is a trade secret and does in fact meet the exclusion criteria. DMME staff also report being confident that neither the expected volume nor complexity of these determinations will impose a measurable financial impact on the agency.

### Budget amendment necessary?

It is not feasible to assign the estimated fiscal impact to a given fiscal year, but a budget amendment or request in the Governor’s budget likely would be necessary in years when DEQ drills new monitoring wells.

### Agencies affected:

Department of Mines, Minerals, and Energy  
 Virginia Department of Environmental Quality

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