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FISCAL IMPACT REPORT

ORIGINAL DATE 1-23-09

SPONSOR Larrañaga LAST UPDATED _____ HB 63

SHORT TITLE State Engineer Approval of Dam Construction SB _____

ANALYST Woods

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY09	FY10		
NFI	NFI		

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Office of the State Engineer (OSE)
 Department of Game and Fish (DGF)
 New Mexico Environment Department (NMED)

No Response Received From

Association of Counties

SUMMARY

Synopsis of Bill

House Bill 63 amends NMSA 1978, Section 72-5-32 to clarify the authority of the Office of the State Engineer (OSE) in regards to the type of dams that are required to file applications for appropriations and use of water. HB 63 also expands the approval authority of the OSE for dam design to include approval of dam operational plans; requires that the OSE determine how the height, storage capacity and storage duration for all dams are calculated or measured; and requires that the OSE prescribe the form in which dam design plans and operational plans are submitted. There is no appropriation attached to this legislation.

SIGNIFICANT ISSUES

OSE indicates that the legislation provides for less regulation of the design and construction of dams by the State Engineer by increasing the size standard. The proposed size standard is recognized by the federal government in the national inventory of dams and has been adopted by many states. In addition, hundreds of wastewater ponds that currently meet the 10-foot height or

10 acre-foot standard were constructed without the approval of the State Engineer as currently required by Section 72-5-32 NMSA. Preparing the documentation to support the safe design will be a financial burden for these small communities if Section 72-5-32 NMSA remains unchanged. Further, by reducing the size standard, OSE will be able to concentrate the resources of the Dam Safety Bureau on larger dams that require rehabilitation rather than small storage ponds that are of minimal risk to the public.

NMED advises that OSE regulates the safety of dams by approving the construction of dams that exceed ten feet in height measured from the lowest natural ground surface elevation to the crest of the dam or dams that impound more than ten acre-feet of water, except for erosion control dams constructed for the purpose of sediment control that do not impound surface water for fishing, fish propagation, recreation or aesthetic purposes. This duplicates the regulation of many smaller dam structures such as wastewater lagoons that are regulated under other state laws and regulations. For example, the NMED regulates the construction and operation of wastewater treatment plant lagoons and dairy lagoons under the New Mexico Water Quality Act and New Mexico Water Quality Control Commission regulations. NMED regulatory requirements include certification of the design and construction of these structures by a registered professional engineer such that there is certainty that the lagoons will be safe and maintain their integrity. NMED review and approval of these lagoons is also overseen by registered professional engineers on staff with the NMED. At this time, these wastewater treatment plant lagoons and dairy lagoons must also receive engineering approval from the OSE under current law.

NMED adds that the legislation will reduce the OSE authority over the engineering design construction requirements for smaller impoundments such as wastewater treatment plant lagoons and dairy lagoons that are regulated under other laws and regulations and pose lesser safety hazards. This will allow the OSE to focus their efforts on larger, more threatening structures. OSE's authority will still allow the OSE to require emergency repairs of any dam that is deemed a threat, regardless of size; as well as eliminate significant increases in costs to local governments and small business owners when constructing and operating wastewater treatment plant lagoons and dairy wastewater lagoons facilities.

DGF states: "None of the proposed exceptions affect any facilities currently owned by the State Game Commission or operated by the Department of Game and Fish. As proposed, the Department's responsibilities essentially remain the same as under existing regulations."

ADMINISTRATIVE IMPLICATIONS

NMED concludes that HB63 will streamline the permitting of wastewater treatment plant lagoons and dairy lagoons under NMED statutory and regulatory oversight. NMED has previously had construction of wastewater treatment plant projects held up for approximately a year because of the need to meet duplicative dam permitting through the OSE. At one site, the wastewater treatment ponds did not have a high dam, but collectively contained more than 10 acre-feet of wastewater making it subject to OSE's dam requirements. The safety risk from the structure was minimal, but the duplicative dam requirements of OSE resulted in permitting and project delays thereby increasing the cost to the local government attempting to improve a public wastewater system. HB 63 will eliminate duplicative permitting requirements but will still allow the OSE to intervene if the OSE believes a safety hazard exists.

OTHER SUBSTANTIVE ISSUES:

OSE has identified 128 safety deficient dams statewide and there is a great need to concentrate OSE Dam Safety resources on rehabilitation of unsafe dams rather than trying to regulate small ponds constructed without a permit. The OSE has estimated that of the 400 dams currently regulated by the State Engineer, 75 will be removed from jurisdiction based on the increase in the size standard. These dams mainly consist of small dairy ponds, golf course ponds and evaporation ponds that do not provide a significant safety risk. However, if a small dam is unsafe and there is a threat to life and property, the State Engineer has the authority to exercise jurisdiction over the dam and require action to correct the condition in accordance with Section 72-5-11 NMSA. OSE details four primary benefits associated with the legislation:

- (1) it increases the size standard by which dams may be excluded from Office of the State Engineer (OSE) regulation of the design, construction and operation by replacing the 10-foot height and 10 acre-foot storage standard with a 25-foot height and 50 acre-foot storage standard along with a minimum height and minimum storage threshold;
- (2) it removes language that specifically exempts erosion control structures whose maximum storage is less than 10 acre-feet because the exemption is no longer needed due to the increase in the size standard;
- (3) it provides that an application to appropriate water is not required for dams constructed for the purpose of flood or erosion control that do not store water for more than 96 hours and water not be put to beneficial use unless authorized by the OSE; and
- (4) it recognizes the OSE's authority to determine how height, storage and storage duration times are measures or calculated and the authority to prescribe the form for design and operational plans, which are currently addressed in the OSE's rules and regulations for dams.

ALTERNATIVES:

OSE suggests, "Provide additional staff engineers to the OSE to regulate the hundreds of dams that have been constructed without a permit."

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL:

OSE suggests that it will be required to work with the Environment Department and others to identify dams that were constructed that exceed the 10-foot height or 10 acre-foot storage standard. The OSE will then be required to notify the owners that the dams were constructed in violation of state law and give the owners a specified time to submit plans that support a safe design in compliance with OSE rules and regulations for dams. If the owner is unable to document the safe design, the State Engineer will be required to order storage restrictions or a breach order may be issued. This potential action could be detrimental to small communities owning wastewater ponds that fall within the current size standard. This activity will limit the OSE Dam Safety Bureau's ability to address rehabilitation needs of large unsafe dams. The OSE would be required to continue its practice of waiving a water right appropriation permit for flood control dams and require owners to obtain a water right for the short duration time, which is not practical. This will require OSE Water Right Staff to evaluate the permit application and results in additional expense both to the state and the dam owner.

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NMED adds that the regulation of many small dam structures that pose small safety hazards, such as wastewater treatment plant lagoons and dairy lagoons that are regulated under other state laws, will continue to be duplicated by the OSE, resulting in permitting and project delays thereby increasing design and construction costs to local governments and small business owners.

AMENDMENTS:

None suggested.

BW/mt