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## FISCAL IMPACT REPORT

ORIGINAL DATE 02/27/09  
 LAST UPDATED 03/16/09

SPONSOR SFI HB CS/CS/CS/379/aSFI#1/  
 SHORT TITLE Off-Highway Vehicle Regulations SB aHTPWC/aHFI#1

ANALYST Lucero

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY09	FY10		
Indeterminate but estimated to be moderate	Indeterminate but estimated to be moderate	Recurring	Trail Safety Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

### REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Non-Rec	Fund Affected
FY09	FY10	FY11		
\$123.0	\$492.0	\$492.0	Recurring	Trail Safety Fund
Indeterminate but estimated to be minimal	Indeterminate but estimated to be minimal	Indeterminate but estimated to be minimal	Recurring	General Fund

(Parenthesis ( ) Indicate Revenue Decreases)

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

	FY09	FY10	FY11	3 Year Total Cost	Recurring or Non- Rec	Fund Affected
<b>Total</b>		Moderate	Moderate	Moderate	Recurring	Trail Safety Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General's Office (AGO)

Department of Game and Fish (DGF)

Taxation and Revenue Department (TRD)

Tourism Department (TD)

## SUMMARY

### Synopsis of HFI Amendment #1

House Floor Amendment # 1 to the Senate Floor substitute for Senate Judiciary Committee (SJC) substitute for Senate Corporations and Transportation Committee (SCORC) substitute Senate Bill 379 as amended by the House Transportation and Public Works Committee (HTPWC) and by Senate Floor Amendment #1 rewrites subsection C and D of Section 2 in the bill to provide clarity regarding non-resident permits of off-highway vehicles.

### Synopsis of HTPWC Amendment

The House Transportation and Public Works Committee (HTPWC) amendment to the Senate Floor substitute for Senate Judiciary Committee (SJC) substitute for Senate Corporations and Transportation Committee (SCORC) substitute for Senate Bill 379 as amended by Senate Floor Amendment #1 clarifies that a person shall not ride an off-highway vehicle on or within an earthen tank or other structure meant to water livestock or wildlife, unless it is on a route designated by the landowner or land management agency as an off-highway motor vehicle route.

### Synopsis of SFI Amendment #1

The Senate Floor amendment to the Senate Floor substitute for Senate Judiciary Committee (SJC) substitute for Senate Corporations and Transportation Committee (SCORC) substitute for Senate Bill 379 reduces the maximum gross vehicle rating of the new “recreational off-highway vehicle” from 3,750 lbs. to 1,750 lbs.

### Synopsis of Original Bill

Senate Floor substitute for Senate Judiciary Committee (SJC) substitute for Senate Corporations and Transportation Committee (SCORC) substitute for Senate Bill 379 proposes the following changes to Section 66-3-1001.1, the Off-Highway Motor Vehicle Act:

- Changes “safety” board to “advisory board”
- Changes the oversight agency from the Tourism Department, by adding the definition of “department” as meaning the Department of Game and Fish (DGF)
- Adds and defines “division” as the Motor Vehicle Division (MVD) of the Taxation and Revenue Department (TRD)
- Adds under definitions of “off-highway motor vehicle” – “recreational off-highway vehicle, which means a motor vehicle designed for travel on four or more non-highway tires, for recreational use by one or more persons. Further clarification includes seating, speed capability, gross vehicle weight, size, vehicle identification number specifications. Authorizes the DGF to add additional vehicles by rule.

In Section 66-3-1004 distribution of fees charged for registration and non-resident permits and duplicates are clarified, as are fee collection sites, and appropriates a portion of the fees.

In Sections 66-3-1010.1 and 66-3-1010.2 regarding safety training, the bill shifts approval from the board to DGF for organizations approved to offer off-highway safety training.

Section 66-3-1010.3, adds that a person shall not operate an off-highway vehicle:

1. in pursuit of or harassment of livestock in a manner that negatively affects the livestock's condition;
2. within one hundred feet of an earthen tank or other structure meant to water livestock or wildlife;
3. in a manner that has a direct negative effect on or interferes with persons engaged in agricultural practices; and
4. where off-highway motor vehicle traffic is prohibited under local, state or federal rules or regulations.

It also prohibits the exemption of a person under the age of eighteen, when part of an organized tour under the guidance or direction of a guide certified by the board, from operating all-terrain vehicles (ATV) and recreational off-highway vehicles (ROHV)

Changes to Section 66-3-1010.5, requires dealers to distribute safety information provided by the department on state laws, and adds “environmental and cultural consideration, customs”...

Changes to Section 66-3-1011, primarily expand responsibility of an adult operator of a vehicle to include parents, guardians and custodians of children operating off-highway vehicles on street or highways. The bill prohibits a person from removing, defacing, destroying, and installing a motor vehicle sign without authorization.

Revises Section 66-3-1017, and re-designates the safety board as the advisory board and changes the membership to seven members, clarifies its duties, and authorizes per diem and mileage for the board. Members shall serve staggered terms each term being two years.

Section 66-3-1018, changes some duties from the board to DGF, eliminates prior deadlines, and sets out responsibilities of the department for planning, enforcement, and education.

The bill changes Section 66-3-1019, to stipulate how the department will allocate funds.

Changes to Section 66-3-1020 relate to penalties, clarifying that a parent, guardian or custodian who knowingly permits a child under the age of 18 in violation of Act is subject to the same penalty a child in violation of the Act. A person who violates the provisions of the Act is guilty of a penalty assessment misdemeanor. Penalty assessments are listed by violation and provides for increasing penalties for subsequent violations within a three-year time period. The Senate Floor substitute increases the penalty operating a vehicle without a spark arrester.

The bill also provides that in addition to LFC oversight the department must report annually to an interim committee of the NM legislative council. The bill accounts for transfer of personnel, property, contracts, records and appropriations by July 1 2009; repeals sections 66-3-1004.1-66-3-1016 NMSA 1978 and is to be effective immediately in the interest of public safety.

## **FISCAL IMPLICATIONS**

### Continuing Appropriations

This bill provides for continuing appropriations from the Trail Safety Fund to the Department of Game and Fish (DGF). The LFC has concerns with including continuing appropriation language in the statutory provisions from fees collected, as earmarking reduces the ability of the

legislature to establish spending priorities. This bill appropriates as follows:

1. Increases the cap on user fees from \$30 to \$40 which is distributed to the trail safety fund. Money in the trail safety fund is appropriated to DGF.
2. Appropriates \$5.00 of a \$17.00 of the registering fee to the MVD to defray the cost of making and issuing registration certificates, validating stickers, and nonresident permits. The remaining \$12.00 shall be deposited in the motor vehicle suspense fund.
3. Appropriates \$5.00 of a \$17.00 registration and user fee for ninety-day permits to the Motor Vehicle Division to defray the cost of making and issuing duplicate registration certificates and nonresident permits. The remaining \$12.00 shall be deposited in the motor vehicle suspense fund.
4. Appropriates the \$7.50 fee collected for duplicate registration certificates and nonresident permits to the Motor Vehicle Division to defray the cost of making and issuing duplicate registration certificates and nonresident permits.

Under this bill, money in the trail safety fund is appropriated to DGF; however, no more than 30 percent of the fund can be used for administrative overhead, and at least 50 percent shall be devoted to law enforcement and education.

The bill provides in section 14 the authority to transfer personnel, property, contracts, records and appropriations on July 1, 2009.

TRD notes that the fiscal impact calculations are based on the off-highway vehicle registration count (includes title and nonresident) for the period 2/1/08 to 1/30/09:

$(22534 \text{ registrations} + 10231 \text{ title} + 34 \text{ nonresident}) \times \$15 = \$492.0 \text{ new revenue/Trail Safety Fund}$

$\$492.0 / 4 = \$123.0/\text{FY09}$  prorated revenue; if the bill passes, it will go into effect immediately and this calculation reflects only the last quarter of the fiscal year.

The bill adds new and specific penalty assessments for violations of the Off-Highway Vehicle Act. Per Section 66-8-119 NSMA 1978, MVD misdemeanor penalty assessments under Section 66-8-7 NMSA 1978 are deposited with the state treasurer for credit to the general fund. Impact to the general fund is indeterminable.

The DGF reports that:

The restrictions in the bill related to maximum and minimum amounts that can be used for specific purposes could prove to be problematic in implementing a newly transferred program. For example no more than 30% of the fund may be used for administrative overhead (page 24, lines 7-8). The Tourism Department has indicated to DGF that the equipment that would transfer to DGF includes two ATV's and a trailer. Although the bill calls for the transfer of personnel, property, contracts, records, and appropriation from Tourism, DGF speculates that the staff would transfer with no computers, vehicles, supplies, other equipment or office space needed to run the OHV program. DGF contends that providing the OHV program with necessary materials and services could require significant expenditures to begin running the OHV program.

DGF may need to process a budget adjustment request (BAR) from the Trail Safety Fund to provide for the operational costs of program staff projected to be higher than what was requested by the Tourism Department in its operating budget for FY10. There are statutory

restrictions at both the state and federal level that preclude the DGF from utilizing funds derived from the sale of hunting and fishing licenses to support programs such as the OHV program. The restrictions are found in Sections 17-1-14, 17-1-28 and 17-4-30 NMSA 1978, and in federal law as well. The consequence of not abiding by the state and federal requirements is the loss of New Mexico's ability to participate in the federal grant programs that supply nearly a third of the agency's budget, around \$11 million each year. The Trail Safety Fund and the Game Protection Fund must remain separate to ensure that State and Federal provisions and restrictions are maintained.

DGF is also concerned that the operating budget requested by the Tourism Department is not adequate to support the existing staff. The requested budget was not built with the significant focus on law enforcement activities contemplated in this bill, so funding existing staff and law enforcement activities at the mandated level may not be possible by simply transferring the Tourism request to DGF.

The bill requires that at least 50% of the budget in the Trail Safety Fund will be devoted to law enforcement and education (page 24, lines 8-9). While enforcement is a priority of this program and an area that has likely been underserved in the past, other areas of importance may also need significant financial support. Areas like education and training; information system development and resource monitoring and protection and trail building and restoration (all provided for on page 25, lines 3-7) will take a significant financial commitment to provide meaningful results.

Most of the 30% allocated to administrative costs will be utilized to establish office space, pay staff and meet business needs. Adding the 50% required for law enforcement and education takes up 80% of the budget, leaving only 20% to conduct outreach, information system development and the other tasks required by this bill.

The bill also contains an emergency clause, however, under Section 14, Temporary Provisions, the transfer of funding, staff, contracts, etc., will not occur until July 1, 2009. The program during the intervening period will not be functional. DGF is not able to support the provisions of the bill using funds or other resources, including personnel, obligated to Game Protection.

## **SIGNIFICANT ISSUES**

DGF acknowledges:

There are several new prohibitions established in the bill. In Section 66-3-1010.3 a person shall not operate an off-highway motor vehicle in pursuit of or harassment of livestock in any manner that negatively affects the livestock's condition (page 8, lines 13-15). Enforcement of this provision will be difficult for officers as they will very rarely have enough evidence and information to prove a horse or cow's condition was negatively affected. This term indicates to the reviewer that some demonstrable negative physical condition is a result of being chased or pursued by an OHV. Outside of a physical injury like a cut, gash or broken limb, it will be hard to prove a negative affect.

Another prohibition is that a person shall not operate an OHV within 100 feet of an earthen tank or other water structure meant to water livestock (page 8, lines 16-17). Since these prohibitions are for operation of OHVs on public lands (see 66-3-1005 Exemptions), this

could be a problematic prohibition in some areas. Many times public roads on the forest and other public lands go beside earthen tanks and even utilize the earthen bank as the roadway. With this prohibition, either OHVs could not travel beyond this point or a new road or trail would have to be created outside of a 100 feet. This would be counter productive to conserving habitat, top soil and vegetation.

Another prohibition is that a person shall not operate an OHV in a manner that has a direct negative effect on or interferes with the persons engaged in the pursuit of agricultural practices (page 8, lines 18-20). Enforcement of this provision will be difficult for officers must determine if a negative effect has occurred. This is a very subjective term. What may be a negative effect to one officer may not be viewed as a negative effect by another. Also, since this provision applies on public land, it appears the State is dictating which multiple use activity (ranching versus OHV riding) is more important. This could indirectly cause issues with federal mandates and requirements. As proposed, any gathering or herding of cattle in a public land pasture could be deemed to have priority and no OHV activity could occur even on an established trail if it was near the cattle.

The Department is required to develop an information system program capable of interfacing with existing government and private databases or other information systems (page 22, line 25, page 23, lines 1-2) . The State, private entities and federal entities have multiple regulations and restrictions to protect computers from viruses, hacking and other threats. Requiring the Department to develop a system capable of interfacing with other governments and private databases may not be achievable. The federal government has its own databases, while private databases vary. This could become a financial burden on the Department and Trail Safety Fund.

This bill establishes penalties for a person who violates the provisions of this act is guilty of a penalty assessment misdemeanor. Fines range from \$10 for first offense to \$200 for third or subsequent violations within three years.

## **PERFORMANCE IMPLICATIONS**

The courts are participating in performance-based budgeting. This bill may have an impact on the measures of the district courts in the following areas:

- Cases disposed of as a percent of cases filed
- Percent change in case filings by case type

Performance measures are included in the Tourism Department related to the OHV program. These measures should be transferred to DGF and perhaps amended based on the new requirements in the amended OHV Act.

## **ADMINISTRATIVE IMPLICATIONS**

The bill changes the board to the “Advisory Board” with fewer members and would not include any representation from any State agency, including DGF.

DGF notes the need to adopt new administrative processes to make sure segregation of funding is maintained related to OHVs from those related to administration of wildlife management in New Mexico. Failure to maintain this separation would put federal funding at risk.

Implementation of this bill will have a low impact on TRD-IT, which TRD will absorb. Listed are the affected programs and time estimates:

- MVD2.0 (80 hrs)
- MVD Mainframe Distribution (MVRO) (120 hrs)
- User Acceptance Testing (60 hrs)

**Total Hours: 260 x \$50.00 = \$13,000**

### **CONFLICT**

Conflicts with HB202. According to NMDOT, the amendments proposed by this bill do not directly impact the NMDOT. However, the NMDOT has previously reviewed HB 202, which, by deleting Sections 66-3-1011(A)(2) and 66-3-1011(B), would repeal the prohibition against operating off-highway motor vehicles on paved streets and highways other than limited access highways and freeways. SB379 would leave those sections in place and, therefore, would retain the prohibition against the operation of off-highway motor vehicles on paved streets and highways, except for crossings authorized in accordance with Section 66-3-1011(B). The prohibition against operating off-highway motor vehicles on limited access highways or freeways would not be affected by either SB379 or HB202.

### **TECHNICAL ISSUES**

Page 2, Line 23 insert “simultaneously”

The bill contains an emergency clause; however, the bill also specifies in section 14 the transfer of funding, staff, contracts, etc. from Tourism to DGF, will not occur until July 1, 2009. DGF recommends that if the emergency clause is retained in the bill, that it applies to all provisions of the bill except that the transfer of the program from the Tourism Department to the Department of Game and Fish not occur until JulyFY 2010.

Many of the new “agriculture” protections are ill defined and vague. The enforcement of these provisions will be difficult for law enforcement, prosecutors, and courts. More precise language and definitions of some of these concepts would be advisable.

### **OTHER SUBSTANTIVE ISSUES**

All-terrain vehicles, or ATVs, weigh up to 600 pounds and can travel at speeds of 65 mph or more. Recreational Off-Highway Vehicles (ROHV) can weigh up to 3,750 lbs. Size, speed and a child’s potential for lack of focus, attention span, discipline, reasoning and decision-making ability make the risk for injury or death to children significant. In an attempt to make operation of ATVs safer for smaller children ATVs are mandated to bear a label from the manufacturer stating that the use of machines greater than 90cc by riders under the age of 12 is prohibited. Also, the U.S. Consumer Product Safety Commission approves of the sale of sub-50cc ATVs for use by children as young as age 6. However, while these labels are required, there is currently no requirement or limit to operation of any ATV for any age in New Mexico.

According to EMNRD, by shifting the OHV program to a natural resources agency New Mexico is in line with most states and there is a better chance that the managing of OHV use will be effective and reduce user conflict, improve conditions for OHV users and give them more

opportunity to assist in the managing of a program that is both safe and respectful of others and of New Mexico's natural resources. This bill is designed to achieve the implementation of a program that will give OHV and non-OHV users of public lands safe and lasting recreation opportunities.

Increasing the number of compliant OHV registered would help in educating residents about their responsibilities while on off-highway vehicles on public lands in New Mexico. The Tourism Department reports that of the approximately 102,000 Off-Highway Vehicles (Class 22) titled in New Mexico only an estimated 22,000 are currently registered. While this bill proposes to increase the cap on user fees, the resulting effect may be a further reduction in the number of off-highway vehicles registered. With the current fees charged in New Mexico, the Tourism Department has been told by some visitors that the fees are a deterrent and will be considered when choosing vacation destinations.

## **AMMENDMENTS**

There is currently no age restriction for operation of ATVs or ROHVs in New Mexico and data show that safety, particularly ATV safety, is an issue with child operators. In New Mexico between 1982 and 2004 there were 71 reported ATV-related deaths. Of these deaths, 24 (34%) were children under the age of 16 years (U.S. Consumer Product Safety Commission [CPSC]). National CPSC data show that children under 16 years of age suffered 40,000 serious injuries in 2007, which accounted for 27 percent of all ATV-related injuries. And, since 2001, there has been a statistically significant increase (17%) in the number of children under 16 seriously injured (traumatic brain, spinal, abdominal, and complicated orthopedic injuries) resulting from use of ATVs. Given the data on death and injury to ATV operators under the age of 16, the Department of Health (DOH) reports that it may be advisable amend the bill to establish a minimum age of supervised use, and to increase the age of unsupervised operation to 16.

1. In Section 5, C (1), Line 10, change the age from fourteen to sixteen.
2. In Section 5, E, change the age from fourteen to sixteen.

Consider adding a definition for: "low-pressure tires", "non-highway tires" and/or use one term or the other for the definitions for "all-terrain vehicles" and recreational off-highway vehicles.

DGF suggests that language on page 8, lines 12-14, be changed regarding harassment of livestock to provide for an enforceable, definable or measurable event. Examples may include livestock being chased for a certain period of time or distance or upon evidence of death.

Prohibitions against operation of OHVs within 100-feet of an earthen tank as provided on page 8, lines 15-16, should be amended to exempt lawful operation on established designated roads or trails that are on or within 100-feet of earthen tanks.

The disposition of the permit fee for a nonresident permit is unclear (Page 5, lines 6, 7, 8).

The bill provides for a smaller board that becomes advisory. Currently there are 26 members of the board; however, the new five-member advisory board provided for in the bill may be too small. The Tourism Department recommends adding a seat on the board for the Bureau of Land Management and the U.S. Forest Service as they oversee public lands that allow off-highway motorized use and an independent expert that could provide guidance to the program. Others for

consideration would be a health professional, a tourism industry representative, a motorcycle user, a local law enforcement officer.

The bill changes the current board to an “Advisory Board” with fewer members and would not include any representation from any State agency, including DGF. It would seem appropriate to have at least DGF on the board.

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