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FISCAL IMPACT REPORT

ORIGINAL DATE 02/18/09

SPONSOR Nava LAST UPDATED _____ HB _____

SHORT TITLE Dept. Of Environment Permit Denial SB 382

ANALYST Aubel

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY09	FY10	FY11	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
NMED		(\$0.01)*	(\$0.01)*	(\$0.01)*	Recurring	Various
NMED		\$0.01*	\$0.01*	\$0.01*	Recurring	Various
DPS		\$0.01*	\$0.01*	\$0.01*	Recurring	Various

(Parenthesis () Indicate Expenditure Decreases)

*See Fiscal Impact

SOURCES OF INFORMATION

LFC Files

Responses Received From

New Mexico Environment Department (NMED)
 Energy, Minerals and natural Resources (EMNRD)

SUMMARY

Synopsis of Bill

Senate Bill 382 amends the Air Quality Control Act to allow the Environment Department to deny or condition an air quality permit and modify, suspend or revoke an existing air quality permit if the permit applicant has:

- knowingly misrepresented facts in the application for a permit;
- refused or failed to disclose the information required under the provisions of the Air Quality Control Act;
- been convicted in any court, within the past ten years of:
 - a felony related to environmental crime; or
 - a crime defined as involving restraint of trade, price-fixing, bribery or fraud;

- exhibited a history of willful disregard for environmental laws; and
- had any permit revoked or permanently suspended under environmental laws.

SB 382 also requires air quality permit applicants -- except for federal, state and local government, and corporate applicants -- to file a disclosure statement along with their permit application. At the Environment Department's request, the bill directs the Department of Public Safety to prepare an investigative report based on the disclosure statement.

FISCAL IMPLICATIONS

NMED notes that sustained and blatant disregard for air quality regulations on a few occasions has created a tremendous burden on agency resources by requiring continued legal actions, inspections, and other activities to try to enforce compliance to preserve air quality. SB 382 would allow the agency to determine ahead of time whether an applicant has clearly demonstrated actions that would make it unlikely for that applicant to comply with federal and state air quality requirements. Denying an air quality permit in these few instances would proactively save the department these operating costs, which are indeterminate.

The agency would need to review disclosure statements on about 2 percent of the 500 average annual permit applications, review the DPS investigative reports, and modify permits. According to the agency, these activities would be minimal in cost and would be far less than the current amount of resources devoted to legally resolving continued compliance issues

DPS would be required to perform background checks at the request of NMED, but NMED notes that this number most likely will be minimal and could be accomplished presumably within the operating budget for DPS.

SIGNIFICANT ISSUES

Unlike many permits in New Mexico, air quality permits are issued into perpetuity except for 155 large permit holders that operate under the federal Title V Clean Air provisions, which renew every five years. Also unique to the Air Quality Act, air quality violations can only be addressed through enforcement actions, with penalties as the only deterrent. The Hazardous Waste Act, the Water Quality Act and the Solid Waste Act all provide for suspension or revocation of the permit, modifying permits or making the permit conditional.

NMED notes that "the vast majority of air quality permit applicants and holders strive to comply with state and federal regulations; however, a tiny minority of air quality permit applicants and holders do not, leading to intensive use of resources for the agency to address noncompliance permittees. Continuous noncompliance can lead to situations that significantly endanger public health and the environment."

SB 382 would amend the New Mexico Air Quality Control Act to be consistent with other New Mexico environmental statutes, while also providing a tool to NMED to encourage compliance with state and federal air quality laws and rules. Improved compliance with air quality laws and rules would improve air quality statewide.

TECHNICAL ISSUES

EMNRD notes that the bill does not specify who will pay the cost of the background checks—NMED or DPS. The agency also suggests that the grounds for permit denial is based in part on the applicant “knowingly misrepresenting a material fact,” which may be difficult to implement in practice. The agency details, as follows:

As has been the experience of the Oil Conservation Division, for whom one of the standards of proof is “knowing and willful,” defining and meeting this standard is more difficult than it might at first appear. In addition, this establishes a basis not only for denying new permits under this section, but also for revoking, suspending or modifying existing permits. Arguably, this language sets a higher standard for revocation/suspension/modification of existing permits than that already established by the Environment Department’s Regulations at 20.2.70.405.A(1)(c) NMAC 2008, which requires only that “inaccurate statements were made in establishing the terms of the permit,” but does not require actual knowing misrepresentations to have been made by the applicant.

Likewise, at Subpart P(3)(a), the language provides that an applicant previously convicted (within the preceding 10 years) of a “felony related to environmental crime” can be denied a permit. The phrase “environmental crime” may be a difficult one to define and apply.

OTHER SUBSTANTIVE ISSUES

SB 382 requires air quality permit applicants to submit a disclosure statement along with the permit application. The bill excludes the United States, U.S. agencies or instrumentalities; states, state agencies, political subdivisions of states; and corporation, officers, directors or shareholders of corporations with registered statement on file with federal SEC under Section 5, Ch. 38, Title 1 of federal Securities Act of 1933, as amended (if submit evidence of registration) from this provision. According to NMED, the exclusion would cover about 98 percent of applicants.

In those instances where the department has made a request for an investigation, DPS is required to generate a report of its findings within ninety days. Applicants are required to cooperate with any such investigation, and failure to do so is grounds for denial of the permit.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

NMED will continue to enforce air quality compliance solely through enforcement actions. A disproportionate share of agency resources will continue to be expended on trying to bring compliance to a small number of air quality permit holders with a history of willful disregard of environmental laws in New Mexico.