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## FISCAL IMPACT REPORT

ORIGINAL DATE 02/09/13

SPONSOR Griego LAST UPDATED \_\_\_\_\_ HB \_\_\_\_\_

SHORT TITLE Water Quality Control Commissioners SB 193

ANALYST McCoy

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY13	FY14		
NFI	NFI		

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Energy, Minerals and Natural Resources Department (EMNRD)  
 Office of the State Engineer/ Interstate Stream Commission (OSE/ISC)  
 New Mexico Department of Health (DOH)  
 New Mexico Department of the Environment (NMED)

### SUMMARY

#### Synopsis of Bill

Senate Bill 193 (SB 193) amends the Water Quality Act to reduce the number of constituent agencies that administer rules promulgated under that the Act from 8 to 5, removing the Department of Game & Fish (DGF), the Bureau of Geology at New Mexico Institute of Mining and Technology, the Oil Conservation Commission (OCC), and the State Parks Division but adding the Energy, Minerals and Natural Resources Department (EMNRD). SB 193 also amends Section 74-6-3 to lower the membership on the Water Quality Control Commission (WQCC) from 14 to 9. SB 193 removes as members of the WQCC the following: the secretary of the Department of Health (DOH); the director of the DGF; the chair of the OCC; the director of the State Parks Division of the EMNRD; and the director of the Bureau of Geology and Mineral Resources at the New Mexico Institute of Mining and Technology. SB 193 adds as a member of the WQCC the secretary of the EMNRD. SB 193 also reduces the number of public members on the WQCC from four to three, changes the requirements for valid actions of the commission to a majority of the commissioners present at a meeting; and extends the sunset date of the WQCC from 2013 to 2019.

## FISCAL IMPLICATIONS

No Fiscal Impact.

## SIGNIFICANT ISSUES

The New Mexico Water Quality Act is the primary state law addressing surface and ground water quality. The WQCC is the state water pollution control agency for New Mexico for all purposes of the federal Clean Water Act (CWA) and the wellhead protection and sole source aquifer programs of the federal Safe Drinking Water Act (SDWA), the main federal law that ensures the quality of Americans' drinking water; and is authorized to take all actions necessary and appropriate to secure the benefits of the CWA and those programs under the SDWA. Under the SDWA, the U.S. Environmental Protection Agency sets standards for drinking water quality and oversees the states, localities, and water suppliers who implement those standards. New Mexico has adopted the federal standards for public drinking water. Under the New Mexico Water Quality Act, water is defined as all water, including water situated wholly or partly within or bordering upon the state, whether surface or subsurface, public or private, except private waters that do not combine with other surface or subsurface water [§ 74-6-2.H, NMSA 1978].

The WQCC, administratively attached to the New Mexico Environment Department (NMED), has three main functions. The first function is the promulgation of regulations and standards pursuant to the Water Quality Act and the federal CSA. The second function is adjudicating appeals, variances, and compliance order hearings arising under the Water Quality Act. The third function is decision-making regarding administrative issues such as approval of the federally mandated biennial report titled “Water Quality and Water Pollution Control in New Mexico” and approval of the continuing planning process document required by the CWA. Additionally, the duties of the WQCC include the administration of loans and grants from the federal government. The NMED provides technical services to the commission.

Changes in WQCC membership as provided for in SB 193 will change the expertise on the WQCC. Members of the WQCC bring a wide variety of expertise and interests to their deliberations. Having agency officials on the WQCC “serves the purpose of having expertise on the Commission which deals with highly technical and complicated matters.” *Kerr-McGee Nuclear Corp. v. NM WQCC*, 98 N.M. 240, 246 (Ct. App. 1982). The Office of the State Engineer/ Interstate Stream Commission (OSE/ISC) points out under SB 193, several agencies that have expertise in certain fields would not have input into water quality issues that might pertain to their field or involve the agency’s expertise. According to the EMNRD, SB 193 reduces the expertise in wildlife, mining and health matters while retaining expertise in environmental, natural resources, water quality, municipal, Native American and agricultural matters.

The WQCC must assign responsibilities for administering the rules promulgated pursuant to the Act “to constituent agencies so as to assure adequate coverage”. Section 74-6-4(E). Constituent agencies are granted authority to implement the Water Quality Act including issuing permits, taking enforcement actions, proposing rule changes to the WQCC and accepting federal and state funds. The OSE/ISC notes under SB 193, several constituent agencies that have a particular expertise and interest in water quality, especially with respect to any rules they must administer, will have no role in their adoption. However, the EMNRD reports, while the current Act lists 8 constituent agencies, the WQCC has only assigned responsibilities to two agencies: the NMED

and the OCC. According to the EMNRD, reducing the number of constituent agencies from 8 to 5 will not have a practical impact on the administration of the Water Quality Act. The EMNRD also notes, by reducing the WQCC membership from 14 to 9, SB 193 hopefully streamlines the functioning of the WQCC. The WQCC has grown over the years going from 9 members to 11 in 1993, then to 13 in 2001 and then to 14 in 2007.

The NMED points out, SB 193's removal of the DGF as a constituent agency would also remove its authority to implement and enforce the Water Quality Act. Although the DGF is a separate entity from the EMNRD, the DGF is related to the EMNRD because the State Game Commission is administratively attached to the EMNRD and the State Game Commission has certain supervisory authority and compensation approval authority over the DGF. The NMED notes, it seems unlikely that the EMNRD's authority would somehow devolve to a different department to allow it to implement and enforce the Water Quality Act.

SB 193 reduces the membership of the EMNRD representatives from two to one. The EMNRD adds, having multiple EMNRD representatives on the WQCC is partly an accident of history: the WQCC was created before the EMNRD was created as a merger of several entities such as the OCC and the State Parks Department. The EMNRD notes, the current EMNRD members bring expertise in both natural resources and energy regulatory matters to the WQCC, and reducing the EMNRD membership is a logical step if the goal is to significantly reduce membership as SB 193 proposes. The EMNRD adds, eliminating the OCC will require the WQCC to issue a new assignment of responsibilities with the EMNRD presumably replacing the OCC as the regulator of oil and gas activities under the Act. The EMNRD recommends, to avoid any interruption in the regulation of all activities SB 193 should include a transition section that assigns the duties of the OCC to the EMNRD.

The NMED supports reducing the size of the Commission. The NMED also points out, the breadth of expertise provided by the designees of the diverse agencies represented on the WQCC ensures that all issues under commission consideration, from the most complex mines in the state to septic tanks at mobile home parks, are addressed in a fair, consistent and technically sound manner. Broad agency expertise ensures appropriate consideration of the collective state knowledge of water quality issues over time related to water rights, public health, soil and water conservation, water quality management, mines and mineral resources, aquatic biology and ecosystem management, oil and gas resource management, and recreational management. The NMED adds, the State Parks Division and the OCC and adding the EMNRD consolidates the EMNRD's representation on the commission. State Parks is a Division of the EMNRD, and the Oil Conservation Commission is composed of three persons—one of which works for the EMNRD (the Oil Conservation Division Director) and a second is appointed by the Secretary of the EMNRD.

The NMED points out, the representative from the Department of Game and Fish provides important expertise in aquatic biology and ecosystem management which is essential in the commission's duties and deliberations associated with the federal CWA. The NMED notes, representation of the DOH is important to assuring that the commission has representation from the state agency most knowledgeable about public health and environmental risk associated with water contaminants. The NMED adds, the representative from the field of geology provides critical and impartial expertise to the commission in mining, mine reclamation and water issues which are very important to many commission deliberations. The number of public members is reduced from four to three. The NMED suggests that it would be helpful if public members were required to have technical expertise in water quality, public health, or environmental issues.

The DOH reports:

About 20 percent of the population in New Mexico (or estimated 350,000 people) receive water from private wells of which groundwater is the source especially in rural areas. These communities may be more vulnerable to the negative health effects of groundwater degradation. There are many types of health problems that can result from exposure to contaminants in water, even at very low concentrations. Since contamination in a single drinking water system can affect many people at once, drinking water quality is public health issue. People can be exposed to contaminants in water not only by drinking the water, but also by eating foods prepared with the water, eating produce or meats that were grown or raised on the contaminated water, breathing chemicals that have vaporized from the water or absorbing them through direct contact with skin while showering or bathing. If a person is exposed to a high enough level of a contaminant over a long enough period of time, they may become ill. Effects can be seen short- and/or long-term.

The NMED notes, the Water Quality Act currently requires a minimum of six of the fourteen members (approximately 43 percent of the members) to concur for an action to be valid. SB 193 removes this requirement and replaces it with a majority of the members present at a meeting. The existing Water Quality Act, which is unchanged by SB 193, provides that a quorum requires a majority of the commission to be present. With the reductions to the size of the commission under SB 193, only five members would have to be present to have a quorum and only three of those would have to concur for an action to be valid. The NMED notes, this is only one-third of the membership and allows actions such as rule-making to be decided without the concurrence of two-thirds of the commission.

### **ADMINISTRATIVE IMPLICATIONS**

The OCC and the Oil Conservation Division (OCD) of the EMNRD currently administer the Water Quality Act, including the issuance of discharge permits, for certain oil and gas facilities. The OCD also receives federal funds to administer the underground injection control program which is covered by WQCC rules. The EMNRD notes, if the OCC is removed as a constituent agency, both SB 193 and the WQCC need to recognize the EMNRD as the constituent agency for these activities, which will avoid any gaps in regulation and possible loss of federal funds.

### **TECHNICAL ISSUES**

According to the NMED, in Section 2(E) of SB 193, new language is inserted that may narrow the WQCC's jurisdiction in a way that is unintended. The bill inserts "of 1974" after "Safe Drinking Water Act." I.e., "The commission is the state water pollution control agency for this state for all purposes of...wellhead protection and sole source aquifer programs of the federal Safe Drinking Water Act of 1974..." The federal Safe Drinking Water Act has been amended multiple times since 1974. The phrase "as amended" should be added to signify that the commission's jurisdiction applies not just to wellhead protection and sole source aquifer programs under the original 1974 law but also to all amended sections of that law since 1974. The NMED suggests an amendment to that effect below.

### **ALTERNATIVES**

SB 193 extends the sunset of the WQCC by 6 years. The WQCC is governed by the provisions of the Sunset Act, Sections 12-9-11 et seq. The Sunset Act contemplates that the Legislative

Finance Committee (LFC) will hold a public hearing and make a recommendation on the termination or continuation of the agency. “In such hearing, the agency shall have the burden of demonstrating a public need for its continued existence”. Section 12-9-19(A). The EMNRD notes, an alternative is to amend the sunset provision to extend the life of the WQCC for one year and allow the Legislative Finance Committee to hold a public hearing.

The DOH adds, item C of SB 193, (page 2, lines 8-14), references the definition of ‘water pollution’ in the Water Quality Act: introducing or permitting the introduction into water, either directly or indirectly, of one or more water contaminants in such quality and of such duration as may with reasonable probability injure human health...” Additionally, Item P of SB 193, (page 5, lines 4-12), references the definition of “Substantial adverse environmental impact” which means that an act or omission of the violator causes harm or damage: (1) to human beings; or (2) that amounts to more than ten thousand dollars (\$10,000) damage or mitigation costs including ... ground water or surface water. The DOH notes, given the language of Items C and P, retaining the secretary of health or a designated representative would serve to continue the practice of providing the public health perspective as it pertains to the health of human beings and the protection of ground water or surface waters, of which New Mexicans rely on for drinking water.

### **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

The WQCC will terminate on July 1, 2013.

### **AMENDMENTS**

The EMNRD suggests the following amendment:

- On page 9, insert a new section 4 to read as follows: SECTION 4. TEMPORARY PROVISION—TRANSFER OF DUTIES.— On the effective date of this Act, all responsibilities for administering regulations assigned by the commission to the oil conservation commission, pursuant to Section 74-6-4.L, shall be transferred and assigned to the EMNRD.

The NMED suggests the following amendments:

- The NMED suggests that the public members required in Section 2 of SB 193 be required to have technical expertise in water quality, public health, or environmental scientific areas.
- The NMED suggests on page line in Subsection 2(E) after “provide Safe Drinking Water Act of 1974” insert the words: “as amended.”