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FISCAL IMPACT REPORT

SPONSOR: Snyder DATE TYPED: 02/23/01 HB _____
 SHORT TITLE: The Water Resources Department Act SB 730
 ANALYST: Chabot

APPROPRIATION

| Appropriation Contained | | Estimated Additional Impact | | Recurring or Non-Rec | Fund Affected |
|-------------------------|----------|-----------------------------|------|----------------------|---------------|
| FY01 | FY02 | FY01 | FY02 | | |
| | \$ 600.0 | | TBD | Recurring | General Fund |

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files
 Attorney General (AG)
 Department of Environment (NMED)
 Department of Game and Fish (DGF)
 Energy, Minerals and Natural Resources Department (EMNRD)
 Office of the State Engineer (SEO)

No Response Received
 Office of the Governor
 Office of the Natural Resource Trustee (ONRT)

SUMMARY

Synopsis of Bill

This bill appropriates \$600.0 from the general fund to the Office of the Governor for the purpose of funding the Water and Environment Implementation Committee (WEIC) which will develop an implementation plan for creating the Water Resources and the Natural Resources and Environment Departments. The sections of the bill pertaining to WEIC are effective July 1, 2001. The sections of the bill establishing the new departments are effective December 1, 2001.

The WEIC is to be composed of the following members:

1. Governor's Science Advisor;
2. Secretary of the Environment Department;
3. Secretary of Energy, Minerals and Natural Resources Department;
4. State Engineer; and

5. **Five members appointed by the legislative council from a list prepared by the Governor's science advisor.**

The implementation committee is to develop an implementation plan for the Water Resources Department and Natural Resources and Environment Department and will oversee **the implementation of the plan by December 1, 2001**. The committee may propose to the Legislature the assignment of responsibilities over programs from the various departments and commissions.

Water Resource Department (WRD)

This bill enacts new statutes establishing the Water Resource Department (WRD) as a single, unified department to administer laws and exercise specific functions related to water formerly administered by NMED, the Environmental Improvement Board (EIB), SEO, Interstate Stream Commission (ISC), Water Quality Control Commission (WQCC), Oil Conservation Commission (OCC), Coal Surface Mining Commission (CSMC), Mining Commission, and EMNRD. The department is to be a cabinet-level, executive department responsible for environmental management and consumer protection programs related to water resources and waste water. The department manages the Water Conservation Fund and implements new requirements of the Utility Operators Certification Act. The department also manages the Liquid Waste Fund. The Acequia Commission is administratively attached to the department. This is a transfer from the Local Government Division of the Department of Finance and Administration who contracted with the Department of Agriculture to manage Acequia issues. The commission oversees the Acequia and Community Ditch Fund which is used for contracting with acequia and ditch associations to provide assistance to members in the adjudication process.

The Secretary of WRD will be appointed by the Governor with consent of the Senate except that the current Secretary of NMED whose appointment was confirmed by the Senate may serve as the Secretary of WRD without further confirmation. There are seven divisions and the division directors and deputies are appointed and exempt from the Personnel Act. Bureaus may be created as needed and bureau chiefs will be covered by the Personnel Act.

The Secretary and Division Directors, except IG and ASD, will serve as the Directors' Functional Group with respect to the powers and duties of ISC, WQCC, OCC, CSMC and Mining Commission which will be abolished.

The duties and responsibilities of the IG and ASD are the same as found in most government agencies.

The River and Watershed Management Division is responsible for the functions transferred from the following agencies:

1. Compact compliance from ISC;
2. Nonpoint source and total maximum daily load programs from NMED;
3. Supervision and interaction with irrigation and conservancy districts from SEO and ISC;
4. Responsibilities associated with acequias from SEO and ISC;
5. Ecology and biological programs from NMED, SEO and ISC; and
6. State water planning from SEO and ISC.

The division will annually prepare a budget and detailed plan on improving the Rio Grande and increasing the surface flow of the river during the ensuing fiscal year.

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The Water Conservation Division is responsible for the functions transferred from the following agencies:

1. Drought management from SEO and EMNRD;
2. Regional water planning from SEO and ISC;
3. State water planning from SEO and ISC;
4. Subdivision review from SEO; and
5. Water use and conservation from SEO, ISC and NMED.

The Water Quality Protection Division is responsible for functions transferred from NMED:

1. Ground Water Protection and Remediation;
2. Surface Water Quality Bureau;
3. Drinking Water Bureau;
4. Underground Storage Tank Bureau; and
5. Water and Waste Water programs from the Construction Programs Bureau.

The Water Litigation Division is responsible to defend and prosecute all claims in the name of and against the state, department and any director. Legal actions taken are not subject to approval or oversight by the Attorney General.

The Water Rights and Adjudication Division is responsible for the functions from SEO not otherwise assigned to another division. The State Engineer serves as director of the division and is appointed by the Secretary, with approval of the Governor and consent of the Senate. The State Engineer has general supervision of waters of the state and of the measurement, appropriation and distribution thereof.

Natural Resources and Environment Department (NRED)

This bill enacts new statutes establishing NRED as a single, unified department to administer laws and exercise specific functions formerly administered by NMED, EIB, DGF, State Game Commission, CSMC, Mining Commission, New Mexico Youth Conservation Corps Commission, EMNRD pertaining to natural resources and the environment, and Office of the Natural Resources Trustee (ONRT). The secretary establishes Solar Collector Standards and serves on the Radioactive Waste Consultation Task Force. The department is responsible for promulgate, develop and enforce rules and standards in the following areas:

1. Food protection;
2. Air quality management as provided in the Air Quality Control Act;
3. Radiation control and establishing license, registration and other fees as provided in the Radiation Protection Act;
4. Noise control;
5. Nuisance abatement;
6. Vector control;
7. Occupational health and safety as provided in the Occupational Health and Safety Act;
8. Sanitation of public swimming pools and public baths;
9. Plumbing, drainage, ventilation and sanitation of public buildings;
10. Medical radiation, health and safety certification and standards for radiologic technologists as provided in the Medical Radiation Health and Safety Act;
11. Hazardous wastes and underground storage tanks as provided in the Hazardous Waste Act; and,

12. Solid Waste as provided in the Solid Waste Act.

The Secretary of NRED will be appointed by the Governor with consent of the Senate except that the current Secretary of EMNRD whose appointment was confirmed by the Senate may serve as the Secretary of NRED without further confirmation. There are ten divisions and the division directors and deputies are appointed and exempt from the Personnel Act. Bureaus may be created as needed and bureau chiefs will be covered by the Personnel Act. In addition, the Secretary of NRED will serve as the Natural Resource Trustee.

The Secretary and Division Directors, except IG and ASD, will serve as the Directors' Functional Group with respect to the powers and duties of EIB, State Game Commission (SGC), CSMC, OCC, and Mining Commission.

The duties and responsibilities of the IG and ASD are the same as found in most government agencies.

The Energy Conservation and Management Division is responsible for all functions in managing the state and federal energy conservation and alternative energy technology programs. The State Alternative Program is created as part of this division to implement clean alternative fuel transportation programs including mass transit demonstration projects.

The Environmental Protection Division is responsible for functions transferred from NMED:

1. Air Quality Bureau;
2. Occupational Health and Safety Bureau;
3. Solid Waste Bureau;
4. Solid Waste programs from the Construction Programs Bureau;
5. Department of Energy Oversight Bureau; and
6. Hazardous and Radioactive Materials Bureau.

The Forestry Division is responsible for enforcing and administering laws and regulations relating to forestry. The director serves as the State Forester and is paid from the Forest Conservation Fund. The State Forester performs functions under the New Mexico Forest Re-Leaf Act.

The Mining and Minerals Division is responsible for enforcing and administering laws and regulations relating to mine safety, coal surface mine reclamation and abandoned mine lands reclamation. The division performs functions required by the Abandoned Mine Reclamation Act and manages the Abandoned Mine Reclamation Fund.

The Natural Resources and Environmental Litigation Division is responsible to defend and prosecute all claims in the name of the state, department, and any director. Legal actions taken are not subject to approval or oversight by the Attorney General.

The Oil Conservation Division is responsible for administering the laws and regulations relating to oil, gas and geothermal resources. The division director will be known as the State Petroleum Engineer. The division has jurisdiction and authority over all matters relating to the conservation of oil and gas and the prevention of potash waste as a result of oil or gas operations in the state. The division enforces the Oil and Gas Act and any other law relating to the conservation of oil or gas. In the division there is the Office of Interstate Natural Gas Markets.

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The State Parks Division is responsible for managing all state parks and state-owned or state-leased recreation area.

The Wildlife Division is responsible for the powers and duties of the former DGF and SGC. The Conservation Services Bureau performs the functions of the Conservation Services Division of DGF and manages the Game Protection Fund, Game and Fish Capital Outlay Fund. The division enforces the Habitat Protection Act.

All existing functions of ONRT, New Mexico Youth Conservation Corps, and State Park and Recreation Advisory Committee are transferred to NRED.

General Provisions

The bill provides for public hearings applicable to both departments and provides for appeal from department decisions. A person who violates a rule of either department is guilty of a petty misdemeanor. It provides penalties and requires that monies collected will be deposited in the general fund.

Advisory committees may be created as necessary to fulfill advisory functions or to comply with federal or private funding requirements but duties do not extend to administering a program or function; however, this will be at the discretion of the Secretary and the Director's Functional Group.

Both WRD and NRED are authorized to cooperate with the federal government in administration of their respective programs and are designated as the single state agency for the administration of any environmental programs under their jurisdiction.

Significant Issues

The purpose of the bill is to consolidate existing agencies, and supporting boards and commissions, related with water issues into a single agency (WRD) with authority and responsibility to manage water resources throughout the state. As a consequence of this action, the scope of responsibility of the agencies losing water responsibilities are considerably reduced and, as a result, these functions are organized into NRED. The hope is that there will be better administration and management of New Mexico's natural resources. **However, because of the large scope of this reorganization effort and short period of time devoted to putting this bill together, there are many concerns about the bill.** These are expressed in the following.

AG states "the bill removes the power of the Attorney General to approve, oversee, defend or prosecute cases of behalf of the state." This they consider unconstitutional. They state that this is contrary to NMSA 1978, Section 8-5-1, et seq., and conclude that it violates Article V, Sec. 1 of New Mexico's Constitution. AG cites *State ex rel. Bingaman v. Valley Sav. & Loan Ass'n*, 97 N.M. 8, 636 P.2d 279 (1981) where the New Mexico Supreme Court "confirmed the Attorney General not only has the authority, but the duty under statute to take action to protect the public interest."

The AG questions the qualifications stated for the division director of the River and Watershed Management Division of WRD. This division takes over the functions of the current Interstate Stream Commission, yet the qualifications stated require education in biology, forestry or ecology. What is required is a water expert.

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AG is concerned about the elimination of the boards and commissions established by the legislature to provide public representation and oversight over agency actions in the areas of water, environment and natural resources.

AG states, this bill “does not appear to recognize the complex interrelationship between New Mexico’s water law and New Mexico’s Constitution. For example, page 82, lines 14-23 change the right to appeal from a decision of the State Engineer from a “de novo” review in district court to an appeal “on the record” to the State Engineer. This not only makes no sense, it is a clear violation of Article XVI, Sec. 5 of New Mexico’s Constitution which provides that such appeals must be de novo.”

AG further states that “The bill also may unconstitutionally delegate to the secretary of the new water resources department the governor’s power to appoint the officers of the state. For example, the secretary of the water resources department would appoint the State Engineer, who is then confirmed by the Senate. While the governor is given approval power over the appointment, this still appears to run afoul of Article V, Sec. 5 of New Mexico’s Constitution, which provides “the governor **shall** nominate and, by and with the consent of the senate, appoint all officers...” (emphasis added.)”

AG states “This bill may address legitimate issues regarding the structure of natural resources regulation in New Mexico, but the bill has not been subject to the broad range of input appropriate for such a significant change in government structure. A panel of experts, with specific expertise relevant to each agency’s function, should investigate in detail what inefficiencies may exist between the agencies this bill affects. Based upon the report of this expert panel, the Legislature may wish to consider referring this matter to an interim legislative committee for consideration and possible legislation to streamline these agencies’ function before taking any action that could harm the state. **The possible harm to the state of enacting such sweeping reorganization is so serious that it should not be undertaken without thorough investigation and thoughtful deliberation.**”

DGF is concerned with the elimination of SGC which serves as the conduit between the public and wildlife management policy. Currently SGC appoints the DGF director. This bill would have the Secretary of NRED appoint the division director of the Wildlife Division.

DGF is also concerned that the education and experience requirements for division directors may be too restrictive. The current director of DGF would not qualify for appointment as the Wildlife Division director.

The bill assigns the ecology and biological programs of NMED, SEO and ISC to WRD. EMNRD recommends that these functions be performed by NRED to avoid duplication of duties already performed by the Forestry Division and GFD.

EMNRD is concerned that some of the qualifications for division directors lack flexibility and may make selection difficult. For example, the division director of the Oil Conservation Division is to have a degree in petroleum engineering. They recommend consideration of allowing related degrees such as geology. In addition, the director of Energy Conservation and Management Division is to have a degree in economics or business. EMNRD states that an electrical engineer might be a better choice.

EMNRD states that the name Oil Conservation and Management Division of NRED will not reflect the division’s functions. They recommend the name be changed to the Oil and Gas Division.

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According to EMNRD, this bill does not make any changes to the Water Quality Act (Sections 74-6-1 through 74-6-16 NMSA). Definitions and agency names need to be changed. In addition, Section 69-36-7(P)(2) NMSA also needs to be changed to reflect the proper agency names.

NMED responds positively to the reorganization proposed by this bill. They state that it will “allow for more integrated and holistic management of water resources.” Water quantity and quality will be addressed by one agency rather than several as is the current structure. They state that the provision of allowing the new departments to create advisory boards will ensure public participation in the decision-making process will continue.

PERFORMANCE IMPLICATIONS

Performance measures developed for existing agencies would be transferred to appropriate divisions in the new agencies. The implementation committee should develop measures to determine if the reorganization results in more effective management of water and natural resources.

FISCAL IMPLICATIONS

The appropriation of \$600.0 contained in this bill is a recurring expense to the general fund. Any unexpended or unencumbered balance remaining at the end of fiscal year 2002 shall revert to the general fund.

ADMINISTRATIVE IMPLICATIONS

The implementation time schedule falls in the middle of the budget cycle for state agencies. Budgets are due to DFA and LFC on September 1, 2001 and presumably will be submitted by department to reflect the current organizational structure. LFC hearings on budget requests are conducted September to December. Again, the hearings would reflect the current organizational structure. However, if the implementation occurs on December 1, 2001, all the documents would have to be redone to reflect the new organizational structure. Presumably, the December LFC hearings would then have to cover the new organizational structure. Because of the compressed time schedule to readjust budget requests, there is a possibility that items may be missed in the appropriation process and a mechanism may not be available to correct these errors.

NMED and EMNRD have developed separate financial systems using different computer system architecture. Even though these systems are designed to interface with DFA, it is unknown if they will interface with each. The implementation committee will need to address compatibility of existing financial systems and determine costs to integrate the differing agency systems.

TECHNICAL ISSUES

Page 2, line 12 add “oil conservation commission”.

Page 10, line 25 be changed to read: “(5) water and wastewater programs from the construction programs bureau”.

Page 21, line 20 strike “and construction”.

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Page 22, line 5, EMNRD recommends striking “coal surface”. This will allow inclusion of reclamation of all mines pursuant to the New Mexico Mining Act.

Page 35, line 23, strike “II”. The classification no longer exists.

Page 57, line 3 through 11, states that the State Forester is paid from the Forest Conservation Fund which, according to EMNRD this is incorrect. In addition, they state that the language about adopting a seal is unnecessary. EMNRD recommends in page 57, line 8 changing the comma to a period after the word “environment” and striking the rest of the line and striking lines 9, 10, and 11.

Page 57, line 25 change “60” to “56”.

Page 73, line 1, the bill strikes orders from the statute. EMNRD states that the ability to issue orders will still be needed by the Oil Conservation Division. They recommend removing the strike from “orders” on page 73, line 1.

Page 131, line 1 add at beginning: “Section 97. APPROPRIATION.--Six hundred thousand dollars”

Page 131, line 25 strike as it is repeated on the next page.

OTHER SUBSTANTIVE ISSUES

Ira G Clark in his book, Waters in New Mexico, UNM University Press, 1987, points out that in April 1977, SEO and ISC were reorganized into the Water Resources Division of the Department of Natural Resources. The functions and responsibilities were unchanged. However, “reflecting the need for allowing the state engineer the utmost freedom of movement, in 1982 the legislature severed the short-lived time of his office to the Department of Natural Resources by making it an independent agency under the supervision of the governor...”(p. 674).

POSSIBLE QUESTIONS

1. In both proposed agencies, the Directors’ Functional Group replaces many of the existing boards and commissions overseeing environmental areas. Many of these boards and commissions have public representatives from outside the department. What provision exists to receive this public input into the decision-making process?
2. Why not continue the existing board and commission structures until a few years after the reorganization becomes effective to allow consideration and legislative hearings on retaining or eliminating individual boards and commissions?
3. What is the driving factor in attempting to put all activities related to water into the WRD?
4. What advantages are there in having the two new agencies vis-a-vis the current organizational structure?
5. What disadvantages are there in having the two new agencies vis-a-vis the current organizational structure?
6. Why does this organizational change need to be passed during this session?

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7. Why was the bill introduced on the last day for bills and not at the beginning of the sessions so there could be more time for hearings and staff work on the reorganization proposal?
8. What will be the consequences of studying the proposal during the interim and delaying implementation until the forty-sixth legislature?
9. SEO is engaged in a significant amount of litigation that could have a major financial impact on the state, is this the right time to change organizational structures which could complicate the on-going litigation effort?
10. The bill provides for an implementation committee and the legislative counsel is to select five members from a list provided by the Governor's scientific advisor. What if the legislature wants to appoint their own representatives?
11. What if the implementation committee determines that there needs to be additional changes in statute are required to implement the reorganization? How can the implementation proceed when these changes can only be addressed by the next legislative session?
12. Should stakeholders be represented on the implementation committee? If not, why not?
13. Why should the Attorney General be excluded from approving, overseeing, defending or prosecuting cases on behalf of the state that pertain to water, environment and natural resources?
14. The bill states that the River and Watershed Management Division of WRD will submit a budget and a plan for improving and increasing the flow of the Rio Grande, what about other rivers in New Mexico?

GAC/prr