F I S C A L I M P A C T R E P O R T

SPONSOR: Herrera DATE TYPED: 02/11/03 HB 372

SHORT TITLE: Amend Air Quality Control Act SB

ANALYST: Valenzuela

APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY03	**FY04**	**FY03**	**FY04**		
	NFI				

(Parenthesis ( ) Indicate Expenditure Decreases)

HB 371 proposes that the state regulations governing these sources be consistent with, but no more stringent than the federal regulations, operating permits.

SOURCES OF INFORMATION

- *Report of the Legislative Finance Committee to the Forty-sixth Legislature*, First Session, January 2003 for Fiscal Year 2003 – 2004, pp. 591 – 592.
- *Emerging Issues in Air Quality and Regional Haze State Implementation Plans*, Staff Brief for LFC Hearing, June 2002.

Responses Received From
Department of Environment (NMED)

SUMMARY

Synopsis of Bill

House Bill 372 would amend the Air Quality Control Act by inserting language that requires regulations applicable to operating permits be consistent with, but no more stringent than, federal regulations.

Significant Issues

The federal Clean Air Act (CAA), as amended in 1990, directs the U.S. Environmental Protection Agency (EPA) to identify and set national ambient air quality standards (NAAQS) for pol-

lutants that cause adverse effects to public health and the environment. The law allows individual states to have stronger pollution controls, but states are not allowed to have weaker pollution controls than those set for the whole country. In New Mexico, the Air Quality Control Act mandates that statutes are no more stringent than federal law [Section 74-2-1 to 74-2-17 NMSA 1978] for specific conditions: visibility protection in Class 1 areas (e.g., wilderness areas), prevention of significant deterioration for sources that emit more than 250 tons of pollutants per year, non-attainment areas (areas where the NAAQS has been exceeded for any one criteria pollutant), and technology-based standards applicable to new facilities. The regulations, governing operating permits which are at issue in HB372, do not fall within the stringency language presented above. Therefore, state regulation can be stronger than federal regulation.

Generally, the state regulates six criteria pollutants—sulfur dioxide (SO_2), total suspended particulate matter (PM), carbon monoxide (CO), nitrogen oxide (NO_2), hydrogen sulfide (H_2S), and total reduced sulfur. New Mexico standards are higher for these pollutants, but it is important to note the EPA has no standards for H_2S and total reduced sulfur. According to NMED, New Mexico's standards are more stringent because they address health concerns, nuisance issues and property damage. The EPA standards are health-based only.

NMED's operating permit program, known as the Title V permit program, impacts the largest emission sources in the state, those that emit more than 100 tons of any criteria pollutant in one year. There are roughly 160 Title V sources in the New Mexico. Currently, if a Title V facility exceeds the standards, the state requires the company to submit a compliance plan showing how they will reduce emissions to meet standards. Under the program, the federal government does not require individual sources to demonstrate compliance with ambient air quality standards. Thus under HB372, the state and Bernalillo County programs would also be precluded from asking for this demonstration.

According to NMED, state standards are an applicable requirement for minor sources, known as New Source Review or construction permit programs. HB 372 would not affect these sources, which will still need to demonstrate compliance with state and federal standards in order to obtain a construction permit.

FISCAL IMPLICATIONS

House Bill 372 does not contain an appropriation.

ADMINISTRATIVE IMPLICATIONS

The Environmental Improvement Board will have to change its regulations to remove those parts that are not in the federal rules. Subsequently, language in permit templates would need to be changed when issuing new permits. A significant increase in permitting workload may occur in the short term as facilities with previously issued permits apply to have them reissued with the revised language.

OTHER SUBSTANTIVE ISSUES

NMED reports several concerns with HB372, which follow:

HB 372 would provide an economic advantage to a small number of companies who own older, poorly controlled sources of air pollution.

- The Department estimates that less than 2% of permitted sources (emitting approximately 15% of the total nitrogen dioxide from all sources subject air quality permits) could receive an economic advantage relative to other permitted sources under this proposed legislation. [Note: These figures do not include sources in Bernalillo County or on Tribal lands.]

- Air quality dispersion modeling is one of the primary areas in which the state regulation (20.2.70 NMAC, or Part 2.70) differs from the federal regulation. Under state regulation, sources that have not provided a modeling demonstration of compliance with applicable requirements under prior permit or regulatory procedures are required to include such a demonstration in their Title V permit application. This requirement is not explicitly included in the federal regulation.

- The sources affected by the dispersion modeling requirements are a small number of facilities that have been in operation since 1972. The dispersion modeling requirements in Part 2.70 do not affect newer sources.

- The Department has reason to believe that some of these modeling demonstrations, if performed, would show noncompliance with federal ambient air quality standards. These sources would then be required to develop a plan to come into compliance with air quality standards, as newer sources have been required to do. Compliance with these requirements is likely to involve expenses such as additional control equipment or updating process equipment. Some older sources that had been out of compliance with federal ambient air quality standards have agreed to comply.

HB 372 could reduce the State's flexibility in implementing Title V of the federal Clean Air Act

HB 372's intent appears to eliminate state and federal ambient air quality standards as an applicable requirement for the oldest and largest polluters in the state. What is not clear are the additional impacts this proposed legislation would have on the Title V permit programs. HB 372 could potentially limit flexibility for state and local programs as allowed by the federal rules. The flexibility in the state program that could be in jeopardy includes:

- *Fees charged to Title V permittees*-- in New Mexico ($10.25/ton of criteria air pollutants) are among the lowest in the country. We charge about 37% of the national average (approximately $28/ton in December of 2000), and 28% of the presumptively-adequate Title V fee established by federal regulations (currently $36.60/ton). The Department proposed the lower fee level as part of the original program.

- *Exemption of small emission units*--as allowed, but not required, under federal regulations, the Department has developed extensive lists of small emissions units and activities at Title V facilities that are exempted from permit requirements. This has significantly reduced the amount of potential paperwork required of sources.

- *Commencement of Operations*--the state rule allows modifications to existing facilities to

commence operation upon approval of the construction permit, with the application for the operating permit to be submitted within twelve months of commencing operation. The federal rule requires that an existing operating permit must be revised for certain modifications before operations can commence. HB 372 would require that the state rule be changed to conform to the federal rule. The authorized time to revise the existing operating permit may be as long as 18 months.

- *Emitting equipment*--when large quantities of a pollutant are emitted by a facility, the state regulation allows limits to be placed on equipment that emit the pollutant even when there is no applicable requirement. Consequently, the permit will include monitoring, recordkeeping, and reporting requirements to ensure the facility complies with the emission limits. The federal rule does not address the situation of equipment with no applicable requirements.

- *Emergency or upset provision*--The state rule conforms to the federal rule by allowing a defense for facilities that exceed technology-based emission limits when an emergency occurs. The federal rule adds this provision to any emergency or upset provision contained in any applicable requirement. The state rule specifically excludes the applicability of the state rule regarding defense against excess emissions during malfunction, startup, shutdown, or maintenance. This exclusion is more stringent than the federal rule, but provides more incentive for industrial facilities to operate cleanly.

- *Compliance with NAAQS for Older Facilities*--National Ambient Air Quality Standards (NAAQS) have been established based on the levels of pollutants at which adverse health effects can occur. The State of New Mexico has protected human health by addressing a loophole in the federal regulation. This loophole in the federal Title V rule, which affects less than 2% of permitted sources mentioned above, stems from the decision by EPA to not address compliance with the NAAQS directly in Title V permits but, rather, to address NAAQS indirectly through permit conditions based on State Implementation Plan (SIP) requirements. By requiring state programs to address SIP requirements in Title V permits rather than the national standards directly (except for the rare temporary major source), a loophole was created for older ("grandfathered") sources. This issue was discussed in the state hearing when our Title V program was adopted, and the EIB chose to close the loophole by addressing ambient air quality standards directly rather than indirectly. Under the state program, we rely on our permitting programs, including the Title V (major source) operating permit program to ensure that the state maintains its status of attainment of ambient air quality standards. This allows us to address the issue of a single source in non-compliance with the standards in a site-specific area. This way, we can keep an area from being non-attainment (thus avoiding the negative economic implications of non-attainment), avoid penalizing other nearby sources, and ensure in a straightforward manner that residents close by enjoy the excellent air quality they expect in New Mexico. A more cumbersome and costly way to close this loophole would be through the SIP process, which would involve declaring portions of the state a non-attainment area, thereby severely limiting allowable growth in those areas. The cost of this SIP process would be externalized to other sources of emissions and to the taxpayer.

- *Air Dispersion Modeling*--As part of addressing National Ambient Air Quality Standards, the state regulation has required air dispersion modeling to be performed for sources that have not made demonstrations under prior permit or regulatory procedures.

The state program is consistent with the federal Title V regulation and with the principles on which the federal program is based.

- Closing this loophole in the Title V program is consistent with both the federal rule and with the principles on which it is based. EPA has noted "Congress's basic goal in adopting the title V permit program is to achieve air quality by establishing a broad-based tool to aid effective implementation of the [Clean Air] Act". EPA intended that this broad-based tool be flexible, stating "requirements for title V programs are intended to be flexible enough to allow States a reasonable range of options in designing their State Program". This flexibility extended to implementation of the NAAQS. EPA has stated "the State may choose to remedy the [NAAQS exceedances] using a series of individual permits". The Title V permit program is designed to complement SIP's in achieving improved air quality management across the country. Because operating permits will contain more source-specific details than SIP's, EPA intends that source-specific changes be implemented wherever possible solely through the procedures in the permit program rather than through the SIP process. In this way, subject sources and governments will experience less burden and delay than would be associated with a multi-step procedure which includes the more cumbersome SIP revision process.

MFV/prr