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FISCAL IMPACT REPORT

SPONSOR: Heaton DATE TYPED: 3/03/03 HB 654/aHENRC
 SHORT TITLE: Public Hearings on Water Quality Permits SB _____
 ANALYST: Maloy

APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY03	FY04	FY03	FY04		
	NFI		(See Narrative)	Recurring	General Fund

SOURCES OF INFORMATION

Responses Received From
 Attorney General's Office
 Office of the State Engineer
 Game and Fish Department
 Energy, Minerals and Natural Resources Department
 Environment Department

SUMMARY

Synopsis of HENRC Amendment

The House Energy and Natural Resources Committee amended HB 706 to strike a *general* notice to public and affected government agencies provision and, in its place, insert specifics as to the form/content of the notice and the acceptable methods of notice.

Synopsis of Original Bill

HB654 would change the permit hearing process for the New Mexico Environment Department ("NMED") and other constituent agencies under the Water Quality Act ("WQA").

The process is changes at three levels:

1. Under current statutory authority, permitting actions and certifications of federal permits under the WQA may be subject to a full evidentiary hearing before a constituent agency.

At this level, HB 654 strikes the right of the public to cross examine witnesses.

2. After the hearing before the constituent agency, the constituent agency's decision may be appealed to the Water Quality Control Commission ("WQCC").

Presently, even if there was a full evidentiary hearing on a permit at the first hearing before the constituent agency, an appeal of the decision is subject to a *de novo* (entirely new) evidentiary hearing before the WQCC.

The result is two full evidentiary hearings on the same permit.

HB 654 amends the WQA to provide that an appeal of an constituent agency's permitting action will be conducted as a *record review* by the WQCC, not a *de novo* review.

3. If the WQCC decision is appealed, the appeal goes to the district court first, rather than directly to the Court of Appeals. If a party requests a stay, the time for the WQCC to act is reduced from 90 to 30 days.

Significant Issues

1. The current provisions for two evidentiary hearings are redundant, time consuming, and costly for NMED, the regulated community and the public. The proposed change is consistent with basic principles of administrative law as well as permitting procedures under federal environmental statutes.
2. In general, evidentiary hearings are held before the administrative agency with expertise in the matter, in this case NMED. Appeals from the administrative agency generally take the form of a review of the record created below, not another full evidentiary hearing on the same matter.
3. Under the proposed change, the WQCC may remand the matter to the agency to take additional evidence or comment if, before the date set for the review, a party shows to the satisfaction of the WQCC that there was no opportunity to submit the additional evidence or comment on an issue being challenged. If the WQCC orders the agency to take additional evidence, the agency may revise its decision. The agency must file with the WQCC the record of the additional evidence together with any modified findings and decision. Based upon the record before it, the WQCC will sustain, modify or reverse the action of the agency.
4. The Environment Department recommends striking that portion of HB 654 that limits the department's time for action from 90 to 30 days in the event of a stay. It is impossible for the commission to act on stays within a 30 days timeframe without holding special meetings at considerable taxpayer expense. This change should be deleted from the bill.
5. The Environment Department asserts support for Section 1 of HB 654, since these provisions represent the department's negotiation with industry members. However, Section 2 was not part of the negotiations.

FISCAL IMPLICATIONS

HB 654 will greatly reduce the financial burden of duplicative hearings on NMED and other constituent agencies. NMED does not have sufficient budget to cover the cost of two hearings. Such hearings can take one week or more. A recent example of hearing costs is \$250,000 which included hearing preparation, conducting a two week hearing, and post hearing submittals for the Phelps Dodge Tyrone mine closure permit are those associated with the initial evidentiary hearing before NMED. These costs could be duplicated if there were a second hearing before the WQCC. The \$250,000 is the cost to the state and does not include costs that the public and permittee incur to present their cases in each hearing.

AMENDMENTS

The Environment Department recommends the following changes to 74-6-7 NMSA 1978, Section 2 of the Bill:

1. HB 654 should include an emergency clause.
2. NMED is potentially expecting the filing of three lengthy permit appeals during the remainder of FY03. If an emergency clause is not added to this bill, NMED could be faced with hundreds of thousands of dollars of unbudgeted, duplicative hearing costs during the next 4 months.

SJM/yr/njw