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FISCAL IMPACT REPORT

SPONSOR Cervantes DATE TYPED 01/27/04 HB 99

SHORT TITLE NM Dept. of Agriculture Enforcement Powers SB _____

ANALYST Gilbert

REVENUE

Estimated Revenue		Subsequent Years Impact	Recurring or Non-Rec	Fund Affected
FY04	FY05			
	Indeterminate		Recurring	General Fund

(Parenthesis () Indicate Revenue Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From
 New Mexico Department of Agriculture (NMDA)
 Attorney General's Office (AGO)

SUMMARY

Synopsis of Bill

House Bill 99 provides enforcement authority to the director of the New Mexico Department of Agriculture (NMDA) upon violation of a department statute, a regulation adopted pursuant to statute, or a condition of a permit, license, registration, or certification issued under the statute.

The director may issue a compliance order, assess a civil penalty not to exceed \$3,000 or commence a civil action for appropriate relief, including temporary or permanent injunction. The compliance order may include suspension or revocation of the permit or license. HB 99 further provides that the compliance order of the director is final unless the person requests a hearing and establishes certain hearing deadlines. HB 99 provides that the director shall appoint an independent hearing officer, who shall preside over the hearing, make a record of the proceedings, and make a recommendation to the director. The director shall make the final decision within the time prescribed. The director may also request the attendance and testimony of witnesses and production of documents and may adopt rules for discovery procedures.

Significant Issues

Many of NMDA's statutes regulate an item or entity through issuance of a document (registration, licensing, permitting) or inspections conducted. This system is successful for entities wishing to adhere to a given statute/regulation with the incentive centered on holding the issued document. Current compliance authority centers around revocation of the document held, ultimately putting the entity out of business. This bill would allow NMDA to gain remedy through a compliance order and ultimately penalize violators and rectify problems without going to this extreme.

According to the NMDA, this bill will enhance program efficiency, provide consumer protection for citizens of New Mexico, and ensure a fair marketplace for industry.

FISCAL IMPLICATIONS

Penalties in excess of the cost of recovery and remedy are deposited in the general fund.

TECHNICAL ISSUES

The AGO recommends the following amendments:

- Page 1, line 20: Delete "determines" and insert "alleges."
- Page 2, line 1: Before "violation" insert the word "alleged."
- Page 2, line 22: Delete "request" and insert the words "issue subpoenas to compel."

The AGO also raises two due process issues as outlined below:

(1) The statute authorizes the director to issue a compliance order if he "determines" that a person has violated or is violating the statute, regulation, or condition of the permit or license. Thereafter, the director renders the final decision after a hearing concerning the matter. The actions of the director implicate due process requirements because the state cannot deprive a person of property (monetary penalties or rights under a permit or license) without due process. A fair, impartial hearing and a decision by a neutral, unbiased decision maker are essential to due process. Prejudgment bias will disqualify a decision maker. A person subject to the director's compliance order and decision may question whether the director has made a prejudgment determination that the person has committed a violation before the person has had an opportunity for a hearing. This raises the question whether the director rendered an impartial, unbiased decision and may give the person ground to challenge the final decision on appeal.

(2) HB 99 provides that the director "may request" the attendance and testimony of witnesses and the production of relevant documents. This language does not grant the director subpoena power. Adequate due process procedural safeguards are particularly important in administrative adjudicatory hearings. One element of a trial-like proceeding is the ability of the person to compel the appearance of witnesses and the production of documents on his or her behalf by subpoena. Without subpoena power, which is usually enforceable in the district court, the person may challenge the director's final decision on the ground that the person was not afforded a full and fair hearing that comports with the requirements of due process.

OTHER SUBSTANTIVE ISSUES

Currently section 76-1-2 (H) authorizes the appropriate district attorney or the attorney general to enforce provisions of the statute or rules.

According to the NMAD, they currently have effective enforcement abilities for most routine violations of their statutes and regulations. The intent and use of this penalty is to address continual and willful violators of NMDA statutes and when other enforcement means and mechanisms have proven ineffective or inadequate.

This bill would also provide NMDA with alternative enforcement options, other than putting an entity out of business due to a license/permit revocation.

RLG/prr:dm