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## FISCAL IMPACT REPORT

SPONSOR   SCONC   DATE TYPED   2/18/04   HB                     

SHORT TITLE   Active Resource Water Management   SB   CS/89/aSF1#1/aHF1#1  

ANALYST   Maloy  

### APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY04	FY05	FY04	FY05		
		Significant; See Narrative	Significant; See Narrative	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses for SB 89 Received From

Environment Department  
 Energy, Minerals and Natural Resources Department  
 Department of Agriculture

Portions of agencies' responses are applicable to the Committee Substitute.

### SUMMARY

#### Synopsis of HF1 Amendment #1

The House Floor Amendment #1 to SB89/SCONCS provides:

1. removal of that portion of the Senate Floor Amendment #1 that clarified all *domestic well* applications within a critical management area will be treated in the same manner, rather than "all provisions" applying equally;
2. elimination language allowing the State engineer to deny a domestic well permit in a critical management area, and replacement with language stating the State engineer may limit a domestic well permit to no less than one-half acre-foot per year per household in a critical management area; and
3. addition of a new provision providing the State Engineer shall issue a domestic well permit for use of water in an amount equal to:
  - the amount of water rights transferred to that well, or

- the amount of water under an existing domestic well permit for a well no longer in use and capped;

### Synopsis of SFI Amendment #1

The Senate Floor Amendment #1 to SB89/SCONCS provides:

1. clarification in the title that the law applies to “*domestic*” wells;
2. language that tightens the definition of a “critical management area”, noting the designation must to “specifically” identified;
3. clarification that a “critical management area” may not need “heightened” protection, but rather need “special” protection;
4. clarification that all *domestic well* applications within a critical management area will be treated in the same manner, rather than “all provisions” applying equally;
5. addition of a new provision stating the “critical management” designation shall be reviewed automatically every 5 years;
6. further clarification through clean-up language (changing singular references to plural) that applications within a single area will be treated in the same manner;
7. addition of an option by which the State Engineer can be prevented from denying a new domestic well permit in a critical management area --- a permit cannot be denied if the applicant can show discontinued use of an existing domestic well;
8. re-lettering or paragraphs to accommodate added provisions;
9. clarification that “obtaining” a water right is, in effect, “transferring” a water right through substitution of the terms; and
10. elimination of the emergency clause.

### Significant Issues

The tightened definition of “critical management area”, the distinction between “special” protection versus “heightened” protection, the automatic 5-year review, and express statement that all domestic wells within an area will be treated in the same manner are all significant improvements to the bill.

### Synopsis of Original Bill

Senate Bill 89/SCONCS creates “critical management areas”, addresses the rule-making authority of the State Engineer, and grants the State Engineer the power to deny a request for domestic well permit. The bill contains an emergency clause.

1. A “critical management area” is defined as a “bounded area . . . that requires heightened

water resource protection because”:

- water resources may be inadequate to sustain well production, as evidenced by water level decline rates and available aquifer thickness; or
- additional depletions are shown to negatively affect interstate compact delivery requirements.

SB 89/SCONCS provides all provisions of the critical management area shall apply equally throughout the entire, and

- the designation as a critical management area is subject to reconsideration upon petition by a person owning land or water rights within the area;
  - the petition shall be granted if the critical management area has recovered such that the conditions under which the critical management area was declared no longer exist.
2. The bill proposes “clean-up” corrections to existing law governing the State Engineer’s power to adopt and require compliance with administrative regulations. The State engineer’s current power is broad. Existing law provides the State Engineer may issue orders necessary to implement his decisions and to aid him in the accomplishment of his duties. Existing law expressly states this provision is to be “liberally construed”.

In addition to the clean-up corrections, the bill adds a new section. The bill provides when a special order is issued to designate a critical management area, the order shall not become effective until after notice and hearing. All applications submitted after issuance of the special order shall be subject to the provisions of the final adopted special order. Hearings on special orders to create a critical management area shall be held within the proposed critical management area.

3. Finally, the bill grants the State Engineer the power to deny a domestic well permit in a critical management area, unless the applicant obtains a water right with a priority date and that may be transferred to a new location or purposes.

In obtaining a water right and proposing a new location or purpose, it must be shown that the change in location or purpose will not increase depletions in the critical management area, except that a person required to obtain a water right may be exempt from public notice requirements if:

(a) the change is to domestic use, and the location remains the same; or

(b) the water right transferred is one-acre foot or less; and

- the State Engineer determines that the change will not impair existing water rights, be contrary to conservation of water, or detrimental to the public welfare; and

- the water right to be transferred is not from an acequia or community ditch.

Such decisions made by the State Engineer may be appealed.

### Significant Issues

According to the Energy, Minerals and Natural Resources Department, the State Parks Division (SPD) operates large recreational facilities within both the Rio Grande and Pecos basins and from time to time must apply for and obtain domestic wells to support park operations located in both basins. If areas within these basins were to be designated as critical management areas by the State Engineer and included any of the State Parks operated by SPD, then SPD's ability to obtain new domestic wells needed for operating and maintaining facilities at the parks could be negatively impacted to the extent SPD would first have to obtain existing water rights at a substantial cost to transfer in as a condition to drill new domestic wells. This could have a significant effect on the ability of SPD to fulfill its statutory mandate.

### **FISCAL IMPLICATIONS**

This bill does not contain an appropriation. However, there will be considerable costs in administrative implications. In light of New Mexico's current drought conditions, there will be many "critical management areas" within which the State Engineer will be required to act to protect existing rights by denying additional permits. This will lead to countless hearings and opinions.

In addition to the increased workload for the Office of the State Engineer, there will be a significant impact on the courts as permit denials are challenged.

Energy, Minerals and Natural Resources notes the need for state agencies to have to acquire existing water rights as a condition of establishing new domestic wells at existing, or future, state parks could negatively impact the ability of SPD to administer those parks. Also, SPD has no funds to acquire existing water rights to transfer in as a condition of obtaining domestic well permits from the State Engineer.

### **OTHER SUBSTANTIVE ISSUES**

1. Legal suits will be brought against the state (possibly including constitutional claims) if the Engineer denies a well permit application and, as a result, a property owner's investment is devalued.

Would the act of denying a well permit constitute an imposition on the right to "life, liberty and property?" Seemingly, it would be a deprivation of "property", particularly if the "property" was acquired prior to this change in the law and the purchaser believed that the State Engineer was required to issue a well permit---both because the language of the statute reads "shall" and because of past practices.

2. The Office of the State Engineer may have difficulty justifying the assertion that an area is a "critical management area" because so many basins throughout the state have not yet been adjudicated. Throughout significant portions of the state, the Office is not yet able to establish what rights exist and their priority.

3. Identifying an area as a “critical management area” may be difficult. For instance, if Elephant Butte is designated a “critical management area” and heightened restrictions are imposed, would Santa Fe and Albuquerque be included in the “area” since their use of Rio Grande water has a direct impact on the amount available for the Butte’s reservoir and delivery to Texas? Seemingly, if any area along a water supply is deemed a “critical management area”, ALL areas relying on that water supply constitute the “critical management area”. In which case, ALL of New Mexico is a “critical management area”.

### **AMENDMENTS**

The Department of Agriculture proposes language be added requiring the State Engineer be required to consult with the Environment Department.

### **POSSIBLE QUESTIONS**

1. The power to deny a property owner access to water is a tremendous power. Should such power, even just preliminary or appealable decisions, reside with just one individual?

**SJM/lg:njw:dm**