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FISCAL IMPACT REPORT

SPONSOR Heaton DATE TYPED 3/9/05 HB 35/aHJC

SHORT TITLE Eliminate De Novo Water Hearings SB _____

ANALYST Hadwiger

APPROPRIATION (in \$000s)

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY05	FY06	FY05	FY06		
	None				

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

New Mexico Environment Department (NMED)

New Mexico Department of Agriculture (NMDA)

Energy, Minerals, and Natural Resources Department (EMNRD)

SUMMARY

Synopsis of HJC Amendment

The HJC amendment would require publication of notices of issuance, modification and renewal of permits in a general circulation newspaper in English *and* in Spanish, rather than in English and, *if appropriate*, in Spanish as in the original bill. The amendment also requires the Water Quality Control Commission (WQCC) enter findings of fact and conclusions of law in the record of its appeal decisions.

Synopsis of Original Bill

House Bill 35 amends Section 74-6-5 NMSA 1978 of the Water Quality Act with regard to issuance of permits for the discharge of any water contaminant or for the disposal or reuse of seepage or sludge. In general, the bill would change the procedure for publicizing and conducting initial hearings for issuance, modification or renewal of these permits. It would also alter the process for appealing permitting decisions made by constituent agencies to eliminate de novo hearings before the WQCC.

Significant Issues

Currently, when discharge permit decisions made by a constituent agency (typically the New Mexico Environment Department - NMED) are appealed to the WQCC, the WQCC functions like a court of record and hears all of the arguments as though the hearing were being conducted for the first time (“de novo”). Under HB35, the WQCC would function like an appellate court. It would no longer hear all of the evidence anew, but would be limited to reviewing the record of the original hearing and considering arguments with respect to that record. If a party to the hearing persuades the commission there was no reasonable opportunity to submit evidence related to a particular issue in the appeal during the original hearing, the WQCC could order that additional evidence be taken by the agency that conducted the original hearing. That agency could then alter its decision based on the new evidence.

HB35 also establishes a public notification process for issuance, renewal or modification of these permits that includes:

For issuance or modification of a permit:

1. Notice by mail to adjacent and nearby landowners, as well as local, state and federal governments, land grant organizations, ditch associations, and Indian nations.
2. Posting at a place conspicuous to the public and near the proposed discharge site.
3. A display advertisement in English and Spanish, if appropriate, in a newspaper of general circulation in the location of the proposed discharge (not in the classified or legal advertisement sections).

For permit renewals:

1. Notice by mail of the interested public, municipalities, counties, land grant organizations, ditch associations and Indian nations.
2. A display advertisement in English and Spanish, if appropriate, in a newspaper of general circulation in the location of the proposed discharge (not in the classified or legal advertisement sections).

Constituent agencies would also be required to notify persons who participated in the permitting action of their final decision, if the agency denies, terminates or modifies a permit or grants a permit subject to condition.

Other Significant Issues.

According to NMED, the two evidentiary hearings currently provided for in the Water Quality Act are redundant, time consuming, and costly for NMED, the regulated community and the public. NMED further indicates the proposed bill is consistent with basic principles of administrative law as well as permitting procedures under federal environmental statutes. 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 an appeal, which involves a review of the record created below, not another full evidentiary hearing on the same matter. It is generally recognized that two full evidentiary hearings on the same matter is unnecessary and not a wise use of limited resources.

NMED also indicates that, presently in appeal proceedings, the WQCC will sustain, modify or reverse the action of the agency based on the record before it. However, under HB 35 the WQCC is not bound by the factual findings or legal conclusions of the constituent agency, and may develop its own findings and conclusions based on the evidence contained in the record.

According to the New Mexico Department of Agriculture, one possible concern with HB35 would be that the Water Quality Control Commission does not have the opportunity to personally question persons submitting evidence, data, or views at the public hearing, on which to base their decisions.

EMNRD indicated that elimination of the de novo hearings might result in increased requirements for hearings by constituent agencies: "Existing NMSA 1978, Section 74-6-5.G specifies that there shall be an "opportunity for a hearing" before a ruling is made on an application. Therefore, a constituent agency would be required to hold a hearing if requested. Because the WQCC is currently required to hold a hearing, WQCC rules do not require constituent agencies to hold a hearing. Instead, 20.6.2.3108.J NMAC provides that "A public hearing shall be held if the secretary determines that there is significant public interest." Under present law, if the agency refuses to conduct a hearing, a party would have a right, if it appealed to the WQCC, to a hearing before that body. Since the bill makes the proceeding before the WQCC a record review only; WQCC rules would need to be amended to provide for a hearing in front of the constituent agency."

PERFORMANCE IMPLICATIONS

Elimination of the de novo hearings would likely accelerate the review process for permit issuance, modification and renewal and allow NMED to focus its resources on issuing permits rather than on redundant hearing proceedings.

FISCAL IMPLICATIONS

Eliminating the de novo trials would likely result in reduced costs to NMED. The agency cites a single example (Phelps Dodge Tyrone mine closure permit) where NMED estimates it would have saved about \$250,000 if it had not been required to hold a de novo trial. There would likely be some additional costs to carry out the hearing notification requirements in the bill.

TECHNICAL ISSUES

HB35 does not clearly identify how the Commission would identify members of the "interested public" to notify of permit renewals. (See page 4, lines 16-17.)

DH/yr:njw