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FISCAL IMPACT REPORT

SPONSOR Ingle DATE TYPED 1/26/05 HB _____

SHORT TITLE Environmental Civil Penalties Limits SB 221

ANALYST Hadwiger

APPROPRIATION (in \$000s)

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY05	FY06	FY05	FY06		
	See Narrative				

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

New Mexico Department of Environment (NMED)

Energy, Minerals and Natural Resources Department (EMNRD)

SUMMARY

Synopsis of Bill

Senate Bill 221 would enact a new section of the Environmental Improvement Act that would cap civil penalties from orders issued by the secretary of the New Mexico Department of Environment (NMED) under the Environmental Improvement Act, Air Quality Control Act, Hazardous Waste Act, Radiation Protection Act and Solid Waste Act at \$250,000 and would prohibit imposition of any penalty for violations that occurred more than 24 months prior to the initiation of the administrative action. The same limitations would be imposed on compliance orders issued by a constituent agency under the Water Quality Act.

Significant Issues

The penalties that would be capped by SB221 have been particularly critical in NMED's efforts to enforce environmental quality standards against federal facilities such as Los Alamos National Laboratory, Sandia National Laboratories, and the Waste Isolation Pilot Project. Beyond these venues, the higher penalties have been imposed relatively infrequently and only against flagrant violators of environmental standards. This bill would likely undercut NMED's enforcement efforts with regard to these violators.

NMED indicated three major concerns with SB221. First, NMED indicated that penalties should be proportionate to the violation. When penalties are capped, the most egregious polluters might find it cost-beneficial to pay the penalty rather than remediate the pollution. A crucial component of any deterrence program is ensuring that penalties are commensurate with the impact of a violator's actions and his economic or other gain. The penalty caps in SB221 would be beneficial only to the worst violators of environmental standards in the state.

Second, NMED indicated concern that the two-year statute of limitations would encourage the worst polluters – those who repeatedly defy the law and damage resources – to continue to pollute with near impunity, as their past sins would be forgiven after two years. SB221 could provide an incentive for polluters to conceal the incident for at least two years until NMED would be prohibited from penalizing them. NMED was concerned that this statute of limitations might also create an unlevel playing field, whereby businesses that comply with environmental regulations would suffer a competitive disadvantage against violators. EMNRD shared this concern, indicating the limitation period provided in the bill apparently would run from the occurrence of the violation, not from its discovery by the agency. This would provide for operators an incentive not to report releases in hopes of delaying discovery until after the two-year limitation period.

Finally, NMED was concerned that passage of SB221 would cause the federal government to assume control of environmental enforcement in some areas, due to inconsistency between federal regulations and state laws. Many New Mexico environmental enforcement programs are delegated from the federal government, contingent upon the state enforcing standards comparable to federal laws and regulations. The agency indicated that weakening these penalties might result in the federal government reassuming administration of the programs due to state noncompliance with federal regulations.

NMED indicates that agency seldom levies penalties in excess of \$250,000. NMED's penalty assessments are governed by policies that define the ways penalties are calculated, and are in concert with policies adopted by the U.S. Environmental Protection Agency (EPA). These policies also require the State to consider repeat offenders, even when a past violation is more than 2 years old. Some entities – particularly federal facilities – are found to have the same violations year after year. In the case of the federal government – an entity with virtually limitless means (and lawyers) – a \$250,000 penalty barely registers, hardly serving as a deterrent to bureaucrats in Washington, D.C. For the federal government, SB221 is nothing less than a bailout.

PERFORMANCE IMPLICATIONS

NMED indicates that numerous performance measures would be negatively affected by adoption of SB221, because the agency would not be able to conduct timely and appropriate enforcement. For example, one of the Air Quality Bureau's (AQB) performance measures for the upcoming fiscal year targets corrective action to mitigate violations. The AQB's goal is to have 95% of inspected facilities take prompt action to correct violations. SB221 would likely reduce the effectiveness of this measure by inhibiting NMED's ability to assess substantial civil penalties to "bad actors" and repeat or egregious violators. Similarly, the Hazardous Waste Bureau tracks a performance measure (percent of deliverables under executed consent orders that were acted upon in a timely manner) to assess the pace of cleanup activities conducted at New Mexico's national laboratories. Enforcement of the consent orders that govern these cleanups relies on a robust statutory framework. SB221 removes the primary incentive for the U.S. Department of Energy and its contractors to conduct their field activities in a timely manner.

FISCAL IMPLICATIONS

SB221 would potentially have a significant impact on general fund revenues. According to NMED, the Air Quality Bureau collected \$1 million per year in over the last three years from penalties that would be capped under this proposal. NMED was not able to identify the amount of penalties that exceeded the threshold proposed in this bill.

TECHNICAL ISSUES

EMNRD indicated the phrase “initiation of administrative action” is not defined. An agency would have to assume that it means the time of issuance of formal proceedings to assess a penalty, not the time of initiation of investigation. Hence the bill would make it necessary in some instance for an agency to issue a compliance order or application for penalties without full investigation, in order to avoid being precluded by the two-year limitation provision.

EMNRD also noted it is not clear to what the \$250,000 limit applies. As written, it is a limit on the amount of penalty that can be assessed in any one order. The intention presumably is to limit the total amount of the penalty for any one continuing violation, and perhaps for multiple violations arising from a particular incident. As the bill is written, however, this intent could arguably be avoided by issuance of multiple orders.

DH/yr