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FISCAL IMPACT REPORT

ORIGINAL DATE 2-6-06
 LAST UPDATED 2-12-06 HB 794/aHAGC

SPONSOR Stell

SHORT TITLE State Engineer Compliance Order Enforcement SB _____

ANALYST Woods

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY06	FY07		
NFI	NFI		

(Parenthesis () Indicate Expenditure Decreases)

Duplicates SB684

SOURCES OF INFORMATION

LFC Files

Responses Received From

Office of the State Engineer-Interstate Stream Commission (OSE)

Office of the Attorney General (OAG)

SUMMARY

Synopsis of HAGC Amendment

House Agriculture and Water Resources Committee amendment to House Bill 794 amends the legislation as follows:

1. On page 2, line 5, after “an” insert “artesian conservancy district, an”.

House Agriculture and Water Resources Committee amendment to HB794 adds to appropriation to the legislation.

Synopsis of Original Bill

House Bill 794, relating to water, providing for State Engineer enforcement of compliance orders, seeks to amend §72-2-18 NMSA 1978, which governs the issuance of compliance orders by the State Engineer in response to violations of the Water Code, conditions of permits and licenses issued by the State Engineer, or court orders adjudicating water rights. The legislation

seeks to clarify the language and intent of the statute and establish clear procedures for issuing, and challenging, compliance orders.

There is no appropriation attached to this legislation.

FISCAL IMPLICATIONS

The Office of the State Engineer-Interstate Stream Commission (OSE) indicates that the provisions articulated under § 72-2-18 (G) provide for, but do not require, the assessment of civil penalties of up to one hundred dollars (\$100) per day for violation of a compliance order, which may be assessed and deposited into the general operating fund. Civil penalties, rarely assessed, are anticipated to produce minimal revenue.

SIGNIFICANT ISSUES

The Office of the Attorney General (OAG) notes that this legislation grants broad authority to the Office of the State Engineer to issue “compliance orders” and fines of up to \$100.00/per day for violation of the compliance orders. A compliance order may be issued upon a “finding of fact” that a person has violated:

- “a requirement or prohibition” of the Water Code, NMSA 1978, Chapter 72;
- a “directive adopted by the state engineer pursuant to NMSA 1978, §72-2-8”;
- a condition of a permit or license issued by the state engineer; or
- a court order adjudicating a water right.

The OAG further indicates that a compliance order may include an order to cease and desist. Once a compliance order has been issued, the person named in the order has thirty days in which to request an administrative hearing. If a hearing is not requested, the compliance order becomes final. A compliance order “may require repayment of water that was overdiverted or illegally diverted” and “[r]epayment of water may be up to double the amount of the overdiversion or illegal diversion.” The state engineer is authorized to assess a penalty of up to \$100.00/day for violation of a compliance order. The statute recognizes that a compliance order may be appealed to district court under NMSA 1978, §72-2-16 and §72-7-1.

OSE states that the amendments to §72-2-18 are intended to clarify the scope of compliance orders, to clarify and streamline the procedures relating to issuing and challenging compliance orders and to bring §72-2-18 into conformance with other provisions of the water code. The amendments make some technical changes and reorganize the statute so that it is easier to read and follow. The amendments also make the following substantive changes to the existing statute. OSE further suggests that:

- The language of §72-2-18(C) as it exists now names certain types of enforcement actions that the State Engineer may prosecute, while omitting others. This creates confusion in the issuance of a compliance order and for those receiving a compliance order. The amendment removes any resulting uncertainty by comprehensively stating the scope of orders that may be included in compliance orders. The amended language in Section C states clearly that the scope of a compliance order may include violations of the water code, any condition of permits or licenses issued by the State Engineer, or a court order adjudicating a water right.
- The other substantive changes to the provisions of §72-2-18 relate to clarifying procedures. As it stands now, §72-2-18 does not clearly express when a compliance order becomes final, how the pursuit of an informal resolution of a compliance order affects the procedural requirements of challenging a compliance order, or the process that recipients of compliance orders must follow in order to challenge the order. The amendments to §72-2-18 clarify these issues. The revised language makes it clear that a compliance order is final thirty days after receipt of notice of the order by certified mail, unless the person named in the order requests a hearing before the State Engineer. The revised language also provides for informal resolution of the order only after a timely request for hearing has been made and it clearly sets forth the procedures for requesting a hearing of the State Engineer.
- The final substantive change made by the amendments to §72-2-18 is to be consistent with §72-2-16, which provides that "[n]o appeal shall be taken to the district court until the state engineer has held a hearing and entered his decision in the hearing."

ADMINISTRATIVE IMPLICATIONS

OSE suggests that this legislation will improve the State Engineer's performance in administering the waters of the State of New Mexico, and would enhance the quick resolution of alleged violations of the state water code, which would also benefit persons named in compliance orders.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Duplicates SB684.

BW/mt:nt