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FISCAL IMPACT REPORT

ORIGINAL DATE 2/10/07
 LAST UPDATED 3/12/07 HB 685/HTRCS

SPONSOR HTRC

SHORT TITLE Administrative Accountability Act SB _____

ANALYST Ortiz

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY07	FY08		
	NFI		

(Parenthesis () Indicate Expenditure Decreases)

Relates to HB 729

SOURCES OF INFORMATION

LFC Files

Responses Received From

General Services Department (GSD)
 Department of Health (DOH)
 Environment Department (NMED)
 Human Services Department (HSD)
 Gaming Control Board (GCB)
 New Mexico Lottery Authority
 Department of Transportation (DOT)

SUMMARY

Synopsis of Bill

House Bill 685, which is a House Taxation and Revenue Committee substitute would create the “Administrative Accountability Act”, and would require agencies to follow specified procedures and create rights and duties when rulemaking, adjudicating, conducting inspections or issuing sanctions, fees and licenses. Reports required by agencies under this Act would be subject to public inspection.

Section 3 of the bill would establish a requirement that agencies create an annual report (a “regulatory agenda”) indicating what activities they have taken in the previous year and anticipate taking with regard to rules, and what pending rulemaking remains for the agency,

including what privatization options are being considered. The report does not work as a ban to action if plans are not included in the report.

Section 4 of the bill requires the creation of a timeframe appeals of an agency action for the purpose of initiating adjudication and establishes deadlines for setting appeals timeframes. The bill sets specific criteria which must be included in a final order, including a notice of a person's right to appeal or proceed directly to a court for judicial review if the agency failed to issue a timely final order.

Section 5 requires that an agency set a timeframe for the issuance of sanctions unless one already exists in law, and provides for a default timeframe if the agency does not create one. Section 5 also establishes the timeframe for issuance of any sanctions and information that must be contained in the order. Section 5 also identifies circumstances in which a person may seek judicial review of the sanction without first exhausting administrative remedies.

Section 6 provides requirements for agencies when licensing. Agencies would have to provide individuals a list of steps required to obtain a license, the name and number of an agency contact that could help them through the process, and the applicable timeframes for review.

Section 6 would create timeframes for administrative review, substantive review completion of the process. Section 6 creates exceptions to the process for certain licensure procedures.

In the administrative review, the agency must provide a comprehensive list of any deficiencies to the applicant and hold the application until it receives the complete application packet. If the agency fails to notify the applicant of deficiencies in the application the application will be considered administratively complete.

In the substantive review, the agency would be responsible for notifying the applicant if the application is denied or granted and for requesting additional materials if needed. If an application is denied, the applicant must be provided with a denial, a justification for the denial and their appeal rights, including a contact person to assist with such an appeal.

If an agency fails to act, it must refund any fees and still continue to process the application. Withdrawn from this substituted version of the bill is a requirement that would have imposed a monetary penalty on agencies for not issuing a written decision on a license application within the overall time frame.

Section 7 would provide processes and rules for inspections related to licensing, requiring the agency to provide the regulated person with a statement of their rights, the name of number of a contact person within the agency, who can assist with questions regarding the inspection process, and their right to appeal.

The inspection has to yield a report that details any deficiencies noted and allows the regulated person time to correct the deficiency unless the deficiencies are committed intentionally, are not correctable within a reasonable period of time, evidence a pattern of non-compliance or are a risk to a person or to the health, safety and welfare of the general public.

Section 8 would create reporting requirements, and Section 9 would allow for executive exemptions to the rules in the Act.

FISCAL IMPLICATIONS

All agencies responding on this bill report that the bill imposes timeframes requiring agencies to complete substantial requirements. As such, additional staff would be needed to meet the deadlines set for licensing applications, adjudications and additional reporting requirements regarding rulemaking.

SIGNIFICANT ISSUES

General Service Department notes the following issues regarding HB685.

- It is contrary to the agency enabling statutes because most agency enabling statutes provide the secretary with rulemaking authority that this bill eliminates;
- It duplicates existing reporting requirements;
- It does not consider how it affects each agency in relation to existing statutes and rules;
- Allowing a person to appeal to district court when an agency proposes to sanction that person may be unconstitutional; and
- It conflicts with the Rules of Civil Procedure, the Administrative Procedures Act, the Uniform Licensing Act and other administrative procedures statutes and laws because this bill allows persons to avoid agency adjudication and proceed directly to district court.

According to the Environment Department, accountability was identified in 2003 by NMED as one of its three core principles. However, the bill does not address the intended purpose stated by the proponents of HB 685, which was for operational and regulatory consistency among defined agencies. In fact, this bill requires each agency to promulgate new sets of rules with no reference to consistency for the rules to be established. Furthermore, at least three different sections; Sections 4, 5 and 6 allow different rules for different time frames for different adjudications, sanctions, and licenses.

1. NMED promulgation of new rules takes between 9 months and 2 years, because NMED conducts negotiated rulemaking with interested stakeholders.

2. CS HB 685 would compromise all NMED programs. Adjudications would be taken to state district court (instead of continuing through NMED), which is a more costly, less efficient, and slower venue than before NMED. Sanctions for violation of environmental violations, including flagrant and serious violations, would be barred. Permit applications not timely processed would result in NMED foregoing permit fees,.

3. CS HB 685 provides only for the denial or granting of permits, and would not allow NMED to place conditions in permits unless “specifically authorized by statute or rule.” In general, NMED receives permit applications that contain some, but not all of the conditions necessary to meet environmental statutory and regulatory requirements. Many of these conditions are not based on express or “specific” statutory or regulatory authority, but are nonetheless necessary and appropriate to meet the statutory or regulatory requirements. In fact, it is unrealistic to require each such condition have a “specific” statutory or regulatory citation because the legislature and rulemaking agencies cannot be held to a standard by which all such conditions can be anticipated. Permit conditions are dependent upon the geology, hydrology and geography of each facility. Recently, in *Phelps Dodge Tyrone, Inc. v. New Mexico Water Quality Control*, 2006 NMCA 115, 140 N.M. 464, 143 P.3d 502, the New Mexico Court of

Appeals found that Environment Department had statutory authority to impose reasonable conditions on a company's discharge closeout permit.

NMED cures the permit applications' deficiencies by issuing permits with conditions that ensure environmental protection requirements are met. If NMED were prohibited from issuing permits with reasonable conditions, NMED either (1) would have to deny permit applications, which would prevent companies from operating and would result in many appeals, or (2) would have to issue permits that are not protective of the environment. Neither scenario fulfills the legislative goals of the state's environmental programs.

4. CS HB 685's limitations on the information that NMED may request during permit evaluation are overly restrictive and would result in permits being issued without adequate information or necessitate denial of permit applications. Under CS HB 685, the agency is only allowed to obtain additional information one time for its administrative review and one time for its substantive review (unless an applicant agrees otherwise but even in that case the time frame can only be extended by 25% of the overall time frame). These limitations, especially for agency substantive review, would not enable NMED to effectively and meaningfully review the more complex permit applications. The Hazardous Waste Bureau, for example, operates under extremely complex and voluminous regulations adopted from the federal regulations. Permit review can take substantial time and resources and require more than one round of letters of deficiency or letters requesting supplemental information in order to obtain the necessary information to issue or condition a permit. Sometimes a response from an applicant will be incomplete or will generate the need for additional information. NMED would not be able to issue permits that meet environmental requirements if it did not have the ability to obtain the information it needs and would thus be required to deny permit applications, which would result in facilities not being permitted to operate and litigation.

5. "Sanction" is so broadly defined, *see* Synopsis above, that it encompasses a vast array of agency decisions that are generally not considered "sanctions" but would then be subject to the stringent requirements of CS HB 685. This could result in unreasonable burden on agencies as they proceed with their normal business operations and in endless litigation over what is or is not a "sanction."

PERFORMANCE IMPLICATIONS

Department of Transportation explains that Section 6 distinctly differentiates administrative and substantive reviews. Administrative review is intended to be a review for completeness of the application. However, to the extent completeness assumes adequacy of the application, adequacy is an issue which often cannot be determined until during the substantive review. If the inadequacy is not discovered until the substantive review process, the agency is limited to one request for supplementation. While this process appears directed as expediting license processing, the one supplement-request rule, with its inflexibility, may have the opposite effect. Under the bill, the agency may deny an application due to inadequate information, seemingly starting the process anew, rather than providing a more flexible information supplementation process.

Gaming Control Board is concerned that the bill would create another layer of control over the operations of GCB without necessarily providing increase accountability to the public served. The cost of this would be lengthier process in promulgating final rules and increase staffing costs.

According to the Environment Department Under existing funding and staffing levels, NMED's role in pollution prevention would be severely undermined and protection of human health and the environment put at risk if the additional responsibilities without additional staff were required under HB 685 and if certain of the limitations on agency action were required. In addition, NMED's ability to meet legislatively mandated performance and accountability measures to prevent pollution, and conduct compliance and enforcement actions would be limited.

ADMINISTRATIVE IMPLICATIONS

GSD expressed concern that the timeframes could lead to dismissal of legitimate agency enforcement actions and interfere with the ability of agencies to carry out their statutory duties.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Relates to HB 729 which enacts the “Administrative Negotiated Rulemaking Act” which would allow a state agency with rulemaking authority to establish a rulemaking committee to negotiate and develop a proposed rule if the agency determines that the use of the negotiated rulemaking procedure is in the public interest.

TECHNICAL ISSUES

Department of Transportation notes that Section 1, definitions, includes two definitions, one for “license” and one for “sanctions,” which are very broad. Application of these definitions may require the NMDOT to promulgate regulations detailing the NMDOT's processes, particularly in the right-of-way area, because the definitions could be construed as including such activities and their affect on adjoining property

OTHER SUBSTANTIVE ISSUES

The Lottery Authority was uncertain if this bill would apply to its infrastructure, since it was created as a public body, politic and corporate, separate from the state. The bill would impact how it operates as a sales and marketing business. The bill is not consistent with its mandate to maximize revenue for it beneficiary program.

As a point of reference to the original bill, the substitute withdrew sections that would have required agencies to consider the impact of any rules on small businesses and that would have narrowly limited the scope of an agency's authority to create rules that implement or interpret the specific powers and duties granted by an enabling statute. This is notable, insofar as the latter provision would evidently have contradicted applicable case law, which does not so limit agencies' powers. *See Winston v. New Mexico State Police Board*, 80 N.M. 310 (1969).

Also withdrawn from HB685 is a section that would have prevented an agency from charging a fee or setting a rule regarding fees unless the fee for the specific activity was expressly authorized by statute. Also withdrawn from this version of the bill is a requirement that an annual report be assembled, detailing fees charged or received by an agency, along with the law that allows it; the amount of each fee and the total amount collect from each fee; and a general description of how each fee was distributed.

ALTERNATIVES

The Environment Department points out that the consequences imposed on agencies for not meeting deadlines as proposed in this bill are unrealistic and would undermine NMED's statutory mandate to protect human health and the environment. The issue of an agency action involving permitting and enforcement programs to identify the barriers and problems, such as insufficient funding, and to address those issues on a program by program basis. It would weaken environmental protection and have unintended negative consequences on business.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Agencies will continue to abide by the requirements set forth in their enabling statutes and promulgated rules.

EO/mt