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FISCAL IMPACT REPORT

ORIGINAL DATE 2-17-07

SPONSOR Lopez, L. LAST UPDATED _____ HB _____

SHORT TITLE New Mexico Environmental Health Act SB 880

ANALYST Aubel

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY07	FY08	FY09	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total		See Narrative			Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Duplicates HB 888

SOURCES OF INFORMATION

LFC Files

Responses Received From

Department of Finance and Administration (DFA)
 Energy, Minerals and Natural Resources Department (EMNRD)
 New Mexico Municipal League (NMML)
 Attorney General's Office (AGO)
 Economic Development Department (EDD)
 New Mexico Corrections Department (NMCD)

No Response

New Mexico Environment Department (NMED)

SUMMARY

Synopsis of Bill

Senate Bill 880 enacts the New Mexico Environmental Health Act (Act). The Act would generally require the New Mexico Environment Department to expand its consideration of the effects for permitting regulated facilities beyond environmental effects to include those related to public health, traditional, or cultural values. The Act also requires preparation of an impact assessment report relating to facilities that may have a "significant" impact on New Mexico

communities, defined as those areas of 50 inhabitants or more. The Act also requires a formal notification process and provides affected individuals and communities with legal means for citizens to compel NMED to comply with the Act.

Section 3 provides definitions. A “regulated facility” is one that receives either a permit or funding from the agency or is authorized to be constructed or operated by the agency. A “decision” includes the issuance, renewal, amendment or denial of any permit, variance or waiver or the funding of the facility.

Section 4 relates to the preparation of the “community impact assessment report”, which shall include demographic data; potential present, future and cumulative impacts; other known or proposed regulated facilities and their potential impacts; and any other known environmental factors.

Section 5 provides the public notification requirements.

Section 6 directs NMED to consider that report and explain in writing how it took the report into account in its decision.

Section 7 allows for citizens to file civil lawsuits to compel compliance with the Act. The department and the Attorney General must be given 60 days notice prior to filing an action unless there is an immediate threat to health or safety. Attorneys’ fees may be awarded in these actions.

Section 8 authorizes the Secretary of Environment to adopt rules to ensure compliance with the Act.

Section 9 provides that the Act cannot be construed to preempt more stringent or extensive requirements of any other rules adopted by the department.

FISCAL IMPLICATIONS

According to DFA, SB 880 could result in considerable fiscal impact to the NMED as well as those communities or entities proposing or operating regulated facilities. The primary fiscal impacts anticipated for NMED include additional costs associated with the public notice requirements, translation, potential litigation costs, and potential court settlement fees and awards. In most cases, the costs of preparing the community impact assessment reports will be borne by the regulated facility, but in some instances the entity proposing a facility may be a governmental entity. It should be noted that a similar public hearing process initiated by the “Environmental Justice” executive order has already demonstrated a considerable impact on the NMED staff. No appropriation is made in SB 880 to underwrite this expansion of duties or potential legal costs.

SIGNIFICANT ISSUES

HB 880 seeks to compel NMED to consider impacts on communities and cultural values, not just compliance with environmental standards, and to expand public notice when a decision will have “significant impact” on a community. EMNRD notes that this bill follows the decision of the New Mexico Supreme Court in the Rhino landfill case (*Colonias Development Council v. Rhino*

Environmental Services, Inc., 138 N.M. 133, 117 P.3d 939 (2005)). In *Rhino*, the Environment Department was forced to reevaluate a decision because it failed to consider evidence on community impacts and cumulative impacts.

The potential scope of the Act is extensive. The Environment Department makes thousands of decisions each year that involve issuing, renewing, amending or denying a permit, variance or waiver or involve funding a facility. Facilities regulated by NMED include eating establishments; water and drinking water supply facilities; liquid waste systems; septic systems; air emissions facilities; radiation-producing facilities; nuisance properties; private businesses and construction sites through occupational health and safety bureau; public swimming pools and baths; public buildings; hazardous wastes sites; facilities with underground storage tanks; and solid waste sites. For each decision, the department will need to determine whether that decision “significantly affects a community”, and therefore triggers a community impact assessment report.

PERFORMANCE IMPLICATIONS

While there is anticipated to be a positive performance impact with regard to public involvement, it is unclear to what degree this aspect of performance may improve since many of the agency decisions covered by this Act are already subject to formal procedures with public notice, comment and hearing opportunities.

ADMINISTRATIVE IMPLICATIONS

The Act will add a layer of review for almost every action NMED takes because the department would have to determine whether a decision “significantly affects a community” and, therefore, triggers a community impact assessment report.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Duplicates house Bill 888.

TECHNICAL ISSUES

All responding agencies note that some standards in SB-880 are vague and open to inconsistent decisions by agency officials and courts. For instance, the Act does not define "significant" or what constitutes "traditional and sustainable cultural values." The Act also does not provide a standard for determining whether a hearing should be held. The Act would require public notices to mention either the schedule for a hearing or the process for requesting a hearing, but no further discussion of requirements and timelines in which to hold a hearing is provided.

OTHER SUBSTANTIVE ISSUES

The AGO notes that given the new Act’s extremely broad definition of “regulated facility”, and given its subjective criteria for determining whether an action relating to a “regulated facility” would have a “significant” impact on a community, the ability of the Environment Department to perform its statutory functions could be delayed pending the required impact reports and public hearings.

The AGO also points out that NMSA Section 39-3-1.1 already confers a right to appeal certain administrative decisions of NMED: administrative actions taken by the Secretary pursuant to the provisions of the Recycling and Illegal Dumping Act (NMSA Section 74-13-15); actions regarding food service permits (NMSA Section 25-1-11); licensing actions relating to radiation control (NMSA Section 74-3-9); etc. The AGO concludes that because this Act would expand the right of private citizens to challenge decisions of the department, it would most likely subject the department to increased litigation. In addition, DFA notes that it is likely that agency actions will be reversed by the courts from time to time due to various interpretations of the standards, and the department would have to pay court fees and possibly other settlement costs.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

NMED will use its current requirements, including the expanded program of Environmental Justice, for public involvement before making decisions.

POSSIBLE QUESTIONS

1. Will SB 880 cause significant delays in agency actions on proposed facilities due to the need to prepare a community impact assessment report and provide the opportunity for the public to comment?
2. How will the requirements of the act impact economic development?
3. Will this Act result in duplicative public review processes?

MA/nt