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## FISCAL IMPACT REPORT

ORIGINAL DATE 02/21/13  
 SPONSOR HJC LAST UPDATED 03/14/13 HB 536/HJCS  
 SHORT TITLE Aquatic Invasive Species Control Enforcement SB \_\_\_\_\_  
 ANALYST McCoy

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY13	FY14		
NFI	Indeterminate	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

- Department of Game and Fish (DGF)
- New Mexico Department of Agriculture (NMDA)
- Attorney General’s Office (AGO)
- Energy, Minerals and Natural Resources Department (EMNRD)
- New Mexico Environment Department (NMED)

### SUMMARY

#### Synopsis of Bill

The House Judiciary Committee substitute for House Bill 536 (HB 536) amends the Aquatic Invasive Species Control statute, Section 17-4-35 NMSA 1978, to grant the state greater authority to stop and inspect vehicles and vessels to prevent aquatic invasive species from entering the waters of the state. The bill authorizes the Department of Game and Fish (DGF) to require inspections of any conveyance or equipment a) at ports of entry (in cooperation with the Motor Transportation Division of the Department of Public Safety), b) prior to a vessel entering or exiting a water body in the state or c) under other reasonable circumstances to prevent, control, monitor and possibly eradicate such species. The bill also imposes responsibility on an owner of a conveyance or equipment that is contaminated or impounded to pay all costs of the decontamination or impoundment.

### FISCAL IMPLICATIONS

The New Mexico Environment Department (NMED) notes, the HB 536/HJCS removes a proposed section from the original bill allowing the director of Game and Fish to authorize other

state agencies to conduct inspections for aquatic invasive species; however, the substitute continues to contain language in Subsection M that provides rulemaking authority to “any state agency authorized by the director to conduct inspections under this section.” (Page 7, lines 4-6.) The NMED notes, if this language was left in HB 536 intentionally, it implies that the director has the power to authorize any other state agency to perform work under Section 17-4-35. Thus, the NMED reports, the fiscal implications of HB 536 are difficult to predict but could be significant to the NMED if the DGF determined that it would further the purposes of Section 17-4-35, NMSA 1978 for the NMED to have enforcement powers for controlling invasive aquatic species. According to the NMED, to conduct the inspections envisioned by HB 536, the NMED staff would need to:

- Be placed at ports of entry to inspect “conveyances,” defined as motor vehicles and boats, among other things;
- Require inspections at water bodies of the state prior to the entry or prior to the departure from of conveyances or equipment; and,
- Inspect, potentially anywhere in the state, conveyances and equipment for which the NMED staff have a “reasonable belief” that invasive aquatic species may be present.

The NMED reports, the agency does not have staff available to conduct the duties listed above and its existing statutory duties would be compromised if these duties were assigned unless substantial additional funding and positions were provided. This issue could be resolved by expressly limiting the director’s authority to authorize other agencies to conduct inspections to those other agencies which enter into an agreement with Game & Fish to conduct such inspections. This would allow an agency to refuse to accept additional work load unless adequate resources were available.

The DGF notes, it is expected that the costs of implementing this bill will continue to be absorbed within the current operating budgets of the agencies involved. The DGF will continue its efforts to identify funds from federal agencies that may be available to offset current state costs or enhance current state abilities.

## **SIGNIFICANT ISSUES**

According to the Attorney General’s Office (AGO) the committee substitute could present Constitutional search and seizure issues. First, although numerous cases in many states have upheld reasonable inspection at ports of entry to prevent noxious species, including invasive aquatic species, from entering a state, cases upholding ports of entry inspection are fact-specific, focusing on the determination that the challenged inspection was a reasonable method of furthering a regulatory program and not a pretext for a search and/or seizure that would require a warrant. Thus, any regulations implementing the bill should be cognizant of Constitutional limitations. Second, the bill’s removal of the reason to believe requirement, summarized in Paragraph 5 of the above synopsis may run afoul of the general prohibition against warrantless searches and seizures and recognized exceptions if in fact a conveyance or equipment is impounded solely because the owner refused to submit to an AIS inspection. As in the previous paragraph, cases are fact-specific. *See, e.g., State v. Creech*, 111 N.M. 490, 806 P.2d 1080 (Ct. App. 1991); *State v. Clark*, 112 M.M. 500, 816 P.2d 1122 (Ct. App. 1991), *State v. Jutte*, 1998 NMCA 150, 126 N.M. 244, 968 P.2d 334 (1998).

The Energy, Minerals and Natural Resources Department (EMNRD) notes, the DGF conducts operations within State Parks to determine whether aquatic invasive species are present and to inspect vessels within State Parks for any evidence of aquatic invasive species. The State Parks Division assists the DGF and provides locations for inspections.

According to the DGF, the bill limits inspection points to ports of entry and areas near water bodies of the state. Adding language to allow inspections at other strategic locations not associated with a water body or port of entry may enhance preventive efforts.

The NMED notes the following:

The inspection authority granted in Subsection B (3) of the committee substitute is too broad because it allows inspections anywhere in the state. Although the NMED notes that Subsection I limits “trained personnel” to conducting inspections at ports of entry or near water bodies, the phrase “trained personnel” is not used in granting the inspection authority in Subsection B which allows the “department” (not just “trained personnel” of the “department”) to conduct inspections. Furthermore, Subsection N implicitly allows any other state agency to be authorized by the director of Game and Fish to also conduct inspections. Again, inspections may be conducted by any employee of any state agency authorized to conduct inspections, not just “trained personnel” of those agencies. Since these inspections may be demanded anywhere in the state, the NMED continues to believe that the inspection authority provided is too broad. This issue could be resolved by limiting the inspection authority in Subsections B and N to those conducted by “trained personnel” because Subsection I limits where trained personnel may conduct these inspections. The NMED also notes there is lack of coordination provided in the committee substitute since Subsection M allows any other state agency authorized by the director to adopt rules to conduct inspections. There continues to be no requirement to maintain consistency with Game & Fish rules and no requirement to coordinate inspections. Thus, if the director of Game & Fish authorizes other agencies to conduct inspections, conflicting rules may be adopted and inspections may be performed by multiple agencies in an uncoordinated manner.

## **TECHNICAL ISSUES**

The AGO noted the following technical issues/drafting errors:

1. HB 536 uses the term, “port of entry,” but does not define the term or refer to a definition in another statutory section.
2. HB 536 adds ports of entry to places where trained personnel may establish, operate, and maintain aquatic invasive species check stations, but it does not specifically require that trained personnel actually conduct the inspections.
3. HB 536 defines the term, vessel, in terms of “watercraft,” but does not define watercraft.

## **PERFORMANCE IMPLICATIONS**

The DGF notes, the bill may improve the Department’s ability to prevent, control, contain, monitor and, whenever possible, eradicate aquatic invasive species from waters of the state.

**WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

The DGF will continue to exercise its existing authority under Section 17-4-35 to investigate aquatic invasive species within New Mexico and conduct inspections and enforce the law.

**AMENDMENTS**

The EMNRD proposes the following language:

1. On page 5, lines 4 through 6, delete the underscored language.

The DGF proposes the following amendment which would expand the locations where check stations and inspections would be authorized under the AIS statute:

~~F.~~ I. Trained personnel may:

- (1) Establish, operate and maintain aquatic invasive species check stations and conduct inspections at a port of entry, at or adjacent to the entrance to any state-controlled water body or, pursuant to a cooperative agreement, at or adjacent to any county, municipal, or federal or privately controlled water body or at or adjacent to the exit point of an infested water body or at a location agreed to by the owner of the conveyance or equipment or other constitutionally permissible strategic locations in order to inspect conveyances and equipment prior to a conveyance or equipment entering, being launched onto or being directly exposed to water bodies of the state or upon the conveyance's or equipment's departure from infested waters;

MTM/svb