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FISCAL IMPACT REPORT

SPONSOR HENRC ORIGINAL DATE 02/22/21
LAST UPDATED _____ HB 95/HENRCS
SHORT TITLE Water Administration Changes SB _____
ANALYST Gaussoin/Wan

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY21	FY22	FY23	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		\$500.0	\$500.0	\$1,000.0	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to HB298, HB30.

SOURCES OF INFORMATION

LFC Files

Responses Received From

Office of the State Engineer (OSE)

Department of Transportation (NMDOT)

SUMMARY

Synopsis of Bill

The House Energy, Environment and Natural Resources Committee substitute for House Bill 95 would amend the Water Code to impose new requirements on the Office of the State Engineer (OSE) when processing water rights permit applications. Specifically:

- The State Engineer would be required to publish specific findings supporting its approval or denial of an application, with the factual and legal rationale for the decision.
- A water rights decision would have to include consideration of drought and climate change in determining whether approval would be contrary to the conservation of water within the state.
- The State Engineer would also have to assess the impact on recreational, cultural, and environmental interests in determining whether approval would be detrimental to the public welfare.

The State Engineer would be required to adopt rules to identify and assess the impacts of drought and climate change on the administration of surface and groundwater by July 1, 2023.

The effective date of HB95/HENRCS would be July 1, 2021.

FISCAL IMPLICATIONS

HB95/HENRCS contains no appropriation.

HB95/HENRCS expands OSE responsibilities in the water permit application process. The agency says the additional responsibility to evaluate every application for the impact on health, safety, recreational, cultural, and environmental interests would necessitate hiring 5 FTE at a cost of \$500 thousand. OSE also contends rulemaking would cost \$100 thousand in FY21 and FY22 for a total of \$200 thousand; however, the agency promulgates rules regularly and this cost is not included in the fiscal impact.

SIGNIFICANT ISSUES

NMDOT notes the proposal could create a conflict with the New Mexico Constitution, Article 16, Section 3, which provides, “Beneficial use shall be the basis, the measure and the limit of the right to the use of water.” HB95/HENRCS creates other bases for considering a water use right and those additional considerations could be interpreted as conflicting with the assessment of beneficial use.

OSE has identified a number of potentially significant issues with HB95/HENRCS and argues it already carefully reviews water rights applications: “Impacts of climate change, issues relating to the conservation of water in the state, and issues relating to the detriment to public welfare [are] considered by the State Engineer on a case-by-case basis based on the facts and the data presented by applicants and protestants, subject to judicial review.”

The office outlines these specific concerns:

Required publication of findings for unprotested applications: ... The State Engineer currently makes findings when acting on contested permit applications. But HB95/HENRCS would also apply to applications that are not contested – that is, where no one has protested. ... This would slow down the processing of those applications significantly, and in turn would likely increase the backlog of applications pending before the OSE.

Required public welfare findings: HENRC/HB95 would require the State Engineer to make findings as to “public welfare” of the state (Sections 2-7 of HB95/HENRCS), and as part of those findings, require the State Engineer to analyze the “health, safety, recreational, cultural, and environmental interests” that may be impacted by the proposed application. This requirement presents several issues.

First, HB95/HENRCS likely would render New Mexico’s current statute governing the export of water outside of the state, Section 72-12B-1 NMSA, vulnerable to challenge as a facial violation of the commerce clause of the U.S. Constitution. HB95/HENRCS would amend six different existing statutes to require the State Engineer to consider specific factors in making public welfare determinations when issuing permits (Sections 2-7 of HB95/HENRCS), but it would not require the State Engineer to consider those same factors in making public welfare determinations when acting upon a permit to export water under Section 72-12B-1 (Section 8).

Early versions of Section 72-12B-1 NMSA 1978 were struck down by the courts in the 1980s as commerce clause violations because they required applications for the export and use of water outside of New Mexico to be evaluated by the State Engineer under different standards than those applied to applications for the use of water within the state. That disparate treatment was corrected by the 1985 Legislature, but HB95/HENRCS would expose Section 72-12B-1 NMSA 1978 anew to similar constitutional challenges.

Second, the terms “health, safety, recreational, cultural, and environmental interests” are general and broad. It is unclear how the State Engineer should weigh, for example, different cultural and recreational interests against each other or against economic development opportunities. In addition, it is unclear how extensive these analyses need to be. ... [E]nvironmental impact statements can take years and costs millions of dollars. The generality and breadth of these terms also likely would enable a great many more persons to have standing to protest applications, which would make the hearing process slower and more expensive.

Third, the new public welfare factors listed in HB95/HENRCS could impose significant new costs on applicants and protestants in contested applications. ...

Fourth, HB95/HENRCS is drafted in a manner that the public welfare factors listed in the bill could be interpreted to be exclusive, which would prevent the State Engineer from protecting other significant interests. ... The new factors ... if interpreted to be exclusive, could prevent the State Engineer from taking into account interstate compact and economic development considerations when evaluating permit applications.

PERFORMANCE IMPLICATIONS

A more complicated water rights application procedure could slow down both the water rights determination process and, according to NMDOT, road construction.

ADMINISTRATIVE IMPLICATIONS

HB95/HENRCS creates significant additional administrative responsibilities for OSE.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

HB95/HENRCS duplicates and, in some cases, conflicts with rulemaking required by HB9, which would create a Climate Solutions Act. The committee substitute also would amend Section 72-6-5 NMSA 1978, the Water-Use Lease Act, also the subject of HB30. HB95/HENRCS relates to HB298, which would amend Section 72-2-16 NMSA 1978 to allow certain hearings before the state engineer related to water rights to be held in Santa Fe or via video conference, and House Memorial 10 and Senate Memorial 17, near duplicates that both request the State Engineer to define public welfare.

OTHER SUBSTANTIVE ISSUES

OSE notes findings on the impact of water supply and climate change are less relevant for groundwater storage and recovery projects and the requirement that amends the statute on those projects is probably not necessary. From OSE’s analysis of the original bill:

The bill would amend [statute that] governs applications for the appropriation of groundwater, [which] unlike surface water... is not directly affected by climate change. It is therefore unclear why the bill would require ... findings regarding the impacts of climate change on the sustainability or depletion of groundwater sources.

ALTERNATIVES

NMDOT suggests amending HB95/HENRCS to exempt applications to use water for the purpose of construction, reconstruction, maintenance or repair of public roads, streets, highways and airports.

CW/HFG/sb/rl