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FISCAL IMPACT REPORT

ORIGINAL DATE 1/26/22

SPONSOR McQueen LAST UPDATED _____ HB 127/ec/aHJC

SHORT TITLE Storage of Certain Waste SB _____

ANALYST J. Torres

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY22	FY23	FY24	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		\$200.0	\$200.0	\$400.0	Recurring	General Fund- NMED Budget

(Parenthesis () Indicate Expenditure Decreases)

Duplicates /Companion to SB54

SOURCES OF INFORMATION

LFC Files

Responses Received From

Energy Minerals and Natural Resources Department (EMNRD)
 State Land Office (SLO)
 New Mexico Environment Department (NMED)
 Indian Affairs Department (IAD)
 Department of Homeland Security and Energy Management (DHSEM)

SUMMARY

Synopsis of the Amendment

The House Judiciary Committee amendment to House Bill 127 (HB 127) amends the title on page one, lines 13 through 16 as follows:

RELATING TO RADIOACTIVE WASTE; AMENDING THE RADIOACTIVE AND HAZARDOUS MATERIALS ACT; PROHIBITING THE ISSUANCE OR CERTIFICATION OF A PERMIT FOR THE CONSTRUCTION OR OPERATION OF A DISPOSAL FACILITY FOR SPENT FUEL OR HIGH-LEVEL WASTE, UNLESS A PERMANENT REPOSITORY IS IN OPERATION.

Page 2, line 14 is amended as follows:

House Bill 127/ec/aHJC – Page 2

A. The task force shall negotiate for the state with the federal government in all areas including economic, water quality and environmental justice impacts....

Page 3, line 19 is amended as follows:

74-4A-11.1. CONDITION.--No person shall store, dispose of radioactive materials or radioactive waste or spent fuel...

Page 3, lines 22 through 24 are amended as follows:

preempted by federal law; provided that the state or a political subdivision of the state shall not issue or certify a permit...

Page 4 line 2 amends as follows:

construction or operation of a disposal facility for spent fuel or high-level waste unless a repository, as defined in 42 U.S.C. 10101(18), is in operation....

These amendments are responsive to the feedback agencies have provided and appear to mitigate some of the potential harm they have cited.

Synopsis of Original Bill

HB127 amends the Radioactive and Hazardous Materials Act (RHMA), Section 74-4A-1 ET. seq., NMSA 1978 to ban the storage or disposal of spent nuclear fuel and/or high-level radioactive waste in New Mexico. It also precludes the state or any political subdivision from issuing or certifying a permit for the construction of a disposal facility for spent nuclear fuel and/or high-level radioactive waste. HB 127 amends the definition of “disposal” in the Act to include surface, subsurface, and/or underground isolation, whether temporary or permanent.

HB 127 also expands the composition of the Radioactive Waste Consultation Task Force (Task Force) by adding the Secretary of Homeland Security and Emergency Management, the Secretary of Indian Affairs, and the State Land Commissioner, or their designees. HB 127 further amends the Act to require the Task Force to meet at least annually and requires them to consider the impacts of new privately-owned disposal facilities within New Mexico.

This bill contains an emergency clause and would become effective immediately upon signature by the governor.

FISCAL IMPLICATIONS

NMED reports that its implementation of HB 127 will result in an additional operating FY 23 and FY 24 budget cost of \$200.0 annually, totaling \$400.0.

NMED further reports that it: “...oversees federal facilities disposing of hazardous wastes that are also radioactive. Currently, NMED spends \$1.3 million annually related to the on-going operations at the Waste Isolation Pilot Plant owned and operated by the Department of Energy and its contractor, Nuclear Waste Partnership. This recurring cost covers both permitting and compliance assurance activities, as well as the salary and benefits of six and one-half Full Time Equivalents

(FTE). Under a fee agreement, the Department of Energy (DOE) funds the \$1.3 million annual costs to NMED. A similar fee agreement exists between NMED and the Los Alamos National Lab.

In the event a private company, such as Holtec Inc., proposes a privately-owned, radioactive waste interim or permanent storage location in New Mexico, under HB127 NMED would not be authorized to collect any permit or licensing fees. As a consequence, NMED has no funding for oversight of such a facility and retains no staff currently capable of performing such work.”

Although not reported by these agencies, the SLO, IAD, and DHSEM will likely require additional budgetary funds resulting from their addition to the HB 127 Task Force.

SIGNIFICANT ISSUES

The most significant legal issue is federal preemption over nuclear waste safety regulation. “The federal government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states [citing *Farley*, 115 F.3d at 1502 (stating that under the Atomic Radiation Act, ‘[h]azards arising from atomic radiation were made a particularly federal concern as to which the states had no authority to regulate’)]. See *Pacific Gas*, 462 U.S. at 212, 103 S.Ct. 1713, and *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223 at 1254 (10th Cir. 2004) [holding that Utah’s nuclear waste safety statute was preempted by federal law].

NMED proposes the inclusion of non-safety rationale for HB 127, such as economic, water, or environmental justice concerns.

DHSEM

DHSEM will be appointed to the HB 127 Task Force. This agency supports said appointment and also supports HB 127.

ENMRD

ENMRD supports HB 127 and reports: “HB 127 aligns with Governor Michelle Lujan Grisham, Senator Ben Ray Lujan, Senator Martin Heinrich, and Representative Melanie Stansbury’s letter to U.S. Secretary of Energy Jennifer Granholm of July 2, 2021, which stated that they “are strongly opposed to the interim storage of spent nuclear fuel (SNF) and high-level waste (HLW) in New Mexico. There is currently no permanent disposal strategy for SNF and HLW in place at the Department of Energy. This leaves us extremely concerned that ‘interim’ storage sites with initial 40-year leases, like one proposed for Nuclear Regulatory Commission (NRC) licensing in New Mexico, will become the country’s de facto permanent nuclear waste storage facilities. We cannot accept that result.”¹

HB 127 would help to prevent New Mexico from becoming “...the country’s de facto permanent nuclear waste storage” location by banning the storage and disposal of such waste within the state, as well as not allowing permits for construction of disposal facilities to be issued by the state or any of its subdivisions.”

¹ <https://www.heinrich.senate.gov/press-releases/members-of-nm-congressional-delegation-governor-send-letter-to-energy-secretary-opposing-holtec-nuclear-waste-interim-storage-site-in-new-mexico->

IAD

IAD supports HB 127 and quoted its 2021 FIR on a similar bill as follows: “New Mexico’s nations, tribes, and pueblos continue to be negatively affected by radioactive waste storage and transport around and/or near their tribal homelands. Tribal perspective on this task force would assist the Indian Affairs Department to uphold its vision that ‘tribal nations, tribal communities, and Indigenous people are happy, healthy, and prosperous and that traditional ways of life are honored, valued, and respected.’”

In December 2019, the All Pueblo Council Governors (“APCG”) passed resolution voicing their opposition to license applications to Holtec International and Interim Storage Partners, LLC, to transport and store high-level radioactive nuclear waste in New Mexico and Texas. APCG stated its continued concerns relate to protecting their natural and cultural resources from risks associated with transport to the designation of semi-permanent sites in southeastern New Mexico.”

NMED

NMED reports: “HB127 prohibits the state or a political subdivision of the state from issuing or certifying a permit for the construction or operation of a disposal facility for spent fuel or high-level waste. If enacted, such a facility may not be able to obtain state authorization for various types of discharges, including groundwater discharge permit for industrial wastewater and/or stormwater, a liquid waste permit for managing non-industrial wastewater, or a state water quality certification required in order for a facility to obtain coverage under a National Pollutant Discharge Elimination System permit from the U.S. Environmental Protection Agency. Without such authorizations, such a facility would not be able to operate legally in New Mexico.

Under the U.S. Constitution’s Supremacy Clause, the federal government occupies the field of nuclear safety and state moratoriums on nuclear construction that are grounded in safety concerns fall within that preempted field. State safety regulations that are based on radiation, design, or similar issues are preempted. Some state regulations that have a non-safety rationale have fallen outside that preempted field. The proposed legislation in HB127 would not be upheld on a safety bases (sic), but may be upheld on economic impact, water impacts, or Environmental Justice grounds. The state should articulate those other bases as the foundation for the prohibition of the storage or disposal of spent radioactive fuel and high-level waste.”

SLO

The SLO supports HB 127 and reports: “The State Land Office earned over \$1.2 billion in FY21 and more than 90% of that revenue came from oil and gas wells on state trust lands, and most of that revenue from Southeastern New Mexico. A significant accident or attack on a radioactive waste storage facility could significantly disrupt oil and gas activity in one of the most productive oil and gas producing regions in the world for an unknown amount of time. Furthermore, with no permanent storage solution in sight for our nation’s radioactive waste, any temporary waste facility would likely to be deemed permanent. If the proposed Holtec facility is built, and an incident were to occur, it could jeopardize the sole funding stream for the Land Grant Permanent Fund. Damage to human lives, communities and the environment from a large-scale radiation release are incalculable.”

PERFORMANCE IMPLICATIONS

The passage of HB 127 could result in a significant number of additional state agency responsibilities without an appropriation of adequate revenue to meet these needs.

ADMINISTRATIVE IMPLICATIONS

IAD noted the difficulty of being included in the HB 127 Task Force without the allocation of additional agency resources.

DUPLICATION, COMPANIONSHIP, RELATIONSHIP

SB 54

TECHNICAL ISSUES

Agency analyses point to several technical issues that should be addressed in the wording, passage and implementation of HB 127.

OTHER SUBSTANTIVE ISSUES

Federal Preemption Litigation

The passage and implementation of HB 127 in its current form could result in lengthy and costly preemption litigation under existing law.

ALTERNATIVES:

NMED's Proposed Amendment to HB 127:

“74-4A-11.1. CONDITION. --No person shall store or dispose of radioactive materials or radioactive waste [~~or spent fuel~~] in a disposal facility until the state has consented to or concurred in the creation of the disposal facility, except as specifically preempted by federal law; provided that spent fuel and high-level waste shall not be stored or disposed of in the state; and provided further that the state or a political subdivision of the state shall not issue, approve, or certify a permit, contract, lease, or license related to the construction or operation of a disposal facility for spent fuel or high-level waste. As used in this section, "disposal facility" means an engineered surface, subsurface or underground facility designed primarily for the temporary, interim, or permanent isolation of radioactive materials, radioactive waste or spent fuel other than tailings or other waste from the extraction, beneficiation or processing of ores and minerals.”

NMED's proposed amendment to HB 127 adds the following language: “consented to or”.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

NMED reports: “The Task Force responsibilities would not be expanded to provide review and investigation of proposed privately operated facilities seeking a federal license for temporary or permanent disposal of radioactive materials or waste in New Mexico. Thus, the Task Force would not be as familiar with such privately operated radioactive and hazardous waste facilities seeking

to do business in New Mexico outside of what is included in the Environmental Impact Statement required by the National Environmental Policy Act for such facilities.

Without the passage of HB127, facilities that would otherwise fall under Section 3 of the Bill could apply for and potentially receive permits related to their operations and continue to operate in the state if they comply with those permits.”

Under NMED’s analysis, private companies such as Holtec would likely be permitted by the federal government. Private facilities would require both federal and state operating permits, with NMED overseeing the state permitting process.

The Task force would not be modified as set forth in HB 127.

Temporary nuclear waste storage in New Mexico could result in permanent storage.

JT/al