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FISCAL IMPACT REPORT

SPONSOR: Miera DATE TYPED: 03/07/01 HB 863
 SHORT TITLE: Administering Alcohol Concentration Test SB _____
 ANALYST: Trujillo

APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY01	FY02	FY01	FY02		
		See Narrative		Recurring	General Fund/ Federal Funds

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

State Highway and Transportation Department (NMSHTD)
 Department of Public Safety (DPS)
 Taxation and Revenue Department (TRD)
 Children, Youth and Families Department (CYFD)
 Attorney General (AG)

SUMMARY

Synopsis of Bill

HB 863 adds language requiring chemical tests to determine the blood alcohol content of persons arrested for driving while intoxicated to occur within two hours of arrest. The two-hour limit is new language.

Significant Issues

NMSHTD reports failure to meet this two-hour testing limit may mean that alcohol test results will not be admitted as evidence at DWI trials and administrative driver's license revocation hearings. Suppression of such evidence may result in dismissal or acquittals in DWI cases. DWI cases lost may increase. Passage of HB 863 may cause New Mexico to fail to meet federal criteria in 23 U.S.C. Section 410 and 23 U.S.C. Section 164.

Section 23 U.S.C. Section 410, requires that the percentage of BAC testing among drivers involved in fatal motor vehicle crashes be equal to or exceed the national average.

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23 U.S.C. Section 164 promulgated under the Transportation Equity Act for the 21st Century mandate specific penalties for "repeat DWI offenders". Regulations mandates that State law must:

- c Require all repeat offenders undergo an assessment of their degree of alcohol abuse and provide for treatment as appropriate
- c Require the immobilization, impoundment or installation of an ignition interlock device, in addition to other requirements.
- c The bill does not include language to conform to federal requirements. If passed, sanctions will be imposed on New Mexico, transferring federal highway construction funds for hazard elimination or traffic safety programs.

FISCAL IMPLICATIONS

According to NMSHTD, passage of this bill may cause future loss of Section 410 funding, approximately \$350.0 per year.

If the state laws relating to repeat DWI offenders do not meet federal regulations, the state will be subject to transfer of federal highway construction funds. Currently, New Mexico law is not in compliance with federal requirements for mandatory penalties applied to DWI repeat offenders. This bill will increase the noncompliance with federal regulations as noted above. All states are required to be in compliance with federal requirements by October 1, 2001.

The amount to be transferred is 1.5% of federal highway construction funds (approximately \$3 million dollars) to the Traffic Safety Program or Hazard Elimination Program in federal fiscal year 2002. The transfer increases to 3.0% (approximately \$6 million dollars) in federal fiscal year 2003.

CONFLICT/DUPLICATION/COMPANIONSHIP/RELATIONSHIP

Conflicts with HB381 and SB305 which are duplicate bills amending Section 66-5-5, 66-5-35, and 66-8-102 NMSA 1978 to comply with federal regulation requirements.

Conflicts with HB386 and SB251, which are duplicate bills that increase noncompliance with federal regulations since NM, would not meet the one-year hard license suspension.

Conflicts with HB457 which does not amend existing language for compliance with federal regulations.

TECHNICAL ISSUES

NMSHTD suggests deleting language requiring the two-hour limit for chemical testing and amend the current bill so it creates a relationship to and does not conflict with bills noted above.

OTHER SUBSTANTIVE ISSUES

NMSHTD reports the two-hour limit appears to be unreasonable and may discourage enforcement of DWI laws and officers from testing those arrested for DWI if the testing cannot be done within this time limit. Arrests made in rural or remote areas of New Mexico often require travel of more than two hours to get to the nearest testing facility. Serious crash incidents may require the officer to remain at the scene long enough to delay testing of the driver beyond the two-hour limit. For those drivers who refuse testing, obtaining a search warrant required prior to giving the chemical test, often takes longer than two hours. Passage of HB 863 may make it difficult or impossible to submit the

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results of alcohol tests done after the two-hour limit as evidence at trials or in administrative driver's license revocation hearings. Suppression of such evidence may result in dismissal or acquittals in DWI cases. If this law passes, then the test results from an arrested driver whose BAC testing is delayed 4 - 5 hours but still shows a blood concentration level above .08 or .10, most likely will not be admissible in court as evidence. Cases such as the Gordon House case may result in dismissal or acquittal.

Possible negative impacts include: dismissal or acquittal of DWI cases because alcohol tests not completed within two hours may not be admitted as evidence at trial; decreased testing of drivers involved in fatal crashes; possible loss of Section 410 funding; sanction of federal construction dollars of approximately \$3.0 million dollars in FY 02 and \$6.0 million in FY03.

Section 23 U.S.C. Section 410, requires that the percentage of BAC testing among drivers involved in fatal motor vehicle crashes be equal to or exceed the national average. Passage of HB 863 may decrease the number of drivers involved in fatal crashes who are tested. If officers believe test results will not be admitted at trial, they may not test. Even with the current law, achieving a testing level above the national average has been a problem in New Mexico in the past. Measures to increase testing are in place. Passage of this bill may offset these efforts and cause New Mexico to not qualify for Section 410 funding.

As is, passage of this bill will subject New Mexico to loss of highway construction funds. Federal requirements in 23 U.S.C. Section 164 not met in HB 863 are:

1. Mandatory jail sentence of 5 days for second convictions.
2. Impoundment or immobilization of repeat offender vehicles during license revocation or installation of an ignition interlock system for a period of time after the end of the license suspension or revocation for second or third DWI offenders.

TRD reports the following:

- C The Scientific Laboratory Division regulations governing blood and breath tests already address this issue. For the Implied Consent Act, there is also case law which states the issue is the driver's alcohol concentration at the time of the test, not at the time of driving. While a driver's alcohol concentration can rise or fall between the time of the arrest and the test, this is an issue that can be raised by the driver in both the criminal and administrative revocation settings.
- C The amendment may allow DWI drivers to assert the 2 hour limit as a defense and win the criminal case or the administrative revocation.
- C This proposal may place too much emphasis on the alcohol concentration and not whether the driver was DWI—impaired by alcohol to the slightest degree. It may be counterproductive in cases where the driver's alcohol concentration is so high that the time lapse makes little difference.
- C A 20 minute observation period is required prior to administering a breath alcohol test. Officers may well find it difficult, after placing a person under arrest, to arrange to have the driver's vehicle transported, drive to the testing facility, perform any initial paperwork, observe the driver for 20 minutes prior to administering the test, and calibrate the BAC testing equipment, all within a 2 hour period.

- c The 2 hour limit may not take into account the realities of the rural nature of our state. It may take an officer close to two hours to transport the driver to the detention center where the alcohol test will be administered.

According to DPS, the substantive issue created by the proposed legislation is that law enforcement would potentially be denied valuable evidence. Although chemical tests for alcohol performed at or near the time of the driving behavior resulting in arrest are going to most accurately reflect the individual's blood alcohol content at the time of that driving behavior, evidence of blood alcohol concentrations at later times – even as much as several hours later -- is viable and important evidence. It is possible for experts to make retrograde calculations of an individual's blood alcohol concentration from samples taken several to many hours later. There may be any number of reasons which are not due to any fault of law enforcement officers as to why an individual may not be tested within two (2) hours of arrest. For instance, although under arrest, a suspect's medical condition might not allow the taking of a sample until sometime later. If the proposed legislation were enacted this would deny law enforcement potentially viable evidence.

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