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FISCAL IMPACT REPORT

ORIGINAL DATE 02/02/10

SPONSOR SPAC LAST UPDATED _____ HB _____

SHORT TITLE DWI Incarceration Requirements SB 3 & 5/SPACS

ANALYST Sanchez

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY10	FY11		
	NFI		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Non-Rec	Fund Affected
FY10	FY11	FY12		
	*\$1,000.0	*\$1,000.0	Recurring	General Fund

(Parenthesis () Indicate Revenue Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY10	FY11	FY12	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total		*\$1,500.0	*\$1,500.0	*\$3,000.0	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

*A Base Estimate

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Department of Corrections (DOC)
 Department of Finance and Administration (DFA)
 Attorney General Office (AGO)
 NM Sentencing Commission (NMSC)
 Public Defender (PD)
 Administrative Office of the District Attorney (AODA)

SUMMARY

Synopsis of Bill

The Senate Public Affairs Committee substitute for SB 3 and SB 5 adds a new section of Chapter 33 NMSA 1978 entitled “DWI Community Custody Program” and amends the penalties and fines for driving under the influence of intoxicating liquor or drugs and aggravated driving under the influence of intoxicating liquor or drugs under Section 66-8-102 NMSA 1978.

Section 1

The first part of the substitute adds a new section, “DWI Community Custody Program (CCP),” which provides: “corrections department, local jails and detention facilities may establish DWI community custody programs.” The DWI CCP is an individualized form of supervised community custody for DWI offenders which includes prescribed and restricted activities, compliance verified by electronic monitoring, an alcohol monitoring component and random drug and alcohol testing. Offenders agree in writing to abide by the terms of their program; if the offenders violate the term, the matter is referred to the correctional administrators for action that shall include the offender’s return to serve the mandatory minimum term of incarceration or a longer term up to the remainder of the sentence in accordance with the judgment of the court. Correctional administrators shall follow the orders of the sentencing judge unless resources are unavailable or the offender fails to meet criteria for the DWI CCP, in which case the alternative shall apply.

Section 2:

Subsection E of the statute regarding first convictions is amended to add a fine of \$1,000 in addition to the existing statutory penalty of imprisonment for not more than 90 days. The bill also adds a provision that an offender shall be sentenced to a minimum mandatory jail term of 72 consecutive hours or, for aggravated driving while under the influence of intoxicating liquor or drugs, a jail term of 120 consecutive hours; provided that in lieu of the mandatory jail term, the offender may be sentenced to a minimum of thirty days in a DWI CCP or, for aggravated driving under the influence, a minimum of 50 days in a DWI CCP. The bill deletes sections of Subsection E subsumed by new provisions of the bill.

Under Subsection G, the bill adds a fine of \$2,000 for a second conviction in addition to the existing statutory penalty of imprisonment for not more than 364 days. The bill adds a minimum mandatory jail sentence of 7 consecutive days or, for aggravated driving while under the influence of intoxicating liquor or drugs, a jail term of 15 consecutive days; provided that in lieu of the mandatory jail term, the offender may be sentenced to a minimum of 70 days in a DWI CCP or, for aggravated driving under the influence, a minimum of 150 days in a DWI CCP. In addition, the offender shall be sentenced to not less than 48 hours of community service; and mandated participation in and timely completion of not less than a 28 day inpatient, residential or in-custody substance abuse treatment program approved by the court, not less than a 90 day outpatient treatment program approved by the court, a drug court program approved by the court or any other substance abuse treatment program approved by the court. The bill deletes sections of Subsection G subsumed by new provisions of the bill.

Under revised Subsection H, if an offender with a first or second conviction fails to complete in a timely manner any community service, screening program, treatment program or, as added by the bill, DWI school ordered by the court, the offender shall be sentenced to a mandatory jail term of not less than an additional 48 consecutive hours for a first conviction and not less than an additional seven consecutive days in jail for a second conviction.

Under revised Subsection I, upon a third conviction, an offender is guilty of a fourth degree felony, rather than the current misdemeanor, and shall be punished by a \$5,000 fine and a term of imprisonment of 18 months, 6 months of which are mandatory; provided that 3 months of the mandatory incarceration may be spent in a DWI CCP. The bill deletes sections of Subsection I subsumed by new provisions of the bill.

Under revised Subsection J, upon a fourth conviction of a fourth degree felony, an offender shall be punished by a \$5,000 fine and a term of imprisonment of 2 years, 1 year of which is mandatory; provided that 6 months of the mandatory incarceration may be spent in a DWI CCP.

Under revised Subsection K, upon a fifth conviction, an offender is guilty of a third degree felony and shall be punished by a \$5,000 fine and a term of imprisonment of 30 months, 18 months of which are mandatory; provided that 9 months of the mandatory incarceration may be spent in a DWI CCP.

Under revised Subsection L, upon a sixth or subsequent conviction, an offender is guilty of a third degree felony and shall be punished by a \$5,000 fine and a term of imprisonment of 3 years, 2 years of which are mandatory; provided that 1 year of the mandatory incarceration may be spent in a DWI CCP.

FISCAL IMPLICATIONS

This substitute bill will have a fiscal impact on counties and the state similar to that of SB 3 and SB 5. It increases mandatory minimum sentences for all DWI offenders, which may require county jails to incarcerate DWI offenders for longer periods of time. Tracking offenders in a community custody program will also have a cost.

According to the Sentencing Commission, Department of Corrections, AOC, and AODA there will be a fiscal impact on the state. The increase in minimum mandatory sentences for felony DWI offenders will increase the sentence lengths for DWI offenders incarcerated in state prisons. The Judiciary, District Attorneys and Public Defender Department will also see increases in their respective workloads, as increased mandatory minimum penalties for all DWI offenses may result in more trial requests. Also, proposing that a third conviction be converted from a misdemeanor to a felony may result in more trial requests.

According to the Department of Corrections, higher fines will simply result in additional jail time for indigent persons, costing the Counties and in essence, shifting costs and burdens with the slight gain in revenues more than offset by the increased jail costs borne by the County. While this substitute bill gives a real boost to a potentially effective alternative to either straight incarceration or the status quo – and assuming the costs of EM were covered - the department would anticipate some additional costs in dealing with violation hearings. The department can not estimate the increase in work these increased penalties, with their alternative sentencing options, might bring and therefore cost the department.

The incarceration costs will increase for the county detention centers. If 7,000 persons are convicted of a first time DWI the cost to incarcerate them for seventy two hours at \$50.00 per day is \$1.05 million dollars annually, a low ball estimate.

District Courts believe this bill should contain an appropriation. Courts are having to impose furloughs due to budget cuts, and are closing their doors to the public early in order to give their short-handed staff time to catch up with case filings. Case load increases will lead to delays in case processing, which could lead to even more jail time for offenders who are kept in county jails while they await trial for their felony charge

According to the Public Defender, without funding or clear guidelines, community custody and electronic monitoring programs may be uneven, making enforcement issues difficult for both state and defense. If no indigent funds exist to offset the cost of EM, there may be an equal protection problem as public defender clients must serve sentences in jail while other defendants pay for the less restricted status of community custody/EM.

SIGNIFICANT ISSUES

According to the AOC, the substitute imposes a new mandatory jail term of 72 hours or, for aggravated driving, a mandatory jail term of 120 hours upon a first conviction; provided that in lieu of the mandatory jail term, the offender may be sentenced to a minimum of 30 days in a DWI CCP. The number of people sentenced to jail time will likely increase, especially if a DWI CCP is unavailable, as only 19 of the state's 33 counties have a CCP. Jail beds are also in short supply in many counties: Metropolitan Detention Center in Bernalillo County, for example, has operated at between 110% and 120% capacity for the last six months of calendar year 2009. Additionally, pursuant to a Supreme Court directive and statute, if a defendant cannot or refuses to pay fines and fees, the defendant must be given the option to do community service in lieu of the fines and fees. If the defendant cannot or refuses to do community service, the defendant may be sentenced to jail in lieu of fines and fees. Since the fines are increased for both DWI first and second offenses, it is likely that there will be many defendants who will be sentenced to jail in lieu of fines and fees.

According to the AOC, it is not clear what relation the CCPs described in the act has to the county misdemeanor compliance programs, whether they would share resources, or possibly duplicate each other's efforts. In stating that the "corrections department, local jails and detention facilities" (which in some counties already run their local misdemeanor compliance program) may establish such CCPs, it is not clear if those entities have the staff sufficient to perform the intensive supervision outlined in the description of the CCP. In many counties, the compliance officers do not have the training necessary to perform field work (such as home visits, bar checks, etc.) and instead perform their compliance duties from their offices, via phone calls and in-office visits with the offenders.

County misdemeanor compliance programs also can only monitor those convicted of misdemeanors. The Corrections Department has oversight responsibility for felony offenders, and their probation officers' current caseload will make it difficult for them to monitor the additional felony offenders created by the enhanced penalties in this act, much less take on the additional duties the CCP level of supervision will entail.

Although the act specifies an increase in penalty fees, it does not indicate whether (nor in what manner) those fees will be used to offset some of the increased costs incurred by the counties, corrections department, and/or the courts.

According to the AGO, this bill may address the controversy created by the court of appeals in *State v. Frost*, 2003-NMCA-002, 133 N.M. 45, where they considered whether the mandatory six-month jail term required by Section 66-8-102 (G) for a fourth or subsequent DWI conviction can be served in an electronic monitoring program. The court of appeals concluded that despite the use of the phrase "consecutive days in jail" the Legislature did not preclude the sentencing court from imposing some sort of monitoring or house arrest to satisfy that requirement. This bill, if enacted into law, would authorize programs that incorporate electronic monitoring as a substitute for actual incarceration.

ADMINISTRATIVE IMPLICATIONS

According to DFA, it is unclear who will take the lead on establishing each county DWI community custody program, and whose responsibility it will be to have such a program.

SPAC substitute for SB 3 & 5 changes the criminal classification of the conviction of a third DWI from a misdemeanor to a felony offense. At present, misdemeanor offenses are heard in municipal, metro or magistrate courts. Felony offenses are heard in district courts. This will increase the already over-burdened dockets for all districts courts. Because the charge is a felony, more persons arrested on a third offense will hire attorneys and go to trial. There will likely be more appeals filed on felony level convictions as well.

TECHNICAL ISSUES

According to the AOC, Subsection D of the new material on DWI CCP's refers to circumstances under which "the alternative shall be applied" but it is not clear what "alternative" is being referred to.

OTHER SUBSTANTIVE ISSUES

The intent of committee substitute for SB 3 & 5 is to act as a deterrent to drinking and driving by increasing the penalties and fines for DWI Offenders. As a convicted first time DWI offender in this State, jail time is not mandatory. This bill will strengthen our DWI laws and make sure that even a first time offender spends a minimum of seventy two hours in jail. In states surrounding New Mexico, jail time is mandatory for first time offenders. According to MADD, nearly 70% of crashes with fatalities in New Mexico are caused by a first time DWI Offender. This statistic is very high in comparison to the rest of the nation. The effect of this bill is that it should minimize the number of people who are willing to take the risk of drinking and driving and then spending a mandatory weekend in jail.

The bill increases the amount of fines assessed to a DWI Offender which may also act as a deterrent.

According to the Attorney General, this bill may address the controversy created by the court of appeals in *State v. Frost*, 2003-NMCA-002, 133 N.M. 45, where they considered whether the mandatory six-month jail term required by Section 66-8-102 (G) for a fourth or subsequent DWI conviction can be served in an electronic monitoring program. The court of appeals concluded that despite the use of the phrase "consecutive days in jail" the Legislature did not preclude the sentencing court from imposing some sort of monitoring or house arrest to satisfy that requirement. This bill, if enacted into law, would authorize programs that incorporate electronic monitoring as a substitute for actual incarceration.

ALTERNATIVES

According to DFA, an alternative to this bill is perhaps a memorial to study the impact on the counties and the corrections department to operate CCP's statewide at the county level.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status Quo

CS/mt:svb