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## FISCAL IMPACT REPORT

ORIGINAL DATE 01/28/10  
 LAST UPDATED 02/12/10      **HB** \_\_\_\_\_

SPONSOR SPAC

SHORT TITLE Minimum Concentration for DWI      **SB** 151/SPACS/aSJC

ANALYST Pava/Baca

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY10	FY11	FY12	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
<b>Total</b>			NFI		Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Administrative Office of the District Attorneys (AODA)

### SUMMARY

#### Synopsis of SJC Amendment

The Senate Judiciary Committee amendments to SPACS for Senate Bill 151 add it shall be presumed that the person is intoxicated under the influence of alcohol or

drugs to a degree that rendered the person incapable of safely driving a vehicle;

and insert the following language:

When a person driving a commercial motor vehicle has refused to submit to chemical testing as provided in the Implied Consent Act, it shall be presumed that the person was under the influence of intoxicating liquor or drugs to a degree that rendered the person incapable of safely driving a vehicle.

Editorial changes include renumbering bill sections as appropriate.

#### Synopsis of Original Bill

Senate Bill 151 substituted by SPAC is clarifying the standard for driving under the influence of intoxicating liquor; prohibiting driving under the influence of a combination of intoxicating liquor and drugs; providing a definition; and is removing the slightest impairment standard.

Amending §66-8-102 (A) NMSA 1978 would eliminate “impaired to the slightest degree” from the definition of DWI. SB 151 substituted deletes Section 1. A. ~~It is unlawful for a person who is under the influence of intoxicating liquor to drive a vehicle within this state.~~ Then it adds language to B. now A. “to drive a vehicle when the person is under the influence of intoxicating liquor, one or more drugs or a combination of intoxicating liquor and one or more drugs to a degree that renders the person incapable of safely driving a vehicle.”

SB 151 adds to Section 1. T. now S. an article (3) clarifying what “to drive” or “driving” means. It indicates the person has to be behind the steering wheel and causing the vehicle to move or exercising control over the movement of the vehicle. It adds the specification of “exercising control over a motor vehicle alone, without any movement of the vehicle and with no immediate intent to move the vehicle, does not constitute driving.”

SB 151 substituted adds to Section 2. B. (2) (b) the amount of alcohol or drugs in the person’s blood or breath may be considered with other competent evidence in determining whether the person was under the influence of intoxicating liquor or drugs to a degree that the rendered the person incapable of safely driving a vehicle;

## FISCAL IMPLICATIONS

SB 151/SPAC has no appropriation.

## SIGNIFICANT ISSUES

SPAC’s substituted version of SB 151 preserves Section 2. Subsection (G) that “The presumptions in subsection (B) (also preserved) of this section do not limit the introduction of other competent evidence concerning whether the person was under the influence of intoxicating liquor.”

**AODA notes:** There is a subtle change in the language used throughout SB 151 that may have an impact on further prosecutions. Throughout SB 151 the bill’s sponsor has changed any reference to “a person to drive” or “drives” to “driving”. See, § 66-8-102 (B) (1) and (2); §66-8-102 (C) (1) and (3) as amended. These changes may be intended to address an ongoing issue in DWI prosecutions which is: can a person be found guilty of DWI when he or she is found passed out in a vehicle parked along the road when subsequent chemical tests show that the person had a BAC level that would create a per se violation of the DWI statute. Changing the language to “driving” would seem to support the defense bar’s argument that being passed out in a vehicle is not driving the vehicle and thus not a basis for a DWI conviction.

What is proposed by these amendments to §66-8-102 and §66-8-110 is a fundamental change to DWI law. The law in New Mexico since virtually the enactment of the DWI statute has been that Section 66-8-102(A) (2005) (amended 2008) provides that it is unlawful for a person who is under the influence of intoxicating liquor to drive a vehicle within this state." A person is under the influence of intoxicating liquor if "as a result of drinking liquor [the driver] was less able to the slightest degree, either mentally or physically, or both, to exercise the clear judgment and steady hand necessary to handle a vehicle with safety to [the driver] and the public.

*State v. Gutierrez*, 1996 NMCA 1, ¶ 4, 121 N.M. 191, 909 P.2d 751 upholds the district court's conclusion that there was sufficient evidence of DWI under the impaired-to-the-slightest-degree standard where the defendant's vehicle weaved out of its lane, the defendant had watery, bloodshot eyes, smelled of alcohol, had slurred speech, admitted drinking, and performed field sobriety tests with mixed results. As indicated here, there are circumstances where the state will be unable to establish a per se violation of the DWI statute based on chemical tests. SB 151 if passed would thus set back the state's continuing efforts to reduce the number of DWI drivers and improve the safety of all citizens.

**DOH notes:** SB151 would remove the “slightest impairment” standard from the law. SB 151 qualifies the condition by adding “to a degree that rendered the driver incapable of safely driving the vehicle.” SB151 could prevent law enforcement from charging some drivers they stop for impaired driving behavior with DWI offenses unless drugs are present in the driver's blood.

**PDD notes:** The changes proposed to the DWI laws appear to implicate the issue commonly referred to as “actual physical control” of a vehicle. There are a number of cases pending before the New Mexico Supreme Court challenging convictions for DWI where the individuals were arguably in control of their vehicles but not actually driving.

**NMDOT notes:** Previous concern was with the original SB 151 based on language that may have affected compliance and funding under the Federal Motor Carrier Safety Act (FMCSA). The Committee Substitute appears to alleviate that concern regarding the .04 Alcohol Concentration standard for persons with commercial drivers licenses (CDL).

NMDOT had concern with the original SB 151 because the bill would require the State to rely almost exclusively on a drivers alcohol concentration by blood or breath if the driver was under .08 BAC. The Committee Substitute now addresses poly drug use by providing the following language on page 2: “It is unlawful for a person to drive a vehicle when the person is under the influence of intoxicating liquor, one or more drugs or a combination of intoxicating liquor and one or more drugs to a degree that renders the person incapable of driving a vehicle.” The Committee Substitute for SB 151 preserves Section 2, subsection (G) that “the presumptions in subsection (B) do not limit the introduction of other competent evidence concerning whether the person was under the influence of intoxicating liquor.”

## PERFORMANCE IMPLICATIONS

New Mexico has made great strides in reducing DWI fatalities and crashes by increasing penalties for DWI offenses, increasing enforcement, and supporting adjudication of DWI offenders. This has resulted in significant reductions of DWI-related crashes and New Mexico no longer being one of the top 10 states for DWI fatalities in 2009.

## RELATIONSHIP

SB 151 relates to:

HB 65, Increase Certain Vehicular Homicide Penalties

HB 115, DWI License Revocations & Interlocks

HB 139, Expungement of Certain DWI Records

HB 207, Interlock Fund Eligibility

SB 170, Ignition Interlock License Plates

SB 176, Use of DWI Convictions for Sentencing

**OTHER SUBSTANTIVE ISSUES**

The proposed changes such as removing the “slightest impairment” language could be interpreted as a weakening of New Mexico's anti-DWI efforts. This could prevent the arrest of certain individuals driving under the influence of alcohol who are currently subject to arrest and prosecution.

Under New Mexico law, if a driver is stopped and arrested for DWI after either failing the Field Sobriety Tests and/or an exam by a Drug Recognition Expert (DRE), the officer can request a blood sample for alcohol and drug testing. The NMDOT Traffic Safety Bureau currently monitors and funds the DRE Program, which provides increased detection, apprehension and prosecution of drug impaired drivers throughout the state.

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

If SB 151 is not enacted, the Implied Consent Act would not be amended to limit the act of driving to being behind the wheel and causing the vehicle to move and the impaired to the slightest degree standard would not be changed to “a degree that rendered the person incapable of safely driving a vehicle.”

CP:LB/mew:svb