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## FISCAL IMPACT REPORT

**SPONSOR** Bandy **ORIGINAL DATE** 02/04/11  
**LAST UPDATED** \_\_\_\_\_ **HB** 213  
**SHORT TITLE** Transfer Services to DOE and Make EIB Advisory **SB** \_\_\_\_\_  
**ANALYST** Graeser

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

	FY11	FY12	FY13	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
<b>Total</b>		\$268.0	\$268.0	\$536.0	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Department of Health (DOH)

Attorney General's Office (AGO)

New Mexico Environment Department (NMED)

### SUMMARY

#### Synopsis of Bill

House Bill 213 eliminate some committees, commissions and councils of the Environment Department, transfers some of the duties of the eliminated committees, commissions and councils to the Environmental Improvement Board (EIB) or the NMED and transfers radiation materials licensing functions to the Department of Health. The bill was developed by the Government Restructuring Task Force (GRTF).

The bill includes the following features:

- Transfers radiation licensing functions from New Mexico Environment Department (NMED) to the Department of Health (DOH). NMED retains radiation materials licensing functions.
- Transfers to NMED the rulemaking authority currently held by the Water Quality Control Commission (WQCC), and specifies that two of its public members must represent industry.
- Eliminates the Occupational Health and Safety Review Commission (OHSRC) and transfers functions to the Environmental Improvement Board (EIB).

## House Bill 213– Page 2

- Eliminates the Wastewater Technical Advisory Committee and transfers powers to NMED.
- Eliminates the Storage Tank Committee, Occupational Health and Safety Special Committees, and the Food Sanitation Advisory Council.

NMED identifies the significant features of this bill in some detail:

- eliminates the Environmental Improvement Board's (EIB) authority to enact rules, issue permits and licenses, and conduct hearings, and transfers the authority to the Environment Department;
- transfers licensing authority under the Medical Imaging and Radiation Therapy Health and Safety Act from Environment Department to the Department of Health;
- transfers the powers and duties of the Occupational Health and Safety Review Commission to the Environment Department;
- eliminates the Water Quality Control Commission's (WQCC) authority to enact rules and transfers the authority to the Environment Department;
- the WQCC would retain authority to adopt water quality standards for surface and ground water, issue variances, and entertain appeals of permitting actions and compliance orders.
- specifies membership qualifications for the WQCC;
- transfers the powers and duties of the Wastewater Technical Advisory Committee to the Environment Department; and
- eliminates the Storage Tank Committee, Wastewater Technical Advisory Committee, Occupational Health and Safety Review Commission, Occupational Health and Safety Special Committees and Food Service Sanitation Advisory Council;

NMED also details the changed composition of the WQCC:

- (1) eliminating the member representing the Department of Health (DOH),
- (2) combining the two members who previously represented the Energy, Minerals and Natural Resources Department (Oil Conservation Division and State Parks) into a single member,
- (3) eliminating the member representing the State Engineer,
- (4) combining the two members who were previously affiliated with the Department of Agriculture (Department of Agriculture and Soil and Water Conservation Commission) into a single member
- (5) eliminating county government as a potential local government member
- (6) reducing the number of public members from 4 to 3, and
- (7) assigning the three public members to represent New Mexico Indian tribes or pueblos, regulated industry, and environmental interests.
- (8) the bill also requires that no more than two public members shall be from the same political party.

## FISCAL IMPLICATIONS

From the DFA/LFC briefing document presented to the Government Reorganization Task Force in December:

Transferring the Medical Imaging and Radiation Therapy Health and Safety Act to the Department of Health may cost the general fund approximately \$200 thousand and add 3 FTE. NMED is currently responsible for both the licensing functions for radioactive ma-

terials and the professional licenses for radiation professionals. Because NMED’s Radiation Control Bureau licenses radioactive materials through an agreement with the Nuclear Regulatory Commission, and registers and inspects all radiation machine facilities in the state, the staff conducts inspections of both machines and licensed individuals at each medical facility at the same time. For example, when NMED sends one inspector to Lovelace Hospital, which has a radioactive materials license for nuclear medicine, brachytherapy and gamma knife, that one inspector conducts both radioactive materials license inspections, verifies licenses for the nuclear medicine technologist, inspects the radiology department X-ray machines, verifies the radiological technologist licenses, and inspects the linear accelerators and verifies the radiation therapist licenses.

Nominal savings may be realized by the proposed elimination of boards, committees, councils, commissions and task forces. Of course, some powers and duties are transferred to the Environmental Improvement Board, which may increase frequency and duration of meetings.

The elimination of the Wastewater Technical Advisory Committee might reduce the opportunity for vendors and consultants to have the products and services reviewed independently in an open forum by unbiased professionals. This voluntary, multi-disciplinary committee is providing services that would otherwise require an additional general fund appropriation and FTE of approximately \$70 thousand.

DOH staff is untrained in the details of rulemaking and enforcement of the provisions of the Medical Imaging and Radiation Therapy Health and Safety Act. At minimum, current staff would have to receive extensive training. Additional personnel would likely be required. There would be no decrease in support staff. (Note: LFC/DFA estimated the cost of this additional staff and training at \$200.0.)

NMED reports a small fiscal impact from the elimination of the boards and commissions.

The Environment Department would save approximately \$2,000 in general fund and \$8,000 in federal and other state funds by not having to pay as much to the EIB and Commission in per diems and not having to pay per diems to eliminated boards and commissions.

**Estimated Savings (in thousands of dollars)**

<b>FY11</b>	<b>FY12</b>	<b>FY13</b>	<b>Recurring or Nonrecurring</b>	<b>Fund Affected</b>
0	2.0	2.0	Recurring	General Fund
0	8.0	8.0	Recurring	OSF and federal funds

**Cost to Implement (in thousands of dollars)**

<b>FY11</b>	<b>FY12</b>	<b>FY13</b>	<b>Recurring or Nonrecurring</b>	<b>Fund Affected</b>
	270.0	270.0	Recurring	General Fund

**SIGNIFICANT LEGAL ISSUES**

The AGO discusses some potential legal challenges to the changes proposed in this bill. “There is some exposure to legal challenge with this bill on grounds that a party may contend that the proposed rule-making process violates due process because it would allow the New Mexico Environment Department: (a) to set the hearing, (b) present the evidence at the hearing, (c) appoint

the hearing officer and (d) make the final decision. This legal challenge, however, may not be successful because other agencies, such as Taxation and Revenue Department and NM Health Department, may already follow this proposed model.”

## **SIGNIFICANT ISSUES**

### **Background and Findings from briefing document prepared by LFC and DFA:**

The NMED director may appoint a Food Service Sanitation Advisory Council but it appears that the agency has not done so in recent history, which would indicate that such a council may be eliminated.

Three members comprise the Occupational Health and Safety Review Commission. The committee did not meet in 2010 and met twice in 2009. The proposed legislation would transfer the powers and duties of the commission to the Environmental Improvement Board. It eliminates the commission and the Occupational Health and Safety Special Committees.

The Medical Imaging and Radiation Therapy Health and Safety Act is administered by the Environment Department with the Environmental Improvement Board having the power to promulgate rules and regulation. The proposed legislation transfers authority to the Department of Health, including promulgating rules.

Pursuant to the provisions of the bill, powers and duties of the Utility Operator Act are transferred from the Water Quality Control Commission to NMED. The powers and duties are administrative in nature and it may make more sense for department staff to assume this role but with the hiring freeze the Department already struggles to meet performance measures.

The Wastewater and Technical Advisory Committee meets regularly, approximately six times per year for a full day, to provide standardized objective evaluation of wastewater treatment and disposal technologies, which are then listed by the department for approved use.

The bill includes the following sunset language:

- The Water Trust Board would sunset July 1, 2013.
- The Environmental Improvement Board would sunset July 1, 2014.
- The Radiation Technical Advisory Council would sunset on July 1, 2015.
- The Radioactive Waste Consultation Task Force would sunset on July 1, 2013.

The sunset provisions provide for legislative and executive review either the legislative session before the sunset or the session after the sunset when the boards and commissions continue to operate, but under the sword of being permanently abolished if each board cannot justify its continued existence.

The Radiation Technical Advisory Council advises the agency on both radiation matters and on the Medical Imaging and Radiation Therapy Health and Safety Act. It is a volunteer council and the expertise would be lost by its elimination. An added workload to the Environmental Improvement Board may exhaust its volunteer members and members’

expertise in new issue areas may be limited.

DOH notes the following significant issues under HB 213:

A. DOH would assume the following responsibilities:

- (1) adopt and promulgate such rules and licensure standards as may be necessary to effectuate the provisions of the Medical Imaging and Radiation Therapy Health and Safety Act and to maintain high standards of practice as verified by credentialing organizations for medical imaging and radiation therapy; and
- (2) adopt rules establishing continuing education requirements as a condition of licensure renewal for the purpose of protecting the health and well-being of the citizens of New Mexico and promoting current knowledge and practice as verified by credentialing organizations for medical imaging and radiation therapy.

B. DOH pursuant to the above responsibilities, would assume the following duties:

- (1) maintain and enforce licensure standards for magnetic resonance, radiography, radiation therapy technology, nuclear medicine technology, diagnostic medical sonography and radiology and licensure standards for restricted diagnostic radiography;
- (2) refer to national educational accreditation standards for educational programs and, pursuant to those standards, establish criteria for education programs of magnetic resonance, radiography, radiation therapy technology, nuclear medicine technology and diagnostic medical sonography;
- (3) provide for surveys of educational programs preparing persons for certification under the Medical Imaging and Radiation Therapy Health and Safety Act;
- (4) grant, deny or withdraw approval from educational programs for failure to meet prescribed standards;
- (5) establish procedures for examination, certification and renewal of certificates of applicants; and
- (6) establish scope of practice and ethics rules.

The Department of Health currently surveys portable x-ray units for compliance with federal regulations issued by the Centers for Medicare & Medicaid Services (CMS). These compliance surveys are extensive. Only seven certified portable x-ray units currently operate in New Mexico. The Department of Health is required by CMS to survey only one portable x-ray unit per year and to ensure that no longer than seven years elapse between surveys of any of the units.

Personnel in the Department of Health have no training or experience in magnetic resonance, radiography, radiation therapy technology, nuclear medicine technology and diagnostic medical sonography. They have no knowledge of licensure standards for medical imaging and radiation therapy, and possess no training and experience that would enable them to adopt and promulgate rules or maintain the required high standards of practice.

### **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

HB 80, HB 84, HB 157 and HB 206 are variants on the theme of merging NMED, EMNRD, Natural Resources Trustee and Game and Fish. If any of these bills pass, this bill might create a situation in which the merged agency would have two seats (Section 106 of this bill) on the WQCC.

## TECHNICAL ISSUES

Despite the title that declares ‘eliminating the water quality control commission’s authority to enact rules and transferring such authority to the department of environment’, the AGO notes that, “...the bill creates confusion over water quality rule-making: (a) do both the WQCC and New Mexico Environment Department have that authority under Section 111? (b) Does the New Mexico Environment Department have sole authority under Section 165?”

Restating a comment from the AGO, “if both the WQCC and NMED have rulemaking authority under Section 111, then there are legal uncertainties with the bill as drafted: (a) does a party have the right to judicial appeal over a WQCC rule under the first sentence of Section 112? (b) A party could ask either the WQCC or New Mexico Environment Department to schedule a rule-making under Section 111—what if WQCC and NMED disagree?”

NMED suggests that the “deemed” provisions in Section 167 are inadequate to prevent confusion, particularly in Section 131, wherein there is no explicit definition of “department”. Similarly, “Section 134(G) definition of “division” should be replaced with “department” definition. References throughout the bill to “division” should be amended accordingly.”

NMED also identifies a number of other issues that could and/or should be addressed by amending the bill. Most of these technical issues concern the confusion between “division” and “department” that may or may not be addressed in the transition provisions – Section 167:

Section 15 of the bill should be amended to use the defined term “secretary” instead of “director,” and any references in the statute to “director” should be changed accordingly.

Section 15 of the bill should be amended to use only the defined term “department” instead of using both “division” and “department” as defined terms for the Environment Department. Any references in the statute to “division” should be changed accordingly.

Section 104, page 179, line 16 retains reference to the “commission” regarding regulations that address standards of performance. This reference should be changed to refer to the “department” because under the amendments to the Water Quality Act in HB 213 the WQCC would no longer adopt regulations, it would only adopt standards.

Section 104, page 181, line 8 refers to factors listed in “Subsection E”. This reference is incorrect and should be changed to “Subsection A” to correctly reflect the restructuring and renumbering of WQCC and Environment Department duties in this section.

Section 110, page 211, line 17 refers to fee regulations “provided in Subsections J and K” of 74-6-5 NMSA. This reference should be changed to “Subsection K” because Subsection J of 74-6-5 NMSA is not related to the collection of fees.

Section 112, page 214, line 8, strike the language “or commission’s” because this provision regards the appeal of a regulation adopted by the Environment Department not the WQCC. Under the amendments to the Water Quality Act in HB 213, the WQCC would no longer adopt “regulations,” it would only adopt “standards.”

Page 115, section 74.H refers to “secretary” instead of “department.”

Page 300 line 18, refers to an incorrect citation, 74-13-4; it should read 74-13-3 NMSA.

Sections 154-161 referring to the Recycling and Illegal Dumping Act, starting on page 298, consistently delegates authority for rule making to the “department.” Amendments in HB 213, including delegation of rule making authority, refer to the “division.” These references, as stated above, should refer to the “department” and to the “secretary.”

Section 117 of HB 213 retains the following language: “There is created in the state treasury a revolving loan fund to be known as the ‘wastewater facility construction loan fund’, which shall be administered by the division as agent for the commission and operated as a separate account.” The underlined language may be deleted as not applicable.

Section 74-6A-3 defined term “division” should be replaced with “department,” and all references to “division” should be replaced accordingly.

The WQCC does not play any role in the Clean Water State Revolving Fund. Further references to the “commission” in section 117 should be replaced with “department.” Similarly, references to the ‘commission’ in Sections 74-6A-1 to 15 should be amended accordingly.

## OTHER SUBSTANTIVE ISSUES

NMED discusses a number of policy issues invoked by this bill:

1. Section 106 of the bill proposes to eliminate State Engineer representation on the WQCC. The WQCC is the state water pollution control agency and, as such, it is important that the State Engineer be represented to ensure coordination with state water policies and avoid conflicts with state water law.
2. Section 106 eliminates DOH from representation on the WQCC. DOH added to the WQCC in 2007 to provide technical expertise in the areas of environmental health, health risks associated with environmental contaminants, and epidemiology. DOH should continue to serve on the WQCC order to provide this important expertise.
3. Section 9-7A-6(B)(11)(D) provides that, “The secretary may make and adopt such reasonable and procedural rules and regulations as may be necessary to carry out the duties of the department and its divisions. No rule or regulation promulgated by the director of any division in carrying out the functions and duties of the division shall be effective until approved by the secretary unless otherwise provided by statute.” Rulemaking authority should be vested with the secretary, not the division directors.
4. HB 213 transfers the medical radiation, health and safety act from NMED to DOH. This would result in a loss of administrative efficiency. NMED currently handles the licensing functions for radioactive materials, registration of radiation machines and the professional licenses for radiation professions in medical imaging. The NMED Radiation Control Bureau (RCB) issues licenses to individuals in the following professions: nuclear medicine technologists, radiation therapists (using linear accelerators), radiological technologists (i.e., operators of x-ray machines), and limited licenses for x-ray for extremities only and, in 2012, ultrasound technologists and MRI technologists. Because the RCB licenses radioactive materials through an agreement with the Nuclear Regulatory Commission (NRC), and registers and inspects all radiation machine facilities in the state, the

RCB staff conducts inspections of both machines and licensed individuals at each medical facility at the same time. Training to understand the modalities and licenses issued in the MIRTAC will be additional expense DOH will have to absorb. Combining these three types of inspections represents a cost savings to the state.

5. The current Occupational Health and Safety Review Commission is composed of three members appointed by the governor, with the advice and consent of the Senate. One member each is chosen to reflect the views of labor, industry, and of the general public. The Commission is perceived as an impartial adjudicator of cases involving alleged violations of the Occupational Health and Safety Act. If the duties of the Commission are transferred to the department, the proceedings could be perceived as less independent.
6. Under HB 213, the EIB's rulemaking duties are removed and transferred to the department, and the EIB becomes advisory to department in carrying out objectives of environmental improvement act. The EIB's advisory duties are not defined, which could create conflict between the EIB and the department, and the EIB will expend state resources through per diems.
7. Section 134(F) uses the term "director." It should refer to "secretary." Other references in the bill to "director" to refer to "secretary," except when referring to "directors" appointed by the secretary. The secretary of the department should hold decision making and rulemaking authority, not a "director."
8. HB 213 does not provide for a Radiation Control Bureau (RCB). Although HB 213 gives the department flexibility in establishing bureaus within the department, failure to have a RCB in place could contravene the agreement between New Mexico and the Nuclear Regulatory Commission (NRC), which grants New Mexico agreement state status, essentially delegating the State authority to operate a radiation protection program.
9. Section 91 of the bill amends the Radiation Protection Act is enacted to read: "[NEW MATERIAL] BOARD DUTIES.--The board shall assist the agency in carrying out the objectives of the Radiation Protection Act, including advising the agency on the adoption and implementation of regulations adopted pursuant to that act, and license applications other duties as determined by the agency." The "license applications" reference should be removed because there are training requirements from the Nuclear Regulatory Commission (NRC) to process new, amended, and renewal license applications. License applications assistance from the board could contravene the current agreement between the NRC and the state because of the lack of training of board members.
10. HB 213 provides, "Licensees whose licensed activities consist only of uses of radioactive material [which] that do not create a situation requiring continued care of radioactive materials after the expiration of the license, including but not limited to x-ray generating devices, laboratories, medical facilities, pharmacies, industrial radiography, well logging and gauges, shall not be required to make deposits to the continued care fund." This provision should be deleted because all licensed activities for radioactive materials use radioactive material and do create situation requiring continued care, with the ultimate goal of properly disposing of the radioactive materials (e.g., a licensee who is bankrupt and has no funds to pay for proper handling and disposal of their radioactive materials). Radioactive materials licensees should be responsible for their radioactive materials from cradle to grave, ensuring the health and safety of New Mexico citizens and to ensure that the state does not have to fund such activities.



**POSSIBLE AMENDMENTS**

See list of proposed technical changes to the bill in TECHNICAL ISSUES above. See list of proposed changes suggested for policy reasons in OTHER SUBSTANTIVE ISSUES above.

LG/mew