F I S C A L I M P A C T R E P O R T

SPONSOR Nuñez **ORIGINAL DATE** 02/06/11 **LAST UPDATED** **HB** 225

SHORT TITLE Water Quality Control Act Revisions **SB**

ANALYST Graeser

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY11	FY12	FY13	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
		NFI	NFI	NFI	Recurring	NM Department of Agriculture
		≈200.0	≈200.0	≈400.0	Recurring	EMNRD (Interagency Service Funds)
		Unknown*	Unknown*	Unknown*	Recurring	General Fund (District Court Operating Funds)

(Parenthesis ( ) Indicate Expenditure Decreases)

Note: There is no way of quantifying the cost of judicial review pursuant to this bill. Since the bill provides for Legislative review of rules, there may be no need for aggrieved appellants to avail themselves of District Court review (rather than appeals court review as in current practice). Similarly, there is no way to estimate the number of appellants who elect a trial de novo rather than a review based on the record or if the appellants choose a trial de novo, whether they would choose a jury trial or a trial before the bench.

SOURCES OF INFORMATION

LFC Files

Responses Received From
Office of State Engineer (OSE)
Energy, Minerals and Natural Resources (EMNRD)
New Mexico Department of Environment (NMED)

SUMMARY

Synopsis of Bill

House Bill 225 amends the Water Quality Act (NMSA 1978, Section 74-6-1, *et seq*.) in several ways. Among the changes, the bill:

- transfers all of the Water Quality Control Commission's (commission) duties, including rulemaking, to the Secretary of the Environment Department, or in some instances to

other constituent agencies;
    - Rulemaking authority relating to the oil and gas industry is assigned to the oil conservation commission
    - Rulemaking authority relating to the agriculture industry is assigned to the New Mexico department of agriculture; and
    - Rulemaking authority relating to the mining industry is assigned to the mining and minerals division of the energy, minerals and natural resources department.
- eliminates the existing water quality control commission (commission) as of July 1, 2011 and does not provide the usual one-year transition period for the commission to close out its affairs and transfer functions and property to the Department of Environment ;
- adds the Mining and Minerals Division of the Energy, Minerals and Natural Resources Department as a "constituent agency" under the Water Quality Act (and identifies the Interstate Stream Commission as a "constituent agency" separate from the Office of the State Engineer).
- changes the process for adopting rules under the Water Quality Act. No rule, amendment or repeal of a rule shall become effective until the Secretary of the Department of Environment, the State Engineer, the Director of the New Mexico Department of Agriculture and the Secretary of Energy, Minerals and Natural Resources indicate in writing their concurrence with the adopted rule. The Secretary or constituent agency must file a copy of the rule change with the Legislative Council.
- allows the Legislative Council to request an interim or standing legislative committee to review rules in effect under the Water Quality Act. The committee must approve or disapprove a rule within 60 days after receiving it for review. The bill provides a limited menu of grounds that the standing or interim legislative committee may investigate. If disapproved, the rule has a new effective date on the adjournment of the next regular legislative session.
- changes the process for seeking review by persons adversely affected by an adopted rule, a permitting process or a compliance order. Appeal would be to the district court, instead of to the court of appeals, and may be conducted as a trial de novo or on the record, rather than on the record as currently practice. The standard for overturning the rule at the district court level is the same as at the appeals level if the challenge is on the record, but provides the standard, "unwarranted by the facts" for a trial de novo. HB 225 eliminates the current provision for interim review by the Water Quality Control Commission or the Secretary of Environment.
- provides that all rules that existed prior to December 31, 2011 shall continue in effect unless they are in conflict with, prohibited by or inconsistent with the Water Quality Act. All rules, standards and administrative determinations that need to be initiated, amended or repealed due to amendments of the Water Quality Act in 2011 shall be adopted on or before December 31, 2011.

FISCAL IMPLICATIONS

Presumably, the transfer of personnel, property and functions from the WQCC to the NMED would render that portion of the bill NFI. The water quality division of NMED has total FY 2011 budget authority as follows:

	General Fund	OSF	Intrl Srv	Fed Funds	Total
(a) Personal services and employee benefits	2,393.7		4,903.2	6,901.8	14,198.7
(b) Contractual services	1,455.0		3,531.9		4,986.9
(c) Other	291.8		863.8	946.3	2,101.9
Authorized FTE: 46.00 Permanent; 147.50 Term					

NMED reports the following fiscal impact:

> Ground water discharge permit fees collected from the agricultural industry and mining industry would [continue to] be remitted to the environment department. The estimated average annual fee collections from the agricultural industry would be approximately $100,000. Fees pay approximately 20% of the cost of issuing and overseeing agricultural discharge permits, abatement plans and other water quality protection activities at agricultural facilities. The estimated average annual fee and permit oversight collections from the mining industry would be approximately $350,000.

Although rulemaking authority for agriculture, oil and gas and mining would be transferred under this bill, the inspection and enforcement of the Water Quality rules would remain with NMED. There would be transfers from NMED to Department of Agriculture and EMNRD of the amount of general funds needed to implement the transfer of rulemaking authority (or of joint actions activity). EMNRD has explicit authority in the 2011 General Appropriations Act to request budget increases from internal service funds/interagency transfers from funds received from the department of environment for the water quality program.

EMNRD and Department of Ag would newly engage in rulemaking activity pursuant to the Clean Drinking Water Act. EMNRD was unable to quantify either the budget authority or the FTE required to administer the new rulemaking authority. The Department of Ag was not asked to quantify the costs of new rulemaking authority. Approximately 60% of the Department of Ag's $16.3 million appropriation derives from the general fund. It may be that the Department of Ag could absorb the costs of Water Quality rulemaking within existing budget.

However, the NMED analysis indicates that rulemaking authority and inspections pursuant to the rules would require a minimum of seven scientists, 1 professional engineer and 1 attorney, in addition to current staff to handle the tasks of an effective and comprehensive ground and surface water quality protection program. This is not included in the fiscal impact, because only the rulemaking authority would be transferred to the Department of Agriculture. The inspection program would remain at NMED.

The operating budget fiscal impact for EMNRD is based on two FTE plus contract legal assistance for the proposed EMNRD rulemaking authority. The impact also assumes that this new responsibility and resource would initially be provided by JPA from NMED, under the interagency service appropriation category.

OSE also notes that the expanded access and changed grounds for appeals to the District Court might have financial consequences. Trials de novo are considerably more expensive to conduct than appeals on the record. Costs depend strongly on the number of appeals utilizing the new District Court right to a trial de novo on the facts and whether the appealants choose a jury trial or a trial before the judge.

SIGNIFICANT LEGAL ISSUES

As in several bills introduced this session, the legislative review proposal contained in this bill may be held to be unconstitutional.

The analysis of SB 91 of this session discusses this issue for particular environmental and wage rate rules. The AGO's analysis on SB 91 states:

> There are no significant legal issues. The New Mexico legislature always has the power to "veto" a rule by passing a bill that is approved by a majority vote in both houses of the legislature and signed by the Governor.

The AGO also provided legal analysis in a related bill, SB 190, proposing to repeal a number of already promulgated rules, including one of the greenhouse gas emissions rules that would be rendered ineffective under SB 91. As to SB 190, the AGO advises:

> There is some question about whether the legislature has authority to repeal regulations enacted by an administrative agency in the executive branch, but it appears that the answer to that question is "yes." While administrative agencies reside in the executive branch, their rule-making authority is granted by the Legislature. Additionally, the Legislature has authority to regulate the emission of greenhouse gases on its own initiative.

On the other hand, in analyzing a related bill, HJR 3, which proposes an amendment to the New Mexico constitution (which would require approval of the voters) allowing the legislature to nullify an administrative regulation or rule adopted by an executive agency by resolution passed by the majority of both houses, the AGO reported:

> Attempts in other states to enact statutes providing for a "legislative veto" of rules and regulations adopted by administrative agencies have been subject to challenge under those states' constitutions. A challenge usually alleges that a statute authorizing the state's legislature to repeal or nullify an administrative rule amounts to a legislative intrusion into the executive rulemaking function in violation of separation of powers principles or to an impermissible attempt by the legislature to make laws contrary to the procedures governing the enactment of statutes in the state's constitution.
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> By authorizing the legislature to nullify agency rules and regulations in the New Mexico constitution rather than in a law, HJR 3 undercuts the potential for a successful challenge on state constitutional grounds.

The FIR for SB 91 synthesizes many arguments for and against legislative review of executive agency rulemaking and should be studied for further information concerning this issue.

SIGNIFICANT ISSUES

It appears as if the title of this bill does not give adequate warning of the content to the reader of the title.

- The bill title includes the descriptive phrase, "streamline administrative procedures." The substantive sections of the bill transfer rule making authority from one commission

(WQCC) to four agencies (EMNRD, New Mexico Department of Agriculture, oil conservation commission administratively attached to EMNRD, the mining and minerals division of EMNRD.) On its face, this seems to introduce complexity into the process, not streamlining.

- No rule or amendment or repeal of a rule will become effective until the Secretary of Environment, the State Engineer, the Director of the New Mexico Department of Agriculture and the Secretary of EMNRD indicate in writing their concurrence with the rule. With the WQCC, each of these individuals has a seat and has one vote to adopt a rule. The proposed change gives each of the four agency heads veto power over a rule. Again, this seems to be a basic change in procedures not adequately described in the bill title.
- Water quality rules could be reviewed by the Legislature by assignment to an interim or standing Legislative committee. This review – without public hearing – would consist of a determination whether the rule is a valid exercise of delegated legislative authority and if the rule is necessary to accomplish the apparent or expressed intent of the specific statute. A change of this magnitude should be included in the title.
- The bill abolishes the Water Quality Control Commission, which has existed since 1977. In all of the other Government Reorganization Task Force bills, the titles (when applicable) have included phrases such as, "abolishing boards and commissions and transferring duties to other agencies." This bill's title only mentions moving the rulemaking authority to the Secretary of Environment. In fact, abolishing the WQCC is not mentioned in the title and moving all of the other duties of the WQCC, including developing and maintaining the state's water quality plan, is also not mentioned in the title.

The OSE provides some background and a description of some of the features of this bill:

> The water quality control commission has existed since 1977. Its fourteen members are generally technical experts from a broad range of disciplines from multiple state agencies, and other interests in the state. The disciplines include engineering, geology, hydrology, public health, aquatic biology, water supply and wastewater management, etc. Over its existence, it has done a good job of protecting New Mexico's water quality by addressing the highly technical and often arcane arena of water quality regulations promulgation, and administration and enforcement of the promulgated regulations. HB 225 dispenses with the commission as of July 1, 2011. In its place, HB 225 proposes that the duties of the commission be turned over to the secretary of the environment department, or to the secretary of a constituent agency. The mining and minerals division of the energy, minerals and natural resources department is added as a constituent agency.
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> Unlike some of the current reorganizational proposals being considered by the legislature that look to consolidate government agencies (e.g., HB 80, HB 84, HB 157), HB 225 does the opposite and spreads amongst several agencies the work that is currently centralized in the environment department. It appears that the intent is to put rule promulgation for, and regulation of, specific industries (i.e., dairies, mining, and oil and gas) into the hands of the agencies that also play an advocacy role for those industries. Specifically, Section 2.B. on page 20 assigns the responsibility to adopt and administer rules:
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> - Relating to the oil and gas industry to the oil conservation commission

- Relating to the agriculture industry to the New Mexico department of agriculture; and
- Relating to the mining industry to the mining and minerals division of the energy, minerals and natural resources department.

Spreading the adoption and administration of rules to multiple agencies will not be conducive to maintaining consistency among various rule sets addressing water quality protection in New Mexico. As a consequence, water quality standards could vary from one industry to another for a given contaminant.

Rules generated under the water quality act are almost always the product of extensive hearings and involve significant public involvement. Additionally, the subject matter is highly technical and requires specialized expertise. Often, hearings and deliberations can run into weeks of time, with extensive testimony from technical experts representing all parties to a hearing. A standing or interim legislative committee would have to be able to devote significant time to thoroughly evaluate the merits of a rule to be able to make a decision based on sound science. Additionally, the public, under this bill, would not be provided the same type of notice for legislative hearings as that required of agencies in statutory rule making.

HB 225 in Section 7 changes the judicial review process so that agency rules, permits, federal permit certifications and compliance orders will be reviewed by a district court rather than the court of appeals. … The process delineated allows the district court to hold a trial de novo, which is expensive and resource intensive. The water quality act was amended by consensus of industry and environmental advocacy groups in 2005 specifically to eliminate de novo hearings due to the cost and time associated with them.

The current agency remand process provided for in paragraph R of 74-6-5 NMSA 1978 has been eliminated. The grounds for setting aside an agency action have been expanded so that the court can determine the decision is unwarranted by the facts if there is a de novo trial. This puts the court in the position of making permitting decisions, rather than reviewing an agency's actions, and it also provides additional opportunity for inconsistent application of the water quality act and its attendant rules. Additionally, HB 225 shifts the role of the district court to be rulemaking body.

Section 74-6-3.1 NMSA 1978 – "Legal advice" is repealed. This section provided independent legal advice to the WQCC. This independent legal advice will no longer be provided statutorily. Presumably, in-house counsel will be used to review proposed rules.

ADMINISTRATIVE IMPLICATIONS

This bill assigns the portions of the functions of the WQCC to four agencies: NMED, oil conservation commission of EMNRD, mining and minerals division of EMNRD and the Department of Agriculture. The bill separates regulation of water issues in the state from the enforcement of these regulations. The scientific expertise currently resides in the WQCC and the Water Quality Division of NMED. Developing new procedures pursuant to the provisions of this will be costly and time-consuming and cannot realistically be in place by the end of 2011, as required by the bill.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

House Bill 225 (HB 225) is identical to SB 249.

The legislative review provisions of HB 225 relate to HB 69 and SB 30, as well as SB 91 and SB 190.

The structure of constituent agencies relates to HB 157 and HB 84.

TECHNICAL ISSUES

NMED requests attention to the following points, so that the bill is internally consistent:

Section 2 (proposed 74-6-4.A(4)(d)), page 16, lines 16-18 gives the secretary of the environment department authority to adopt rules for the copper mining industry. This conflicts with the new proposed 74-6-4.B(3) on page 21, lines 1-3 which gives the mining and minerals division the responsibility for adopting and administering rules for the mining industry.

Section 2 on page 20, lines 18-25 and page 21 lines 1-3 in new proposed 74-6-4.B gives the authority for adopting and administering rules for the oil and gas industry to the oil conservation commission; the authority for adopting and administering rules for the agricultural industry to the New Mexico department of agriculture; and, authority for adopting and administering rules for the mining industry to the mining and minerals division of the energy, minerals and natural resources department. There is no definition of oil and gas industry, agriculture industry, or mining industry to clarify exactly what portions of these industries are regulated by each agency. It is not clear, for example, whether the oil and gas industry includes oil and gas, drilling and production; whether the agriculture industry includes commercial food processing and production facilities such as cheese plants; or whether the mining industry includes service companies and trucking companies that provide a service to the mining industry.

Section 3, page 21, lines 7-11 amends 74-6-5.A NMSA to give the secretary of the environment department the authority to adopt rules requiring persons to obtain permits from a constituent agency. This conflicts with the new proposed 74-6-4.B on page 20, lines 18-25 and page 21 lines 1-3, which assigns these duties to the oil conservation commission, the department of agriculture and the mining and minerals division.

Section 3, page 26, lines 15-20 amends 74-6-5.K NMSA such that constituent agencies adopt rules for collection of permit fees and that these fees be deposited in the water quality management fund. However, Section 5, Page 34, lines 4-18 only allows the environment department to use these fees collected to rules promulgated by the secretary. It is unclear if the intent of change is to allow the constituent agencies to rule the amount of permit and inspection fees and to allow NMED to expend these fees for inspections. The simplest approach is to change the statement to "rules adopted by the secretary or constituent agencies pursuant to Section 75-6-5 NMSA 1978."

Section 7, page 40, lines 8-10 in new 74-6-7 NMSA 1978 only allows a person to appeal a rule adopted by the secretary of the environment department to district court. There is no right to appeal a rule adopted by a constituent agency.

HB 225 fails to identify all sections of current law that have been deleted. Existing sections 74-6-3 and 3.1 NMSA 1978 address creation of the water quality control commission and legal advice. These sections do not appear as deletions in HB 225 though they are presumed to be deleted because the commission is proposed to be eliminated effective July 1, 2011. [The "deemed" rule in the transition section 19 may be adequate in this regard, but may also result in confusion.]

Section 74-6-4(A)(1) refers to "interstate agencies." This is not a term with a plain or defined meaning.

OSE notes: "Page 19, line 8: insert "pursuant to any rule generated under this act" after "permit" and before the colon."

OTHER SUBSTANTIVE ISSUES

NMED provides the following facts:

Regulatory activities for mining facilities that would be transferred from the environment department to the mining and minerals division include 32 regulated facilities, representing the most technically complex permits issued by the environment department. Mines have the potential to discharge toxic metals, acids, carcinogens, and other substances that pose significant threats to human health and the environment. Additionally, by their nature, hard rock mines are located in the most complex hydrogeologic conditions, necessitating an in-depth knowledge of hydraulic fracture flow, mineralogy, acid rock drainage, mine engineering, and stability analysis.

Regulatory activities for agricultural facilities that would be transferred from the environment department to the department of agriculture include approximately 220 dairies, 12 chili processing facilities, 6 cheese and milk processing facilities and several concentrated animal feeding operations such as feedlots. The number of regulated dairies fluctuates as some facilities exist only on paper and are in the process of being built or will be built in the future.

The types of contaminants present in dairy wastewater in high concentrations include ammonia, other nitrogen species, chloride and total dissolved solids. As nitrogen species come in contact with oxygen (in lagoons or as wastewater moves through the subsurface) they convert to nitrate which poses a public health threat at concentrations above 10 parts per million (ppm). Typical dairy wastewater contains concentrations of nitrogen which range from 200 to 500 ppm. (For comparison, human waste contains approximately 40 to 60 ppm of nitrogen species)

More than 50 percent of dairies have caused exceedances of New Mexico's ground water quality standards. The highest concentrations of nitrate in ground water in the state are attributable to dairy operations (~200 ppm, 20 times the state's health-based ground water standard). Once in ground water, nitrate is highly mobile and does not naturally degrade in most situations. Nitrate contamination in ground water persists beneath most dairies long after their environmental practices have improved. Therefore proactive pollution prevention strategies are necessary in order to protect ground water quality at dairies. Appropriate ground water pollution prevention strategies for these types of facilities are

important since approximately 78% of the population of New Mexico relies on ground water as a source of drinking water.

Many dairy operations are near highly populated areas, especially along the middle and lower Rio Grande valley and near Roswell, and the environment department receives many complaints each year regarding the impact of dairies on these communities.

Many dairies are located in environmentally sensitive areas (areas where protectable ground water is less than 100 feet deep, areas where ground water is between 100 and 200 feet deep and subsurface sediments are predominately sands and gravels, or areas near rivers, streams and riparian zones).

ALTERNATIVES

NMED comments: "Section 7, page 41, lines 6 through 14 regarding de novo hearings: If a party demonstrates that there was no reasonable opportunity to submit comments or evidence on an issue before the court, the court should remand the issue to the department for further consideration. This is the process currently laid out in the Water Quality Act, and works well to ensure that all issues are considered at the agency level before a court must review the agency decision. Such a procedure would also eliminate the need for de novo hearings."

Section 3, page 26, lines 15-20 amends 74-6-5.K NMSA such that constituent agencies adopt rules for collection of permit fees. However, Section 5, Page 34, lines 4-18 only allows the environment department to use these fees. While substantive rulemaking concerning water quality issues can be transferred to the other named agencies, the secretary of NMED, the agency charged with inspections and enforcement of substantive rules promulgated by the constituent agencies should be allowed to determine the fees necessary to implement an inspection program.

PROPOSED AMENDMENTS

1. Clean up the title to include significant features of the bill not included in the title.
2. Refer to "TECHNICAL ISSUES" for other suggested amendments.
3. Consider the changes discussed in the "ALTERNATIVES" section of this review.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

The OSE observes relative to abolishing the WQCC, that, "…the water quality control commission will continue perform the duties and powers described in §74-6-4 NMSA, with the broad knowledge and perspectives provided by its diverse and expert membership."

LG/svb