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FISCAL IMPACT REPORT

ORIGINAL DATE 03/04/11

SPONSOR HENRC LAST UPDATED 03/08/11 HB CS/381/aHHGAC

SHORT TITLE Repeal Wastewater Tech Advisory Committee SB _____

ANALYST Aledo

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY11	FY12	FY13	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total		NFI*				

(Parenthesis () Indicate Expenditure Decreases)

Relates to HB 213

SOURCES OF INFORMATION

LFC Files

Responses Received From

New Mexico Environment Department (NMED)
Attorney General's Office (AGO)

SUMMARY

Synopsis of HHGAC Amendment

The House Health and Government Affairs Committee amendment to House Bill 381 removes the option for the Wastewater Tech Advisory Committee (WTAC) to hire independent legal counsel.

Synopsis of Original Bill

The House Energy and Natural Resources Committee Substitute for House Bill 381 amends the provisions relating to the Wastewater Technical Advisory Committee (WTAC) to increase the authority of the WTAC and requires the WTAC to comply with the Open Meetings Act and the Uniform Trade Secrets Act.

The Wastewater Technical Advisory Committee (WTAC) is responsible for providing standardized objective evaluation of wastewater treatment and disposal technologies for both large- and small-flow domestic, commercial and agricultural wastewater systems.

The substitute provides for the following changes in committee membership: it changes the representative member from NMSU water utilities technical assistance program to a water

utilities technical assistance program or a member of the NM Water and Wastewater Association with at least ten years of practical experience in the operation and maintenance of wastewater treatment and disposal systems. It also adds a term limit of one year to the public member position and adds that the public member may be either a representative from the NM Home Builders Association (as in current law), a real estate broker, a member of the NM Farm and Livestock Bureau, a dairy producer or designee, or a member of the NM Rural Water Association. HENRC substitute also adds a staggered term for members and limits members to no more than two terms.

FISCAL IMPLICATIONS

The operating budget impact table above has been modified to incorporate the cost reduction brought upon by House Health and Government Affairs Committee amendment which removed the WTAC's option to hiring an independent legal counsel.

This bill requires NMED to provide the WTAC an administrative hearings clerk, independent legal assistance provided by the Attorney General's Office, another state agency or independent counsel hired by the board. NMED estimates the cost of hiring an independent counsel to prepare for and attend routine quarterly meetings to be approximately \$10,800 per year.

The bill also requires a record of the meetings in the form of a recording or written transcripts and provides for sworn testimony and cross examination. These requirements are bound to increase administrative costs to NMED.

SIGNIFICANT ISSUES

The New Mexico Environment Department states that not all wastewater treatment and disposal technologies marketed are effective or effective for all given site conditions. Installation of ineffective wastewater systems can pose significant threats to public health, safety and the environment. NMED notes that septic systems are a leading source of contamination of water supply wells in New Mexico. Additionally, several people in the state have been injured or killed by falling into liquid waste systems. As recently as February 2011 a woman in the eastern area of New Mexico partially fell into a liquid waste system and underwent treatment at the emergency room of the local hospital as well as immunizations for hepatitis. The legislature recognized that an evaluation and approval process for such technologies should be in place in order to protect human health and the environment.

The WTAC members are required to have technical expertise and include a wastewater treatment system engineer with at least ten years of experience in wastewater system design and construction, a faculty member from a university or college located within New Mexico with a minimum of a master's degree in biological science, microbiology, soil science or engineering, and a minimum of ten years of work or academic experience with wastewater treatment or wastewater treatment facility management, a representative from the water utilities technical assistance program or a member of the New Mexico Water and Wastewater Association with at least ten years of partial experience in the operation and maintenance of wastewater treatments and disposal systems, a class IV certified wastewater operator with at least ten years of experience. The bill amends the board membership to extend eligibility to a public member who would represent the interests of either the home builders, real estate brokers, farm and livestock bureau, dairy producers, or the New Mexico rural water association.

Currently, the WTAC is charged with a more limited mandate to “provide standardized objective evaluation of wastewater treatment and disposal technologies for both large- and small –flow domestic, commercial and agricultural wastewater systems and submit findings to the Secretary for final approval by the secretary.” (NMSA 1978, § 9-7A-15) The New Mexico Environment Department is charged with the responsibility “for environmental management and consumer protection in this state in order to ensure an environment that in the greatest possible measure will confer optimum health, safety, comfort and economic and social well-being on its inhabitants...” (NMSA 1978, § 74-1-2) The changes to the WTAC in this bill would place final approval and responsibility on the WTAC. The changes in this bill appear to elevate the WTAC to a quasi-judicial body according to NMED. NMED asserts that this transfer of statutory authority would limit the authority of NMED to prevent hazards to public health and safety.

The Attorney General’s Office raised the following issues:

The HENRC substitute expressly requires many steps to the wastewater treatment product review hearing process that should enhance the Advisory Committee’s decision-making process. However, many such requirements are already in the law. Compliance with the Open Meetings Act, the prohibition against ex parte contacts, the recusal of biased Advisory Committee members, and the opportunity for cross examination in hearings are all required by existing statutory or constitution law (the due process clause). Also, the Advisory Committee already has the implicit authority that all quasi-judicial public entities have to ask for relevant product information prior to hearings, to set a schedule for delivery of final determinations, and standardize hearing procedures. The HENRC substitute does not give the Advisory Committee the option to adopt these procedures; it has no option but to do so. There is also some question why the Uniform Trade Secrets Act is mentioned on page 3 line 11-13 and there is also question whether the damages provision of that Act can be enforceable against the State.

The new material found in the HENRC substitute at p. 6, lines 17-20, prohibits sale of any treatment technologies not approved by the Advisory Committee. This is a new prohibition that does not address existing inventories. The Legislature has the authority to retroactively prohibit products that are inconsistent with public health and safety, but the law requires that retroactive intent be clearly stated. Because there is no clearly stated intent regarding retroactivity, existing inventories may or may not be covered by the HENRC substitute.

On p. 6, lines 21-24 of the HENRC substitute, the Environment Department Secretary may overturn the Advisory Committee’s decisions only if they are “arbitrary, capricious or contrary to law.” Generally, an administrative decision may also be overturned if not supported by substantial evidence, which is defined as the amount of evidence that would persuade a reasonable person to make decisions in his or her life. The language in the HENRC substitute may arguably not allow the Secretary to overturn an Advisory Committee decision that had absolutely no evidence to support it.

PERFORMANCE IMPLICATIONS

According to NMED, currently over 300 hours per year among 6 NMED staff are used to provide technical and legal assistance to the WTAC. NMED contends that the amendments in this bill will increase the costs of supporting the WTAC because NMED staff would need to spend more time to support public hearings, instead of the current requirement for public meetings. The redirection of staff time and funding could negatively impact performance measures of the Liquid Waste Program.

ADMINISTRATIVE IMPLICATIONS

NMED stated that in the over seven years that the WTAC has existed, the NMED Secretary almost always accepts the recommendation of the WTAC. The NMED Secretary has never denied approval of wastewater technology recommended by the WTAC. The NMED Secretary, however, has imposed approval conditions that were not recommended by the WTAC on two occasions. The WTAC adopted comprehensive product review procedures on December 15, 2010 which should reduce the possibility in the future that the NMED Secretary will impose approval conditions not recommended by the WTAC.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Business would continue to be required to submit proposed wastewater technologies to the WTAC for evaluation and recommendation to the NMED Secretary for final approval.

MCA/bym:svb